Continuity in the Presidency: Gaps and Solutions

Building on the Legacy of the 25th Amendment

September 27, 2017

CLE Materials & Speaker Biographies

Fordham University
McNally Amphitheatre, 140 West 62nd Street, New York City
Table of Contents

1. Speaker Biographies
   (view)

2. CLE Materials
   
   Panel 1: Recommendations of Fordham University School of Law’s Second Presidential Succession Clinic
   U.S. Constitution, Article II, Section I, Clause 6: Vacancy and disability.
   (view)
   3USC19: Vacancy in offices of both President and Vice President; officers eligible to act.
   (view)
   U.S. Constitution, Amendment XXV: Presidential disability and succession.
   (view)
   Party Rules for Replacement of Presidential Candidates
   (view)
   Clinic Recommendations
   (view)

   Panel 2: Crafting the Twenty-Fifth Amendment
   Feerick, J. Constitutional Endeavors—Presidential Succession.
   (view)
   Lubot, R. “A Dr. Strangelove Situation”: Nuclear Anxiety, Presidential Fallibility, and the Twenty-Fifth Amendment.
   (view)

   Panel 3: After the Twenty-Fifth Amendment: The Need for Additional Reforms
   Brownell, R. What to do if Simultaneous Presidential and Vice Presidential Inability Struck Today (summary).
   (view)
   The Twenty-Fifth Amendment and the Establishment of Medical Impairment Panels: Are the Two Safely Compatible?
   (view)

Note: The articles included in this packet are in draft form and are being edited in preparation for publication in the December issue of the Fordham Law Review.
Speakers

Dr. Lawrence K. Altman is a global fellow at the Woodrow Wilson International Center for Scholars and a medical reporter for The New York Times, where he has covered the health of presidents and presidential candidates since 1969. He was the first physician to work full time for a daily newspaper. In 1980, Dr. Altman broke new ground in journalism when he interviewed presidential candidate Ronald Reagan about his health. Interviews with numerous other candidates and their doctors followed over the next nearly four decades. He is the author of the 1998 book Who Goes First?: The Story of Self-Experimentation in Medicine.

Akhil Reed Amar is Sterling Professor of Law and Political Science at Yale University. He is one of the nation’s leading constitutional scholars, and has written numerous articles on presidential succession and the 25th Amendment. His influential 1995 article “Is the Presidential Succession Law Constitutional?” evaluated the constitutionality of placing legislators in the line of succession. Professor Amar has testified before both houses of Congress on reforming the presidential succession system. His most recent book, The Constitution Today: Timeless Lessons for the Issues of Our Era, was published in 2016.

Lowell Beck has served in top positions in three of the nation’s most prominent national organizations: the American Bar Association, Common Cause, and the National Association of Independent Insurers. As assistant director of the ABA’s Washington office, Mr. Beck helped lead the organization’s efforts to develop and lobby for the 25th Amendment. He also served as deputy executive director of the ABA. Mr. Beck has taught about interest groups and lobbying at the University of Tennessee at Chattanooga. He authored the 2016 book I Found My Niche, a Lifetime Journey of Lobbying and Association Leadership.

Jason Berman worked for Senator Birch Bayh of Indiana for 11 years, including during the 25th Amendment’s drafting. Mr. Berman left the Senator’s office as chief of staff to become the first vice president for public affairs for Warner Communications. He next served as chairman and CEO of the Recording Industry of America before President Clinton appointed him special counsel for trade. After leaving the White House, Mr. Berman became chairman and CEO of IFPI, the international trade organization for record labels. He is currently on the board of the Baruch College Fund, City College of New York, and is chairman of its Scholarship Campaign.

Roy E. Brownell II is an attorney living in Washington, D.C. He has contributed to a number of books and journals on subjects related to separation of powers, the vice presidency, and executive inability. His 2016 article, “Vice Presidential Inability: Historical Episodes That Highlight a Significant Constitutional Problem,” discussed the numerous vice presidents who have become incapacitated while in office.

Matthew Diller is dean and Paul Fuller Professor of Law at Fordham University School of Law, where he served as dean from 1982 to 2002. Dean Diller was influential in the drafting and ratification of the 25th Amendment, including through his service on a special ABA conference on presidential inability and his testimony before Congress. His 1963 Fordham Law Review article, “The Problem of Presidential Inability—Will Congress Ever Solve It?,” was a key resource in the process. His book The Twenty-Fifth Amendment was nominated for a Pulitzer Prize. Dean Diller is the 2017 recipient of the ABA Medal, the organization’s highest honor. During the 2016–2017 academic year, he taught Fordham Law’s Presidential Succession Clinic.

John D. Feerick is Norris Professor of Law at Fordham University School of Law, where he served as dean from 1982 to 2002. Dean Feerick was influential in the drafting and ratification of the 25th Amendment, including through his service on a special ABA conference on presidential inability and his testimony before Congress. His 1963 Fordham Law Review article, “The Problem of Presidential Inability—Will Congress Ever Solve It?,” was a key resource in the process. His book The Twenty-Fifth Amendment was nominated for a Pulitzer Prize. Dean Diller is the 2017 recipient of the ABA Medal, the organization’s highest honor. During the 2016–2017 academic year, he taught Fordham Law’s Presidential Succession Clinic.

John C. Fortier is the director of the Bipartisan Policy Center’s Democracy Project. Previously, he was a research fellow at the American Enterprise Institute, where he served as the executive director of the Continuity of Government Commission, the principal contributor to the AEI-Brookings Election Reform Project, and the project manager of the Transition to Governing Project. Fortier is the author of numerous articles and books. He co-authored and edited the book After the People Vote: A Guide to the Electoral College, which is now in its third edition.

Robert E. Gilbert is a professor emeritus of political science at Northeastern University. He is a leading authority on the history and impact of presidential health. Professor Gilbert has authored numerous books and articles on the subject, including the 1998 book, The Mortal Presidency: Illness and Anguish in the White House. His 2010 Fordham Law Review article, “Presidential Disability and the Twenty-Fifth Amendment: The Difficulties Posed by Psychological Illness,” is one of the Law Review’s most downloaded articles ever. Professor Gilbert was a member of the Working Group on Presidential Disability from 1994 to 1997.
Speakers (continued)

**Joel K. Goldstein** is a highly respected scholar of the vice presidency, presidency, and constitutional law, having written widely in all three areas. He is perhaps best known for his work on the vice presidency. His doctoral dissertation grew into his first book, *The Modern American Vice Presidency: The Transformation of a Political Institution* (1982), and he recently authored *The White House Vice Presidency: The Path to Significance, Mondale to Biden* (2016). He has also written extensively about the Twenty-Fifth Amendment and presidential succession and inability.

**Linda A. Klein** is the immediate past president of the American Bar Association and senior managing shareholder at Baker Donelson Bearman Caldwell & Berkowitz. She served as the president of the ABA from 2016 to 2017. In 1997, Klein became the first woman to serve as president of the State Bar of Georgia. She has long advocated for legal services for low-income people. A member of the American Law Institute, Klein is listed in “The Best Lawyers in America,” “Who’s Who in America,” and “Chambers USA.”

**Rebecca Lubot** teaches in the department of history at Rutgers University. Her doctoral dissertation, “The Passage of the Twenty-Fifth Amendment: Nuclear Anxiety and Presidential Continuity,” is the first revisionist history of the Twenty-Fifth Amendment. She began her career as a White House intern in the Domestic Policy Office of Vice President Al Gore, ran part of a U.S. congressman’s campaign, served as a legislative aide to a state senator and a policy advisor to a U.S. senator, and oversaw lobbyists at the state level throughout the United States for a national nongovernmental organization.

**Rose McDermott** is the David and Mariana Fisher University Professor of International Relations at Brown University and a fellow in the American Academy of Arts and Sciences. She has taught at Cornell, UC–Santa Barbara, and Harvard and has held fellowships at Harvard and Stanford. She is the author of four books, including *Presidential Leadership, Illness, and Decision Making* (2007), and over 200 academic articles encompassing topics such as experimentation, emotion and decision making, and the biological and genetic bases of political behavior.

**John Rogan** is an adjunct professor at Fordham Law School. He co-taught the Presidential Succession Clinic during the past academic year and currently co-teaches a course on the Electoral College. He returned to Fordham after graduating in 2014 and working as a litigation associate at a New York law firm. While in law school, he was an intern at the U.S. District Court for the Southern District of New York, a board member of Fordham’s trial advocacy team, and a teaching assistant in the legal writing program.

**James Ronan** is a professor of political science at Villanova University. He is the recipient of a research grant from the Gerald R. Ford Presidential Library for study in the field of presidential disability and succession. His book on that subject, *Living Dangerously: The Uncertainties of Presidential Disability and Succession*, was published in 2015. He received his Ph.D. in political science from Catholic University and his M.A. in political science from Villanova University.

**Elizabeth M. Yang** is the deputy director of the Division for Public Services of the American Bar Association, director of the Association’s Standing Committee on Election Law, and most recently for the Standing Committee on Disaster Response and Preparedness. In her role as director of the Standing Committee on Election Law, Ms. Yang is primarily involved with working with the Standing Committee to develop policy on electoral issues for the association and conducting an ongoing study of the electoral process.

**Presidential Succession Clinic Students**

**Presenting**
- Naomi Babu, Class of 2017
- Tim Deal, Class of 2017
- Gareth Horell, Class of 2018
- Marcella Jayne, Class of 2018
- Edgar Mendoza, Class of 2017
- Nikole Devaris Morgulis, Class of 2017
- Alison Park, Class of 2017
- Bronwyn Roantree, Class of 2018
- Ryan Surujnath, Class of 2017
- Javed Yunus, Class of 2017

**Not Presenting**
- Jonathan Coppola, Class of 2017
- Morgan Green, Class of 2017
- Nicole Manganiello, Class of 2018
- Kaitlyn Zacharias, Class of 2018
U.S. Constitution
Article II, Section I, Clause 6

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.
§ 18. Same; parliamentary procedure at joint meeting

While the two Houses shall be in meeting as provided in this chapter, the President of the Senate shall have power to preserve order; and no debate shall be allowed and no question shall be put by the presiding officer except to either House on a motion to withdraw.


AMENDMENTS


§ 19. Vacancy in offices of both President and Vice President; officers eligible to act

(a)(1) If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is neither a President nor Vice President to discharge the powers and duties of the office of President, then the Speaker of the House of Representatives shall, upon his resignation as Speaker and as Representative in Congress, act as President.

(2) The same rule shall apply in the case of the death, resignation, removal from office, or inability of an individual acting as President under this subsection.

(b) If, at the time when under subsection (a) of this section a Speaker is to begin the discharge of the powers and duties of the office of President, there is no Speaker, or the Speaker fails to qualify as Acting President, then the President pro tempore of the Senate shall, upon his resignation as President pro tempore and as Senator, act as President.

(c) An individual acting as President under subsection (a) or subsection (b) of this section shall continue to act until the expiration of the then current Presidential term, except that—

(1) if his discharge of the powers and duties of the office is founded in whole or in part on the failure of both the President-elect and the Vice-President-elect to qualify, then he shall act only until a President or Vice President qualifies; and

(2) if his discharge of the powers and duties of the office is founded in whole or in part on the inability of the President or Vice President, then he shall act only until the removal of the disability of one of such individuals.

(d)(1) If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is no President pro tempore to act as President under subsection (b) of this section, then the officer of the United States who is highest on the following list, and who is not under disability to discharge the powers and duties of the office of President shall act as President: Secretary of State, Secretary of the Treasury, Secretary of Defense, Attorney General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health and Human Services, Secretary of Housing and Urban Development, Secretary of Transportation, Secretary of Energy, Secretary of Education, Secretary of Veterans Affairs, Secretary of Homeland Security.

(2) An individual acting as President under this subsection shall continue so to do until the expiration of the then current Presidential term, but not after a qualified and prior-entitled individual is able to act, except that the removal of the disability of an individual higher on the list contained in paragraph (1) of this subsection or the ability to qualify on the part of an individual higher on such list shall not terminate his service.

(e) Subsections (a), (b), and (d) of this section shall apply only to such officers as are eligible to the office of President under the Constitution. Subsection (d) of this section shall apply only to officers appointed, by and with the advice and consent of the Senate, prior to the time of the death, resignation, removal from office, inability, or failure to qualify, of the President pro tempore, and only to officers not under impeachment by the House of Representatives at the time the powers and duties of the office of President devolve upon them.

(f) During the period that any individual acts as President under this section, his compensation shall be at the rate then provided by law in the case of the President.


AMENDMENTS


EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–527 effective Mar. 15, 1989, see section 18(a) of Pub. L. 100–527, set out as a Department of Veterans Affairs Act note under section 301 of Title 38, Veterans’ Benefits.

EFFECTIVE DATE OF 1979 AMENDMENT

Amendment by Pub. L. 96–88 effective May 4, 1980, with specified exceptions, see section 601 of Pub. L. 96–88, set out as an Effective Date note under section 3401 of Title 20, Education.

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91–375 effective within 1 year after Aug. 12, 1970, on date established therefor by
Board of Governors of United States Postal Service and published by it in Federal Register, see section 16(a), formerly section 15(a) of Pub. L. 91-375, set out as an Effective Date note preceding section 101 of Title 39, Postal Service.

**Effective Date of 1966 Amendment**


**Effective Date of 1965 Amendment**

Amendment by Pub. L. 89-174 effective upon expiration of first period of sixty calendar days following Sept. 9, 1965 or on earlier date specified by Executive order, see section 31(a) of Pub. L. 89-174 set out as an Effective Date note under section 3531 of Title 42, The Public Health and Welfare.

**§ 20. Resignation or refusal of office**

The only evidence of a refusal to accept, or of a resignation of the office of President or Vice President, shall be an instrument in writing, declaring the same, and subscribed by the person refusing to accept or resigning, as the case may be, and delivered into the office of the Secretary of State.

(June 25, 1948, ch. 644, 62 Stat. 678.)

**Presidential Recordings and Materials Preservation Act**

For protection and preservation of tape recordings of conversations involving former President Richard M. Nixon, see sections 101 to 106 of Pub. L. 94-430, set out as a note under section 2107 of Title 44, Public Printing and Documents.

**§ 21. Definitions**

As used in this chapter the term—

(a) “State” includes the District of Columbia.

(b) “executives of each State” includes the Board of Commissioners of the District of Columbia.


**Transfer of Functions**


**CHAPTER 2—OFFICE AND COMPENSATION OF PRESIDENT**

Sec. 101. Commencement of term of office.

102. Compensation of the President.

103. Traveling expenses.

104. Salary of the Vice President.

105. Assistance and services for the President.

106. Assistance and services for the Vice President.

107. Domestic Policy Staff and Office of Administration personnel.

108. Assistance to the President for unanticipated needs.

109. Public property in and belonging to the Executive Residence at the White House.

110. Furniture for the Executive Residence at the White House.

111. Expense allowance of Vice President.

112. Detail of employees of executive departments.

113. Personnel report.

114. General pay limitation.

115. Veterans’ preference.

**Amendments**


1978—Pub. L. 95-570, §§1(b), 2(b), 3(b), 5(b)(2), (c)(2), Nov. 2, 1978, 92 Stat. 2447, 2449, 2450, 2451, substituted in item 105 “Assistance and services for the President” for “Compensation of secretaries and executive, administrative, and staff assistants to President”; in item 106 “Assistance and services for the Vice President” for “Administrative assistants”; in item 107 “Domestic Policy Staff and Office of Administration; personnel for “Detail of employees of executive departments to office of President”; in item 108 “Assistance to the President for unanticipated needs” for “Accommodations for vehicles”; and in item 109 “the Executive Residence at the White House” for “Executive Mansion”; inserted in item 110 “the Executive Residence at the,” before “White House”; and added items 112, 113 and 114.

**Executive Office Personnel Background Investigations; Leaves of Absence**


“(a) IN GENERAL.—Hereafter, the employment of any individual within the Executive Office of the President shall be placed on leave without pay status if the individual—

“(1) has not, within 30 days of commencing such employment or by October 31, 1994 (whichever occurs later), submitted a completed questionnaire for sensitive positions (SF–86) or equivalent form; or

“(2) has not, within 6 months of commencing such employment or by October 31, 1994 (whichever occurs later), had his or her background investigation, if completed, forwarded by the counsel to the President to the United States Secret Service for issuance of the appropriate access pass.

“(b) EXEMPTION.—Subsection (a) shall not apply to any individual specifically exempted from such subsection by the President or his designee.”

[For transfer of the functions, personnel, assets, and obligations of the United States Secret Service, including the functions of the Secretary of the Treasury relating thereto, to the Secretary of Homeland Security, and for treatment of related references, see sections 381, 551(d), 552(d), and 557 of Title 6, Domestic Security, and the Department of Homeland Security Reorganization Plan of November 25, 2002, as modified, set out as a note under section 542 of Title 6.]

**Reorganization Plan No. 1 of 1977**


Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, July 15, 1977; pursuant to the provisions of Chapter 9 of Title 5 of the United States Code.

**Executive Office of the President**

**Section 1. Redesignation of Domestic Council Staff**

The Domestic Council staff is hereby designated the Domestic Policy Staff and shall consist of such staff personnel as are determined by the President to be nec-

1 As amended Sept. 13, 1977.
U.S. Constitution
Amendment XXV

Section 1.
In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2.
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.

Section 3.
Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4.
Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.
Rules of the Republican National Committee

Rule No. 9: Filling Vacancies in Nominations

(a) The Republican National Committee is hereby authorized and empowered to fill any and all vacancies which may occur by reason of death, declination or otherwise of the Republican candidate for president of the United States or the Republican candidate for vice president of the United States, as nominated by the national convention, or the Republican National Committee may reconvene the national convention for the purpose of filling any such vacancies.

(b) In voting under this rule, the Republican National Committee members representing any state shall be entitled to cast the same number of votes as said state was entitled to cast at the national convention.

(c) In the event that the members of the Republican National Committee from any state shall not be in agreement in the casting of votes hereunder, the votes of such state shall be divided equally, including fractional votes, among the members of the Republican National Committee present or voting by proxy.

(d) No candidate shall be chosen to fill any such vacancy except upon receiving a majority of the votes entitled to be cast in the election.

The Bylaws of the Democratic Party

Article Three. Section 1. The Democratic National Committee shall have general responsibility for the affairs of the Democratic Party between National Conventions, subject to the provisions of this Charter and to the resolutions or other actions of the National Convention. This responsibility shall include:

... (c) filling vacancies in the nominations for the office of President and Vice President; ...

Article Two. Section 8.

... (b) A majority of the full membership of the Democratic National Committee present in person or by proxy shall constitute a quorum, provided that no less than forty percent (40%) of the full membership be present in person for the purpose of establishing a quorum provided, however, that for purposes of voting to fill a vacancy on the National ticket, a quorum shall be a majority of the full membership present in person.

2016 Call for Democratic National Convention

VIII(G). Filling a Vacancy on the National Ticket: In the event of death, resignation or disability of a nominee of the Party for President or Vice President after the adjournment of the National Convention, the National Chairperson of the Democratic National Committee shall confer with the Democratic leadership of the United States Congress and the Democratic Governors Association and shall report to the Democratic National Committee, which is authorized to fill the vacancy or vacancies.
Recommendations of Fordham University School of Law’s  
Second Presidential Succession Clinic

I. Executive Branch Contingency Planning
   1. The President should create a prospective declaration of inability pursuant to  
      Section 3 of the Twenty-Fifth Amendment allowing the Vice President to initiate  
      a transfer of power during emergencies when there is not enough time for the  
      Vice President and Cabinet (the “heads of the executive departments”) to engage  
      in the Section 4 process.
   2. The White House Medical Unit should add a mental health professional.

II. Line of Succession
   1. Congress should remove the Speaker of the House, Senate President pro tempore  
      and several lower-ranked Cabinet Secretaries (except the Secretary of Homeland  
      Security) from the line of succession, and allow the President to nominate four  
      specifically designated persons as “standing successors.”
   2. Congress should clarify the status of acting cabinet secretaries in the line of  
      succession, ideally by removing them from the line.
   3. Incoming and outgoing administrations should coordinate to allow for the  
      confirmation of some incoming Cabinet Secretaries before the inauguration  
      ceremony to prevent the line of succession from being nearly vacant due to the  
      resignations of outgoing Cabinet Secretaries.
   4. All officials in the line of succession should prepare for succession contingencies,  
      becoming fully aware of their roles, to avoid situations like the confusion over  
      who is in control.

III. Dual and Vice Presidential Inability
   1. To address the absence of procedures for declaring a “dual inability” of the  
      President and Vice President, Congress should pass a statute authorizing the next  
      official in the line of succession after the Vice President to act with the Cabinet to  
      declare a “dual inability.”
   2. To address the absence of procedures for declaring the Vice President unable,  
      Congress should provide by law for the Vice President to do so or, if he is unable,  
      the President and majority of the Cabinet.

IV. Congressional Procedure in a Section 4 Scenario
   1. To fulfill its responsibility under Section 4 of the Twenty-Fifth Amendment to  
      evaluate the President’s capacity in the event of a dispute over whether the  
      President is unable, Congress should establish a twelve member joint bipartisan  
      committee from the congressional committees with jurisdiction over presidential  
      succession issues.
   2. The committee should have power to subpoena documents and testimony with the  
      concurrence of both chairmen or the concurrence of one chairman and a majority  
      of the committee members.
3. The procedure Congress follows should ensure that the President receives due process, particularly fair and adequate notice of the inquiry and an opportunity to testify before the committee.

V. Campaign Health Issues
1. Congress or a private organization should form a commission to create non-binding guidelines of what presidential candidates should disclose about their health.
2. Laws requiring the release of medical records or participation in medical examinations may not be sound policy or constitutional.

VI. Political Party Rules for Replacing Presidential Candidates
1. The political parties should implement a rule for replacing presidential nominees that has separate procedures for two different periods following the national conventions. During the period after the convention but before September 15, the national committee should select a replacement candidate from a list of two to four possible replacement candidates submitted to it by a special “vacancy committee.” After September 15, the vice presidential nominee should succeed to the presidential nomination unless two-thirds of the national committee votes against his or her succession.
2. The parties should also create procedures for removing medically incapacitated presidential candidates.
The following is a draft of a chapter in a book that Dean Feerick is writing. He wrote this chapter in response to inquiries over the years as to how he became involved in the cause of reforming the succession system and what his work consisted of.

The Fordham Law Review will publish this piece in its December issue. It is still subject to editing, footnoting, and other changes.

Chapter 27: Constitutional Endeavors—Presidential Succession

“And so, my fellow Americans, ask not what America will do for you, but what together we can do for the freedom of many.”

- John F. Kennedy, January 20, 1961

When I left law school, I did not realize that I would have a unique opportunity to apply the learning I received on the Constitution. It all started with a newspaper item I saw describing a constitutional problem involving the disability of a President. I mentioned the subject to my college classmate, Louis Viola, who said he had a file of newspaper clippings that dealt with the disabilities of President Eisenhower. Upon reading it, I became fascinated by the subject and decided to research the issue and offer my ideas as to a solution.

By early 1963, I had written a rather long article and submitted it for consideration to the Fordham Law Review entitled The Problem of Presidential Inability—Will Congress Ever Solve It. In its opening section, it stated that the presence in the White House of an “able, healthy and young president” made it timely to consider the subject, since there could be no reflection on the current occupant of the office. I offered my solution, influenced by Eisenhower’s 1958 letter agreement with Vice-President Nixon. The article appeared in the October 1963 issue of the review. I followed up its publication with a letter to the New York Times, published on November 17, 1963, stating:

[Presidents are mortal. President Garfield’s shooting, President Wilson’s stroke and President Eisenhower’s heart attack rendered the respective President temporarily unable to exercise the powers and duties of his office. Despite this, Congress has consistently failed the American people by not acting to eliminate the possibility of a gap in the

---

3 Id. at 76.
4 Id. at 112–13, 126–28.
executive because of the confusion existing over the meaning of the succession provision of the Constitution.\(^5\)

To drum up support for a change in the Constitution, I sent reprints of my article to individuals who might have an interest in the subject. Not until the writing of this chapter did I realize that I had stored away in boxes, dating back more than 50 years, the acknowledgements I received. Some examples follow.

By letter dated November 13, 1963, President Kennedy’s assistant, Ralph A. Dungan, said: “The President has received your letter and asked me to thank you for sending him the accompanying copy of your article…”\(^6\) By letter dated November 11, 1963, Attorney General Robert Kennedy did the same but added: “I appreciate your bringing it to my attention as this is a subject which we have been studying here in the department for some time.”\(^7\) By letter dated November 5, 1963, Senator Edward Kennedy said: “I look forward to reading your discussion of this complex subject.”\(^8\) George Reedy, press secretary to Vice President Johnson, said in his letter dated November 6, 1963: “I know he will be greatly interested in your study which will be called to his attention promptly upon his return.”\(^9\) Former Vice President Nixon said in a letter dated two days before President Kennedy’s assassination:

This is a subject in which I am most interested, but due to the heavy pressures of my legal practice at this time I would not be able to do justice to a letter commenting on the article. If my schedule should lighten up in the period ahead, I will have the article in my reading file and will try to drop you a note.\(^10\)

Former Vice President Henry Wallace had a short but interesting response, dated November 12, 1963: “It was most kind of you to send me the article on the situation in case of the President’s Inability to discharge his office. Curiously enough I gave this problem no thought while I was the Vice President.”\(^11\) Arthur Krock of the New York Times, in a letter dated November 7, 1963, said: “I wish Congress were as much interested [in the subject] as you or I.”\(^12\) Professor David Fellman of the University of Wisconsin, in a thoughtful letter of November 7, said: “[I]t may well take a constitutional amendment to solve the problem, but amendments are awfully hard to come by, and I would hope we could work something out by legislation alone…”

---

\(^6\) Letter from Ralph A. Dungan, Special Assistant to the President, to John D. Feerick (Nov. 13, 1963) (on file with the Fordham Law Library).
\(^7\) Letter from Robert F. Kennedy, Attorney Gen., to John D. Feerick (Nov. 13, 1963) (on file with the Fordham Law Library).
\(^9\) Letter from George E. Reedy, Special Assistant to the Vice President, to John D. Feerick (Nov. 6, 1963) (on file with the Fordham Law Library).
I was touched to find in one of my boxes a letter from Dean Mulligan, in which he said: “The article shows scholarship and research of the highest order. Too many of our Law Review people forget about scholarly contributions to the Review after graduation and I was therefore delighted to see your very fine piece.” He then added: “My only quibble with your conclusions is point 5 on page 128 giving the right to the President to declare a cessation of the inability. Query: Do you mean the Vice President or the former President. If you mean the latter, it would seem to me that problems could be created.” The dean obviously had read the article as did Nathan Siegel of the Department of Justice who, in a letter of November 19, questioned the wisdom of an impeachment remedy as discussed in the article in a neglect of duty context. By letter dated November 14, 1963, then political science professor James C. Finlay, S.J. of Fordham said: “We are always delighted at the success of our former students in this department. I shall forward the clipping to Father McKenna, because he, too, is very much interested in your achievements.” By note from Nigeria, dated April 4, 1964, my college teacher, Father Joseph C. McKenna, S.J., commented favorably on my Fordham article but he thought I over-wrote separation of powers, “prefer[ing] to say they are divided but not separate.” He concluded with “the piece turned out to be timelier that you knew. Keep up the good work.”

Finally, by letter dated November 11, Lewis Powell, president-elect of the ABA, said: “The ABA is indeed interested in this question, and I am sure your article will be most helpful if we should be called upon again to testify. Quite obviously you have done an enormous amount of research and work in the field.”

Death of President Kennedy

The academic nature of my writing changed on November 22, 1963, when people everywhere were shocked to learn of the assassination of President Kennedy. Attention was given in the press as to what might have happened if Kennedy lived but was quite disabled. It took me weeks to process this national tragedy. He was my hero. In the meantime, unexpected attention was given to the article. On November 24, Arthur Krock discussed my views in his national column as part of a discussion of what would have happened if Kennedy had lived but was disabled. I also received a call from CBS News, asking for copies of the article for a program it wanted to develop on presidential succession. Letters concerning my article arrived which required a response.

14 Id.
15 Letter from James C. Finlay, S.J., Chairman, Fordham Univ. Dep’t of Political Philosophy & Gov’t, to John D. Feerick, Skadden, Arps, Slate, Meagher & Flom (Nov. 14, 1963) (on file with the Fordham Law Library).
17 Id.
18 Id.
19 Letter from Lewis F. Powell, Jr., Hunton, Williams, Gay, Powell & Gibson, to John D. Feerick (Nov. 11, 1963) (on file with the Fordham Law Library).
21 For example, on January 28, 1964, I responded to Congressman Louis C. Wyman of New Hampshire, who shared with me a copy of a letter dated January 21, 1963 that he sent to his former professor, Paul Freund. In that letter, he said that Congress could solve the problem by statute:
later said to me that he came across the article and thought it would be helpful for educating a group about the problem.\textsuperscript{21} He and other key staff urged the ABA, which already had a position, to give renewed leadership to solving these problems.\textsuperscript{22} As a result, the ABA decided to convene a two-day conference on presidential inability and vice presidential vacancy for late January 1964, to which 12 lawyers were invited to participate, plus several guests.\textsuperscript{23} I was one of the 12 because of my article. I had no sense of what was to come and was concerned about the diversion of time from my billable work at Skadden—then a young associate. The firm became totally supportive of this activity.

**The ABA Conference and Consensus**

Before the meetings in Washington’s famous Mayflower Hotel, each participant received a binder of reading material. I was surprised to see my article as the lead off reading. If it did nothing else, it gave a detailed history of presidential disability from colonial America to 1963, discussed precedents in the 50 states and foreign countries and the many proposals to solve the problem, and it suggested that the major roles should be with the President and Vice President, with the additional recommendation that in making any determination the Vice President should secure the opinions of the Heads of the Executive Departments. Other material in the binder included an article by Lewis F. Powell, Jr. Esq. then president-elect of the ABA; excerpts from both President Nixon’s book, *Six Crises*, and the Congressional Record; a copy of Senate Joint Resolution (S.J. Res. 139), then not yet in print; and a print of the Senate hearings of June 1963, chaired by Senator Estes Kefauver, who had died in August 1963.

From this two-day conference on January 20 and 21, 1964, the following consensus developed as to content of a constitutional amendment:

---

The Constitution plainly provides that the Vice President shall take over when the President has an inability. It likewise plainly gives to the Legislative Branch the power to implement its general caveats by legislating the details of the method. The Constitution likewise explicitly authorizes Congress to provide for succession when the President and Vice President shall be out of the picture.

In reply, I said:

I find it difficult to accept that a statute which would divert the determination of inability from the person next in line, be he the Vice President or, as now, the Speaker, would be constitutional. As the Constitution now stands, it is the duty of the Vice President (or the officer next in line) to act as successor in cases of inability and therefore, by implication, his duty alone to make the determination. My reading of the debates at the . . . Convention . . . leads me to the conclusion that Congress has no power to legislate in this area other than to name the successors after the Vice President.

---


\textsuperscript{23} The members included Herbert Brownell, former Attorney General; Walter F. Craig, Jr., President of the ABA and chair of the meetings; Professor Paul A. Freund of Harvard Law School; Jonathan C. Gibson, chair of the ABA committee on jurisprudence and the law; Richard H. Hansen, author of *The Year We Had No President*; James C. Kirby, Jr., former general counsel of the Senate Subcommittee on Constitutional Amendments; Ross L. Malone, general counsel of General Motors and a former U.S. Deputy Attorney General; Dean Charles B. Nutting of the George Washington University Law School; Lewis F. Powell, Jr.; Martin Taylor, chair of the New York State Bar committee on the Constitution; and Edward L. Wright, chair of the ABA House of Delegates.
DRAFT VERSION

(1) in the event of the inability of the President, the powers and duties, but not the office, shall devolve upon the Vice-President or person next in line of succession for the duration of the inability of the President or until expiration of his term of office;

(2) in the event of the death, resignation or removal of the President, the Vice-President or the person next in line of succession shall succeed to the office for the unexpired term;

(3) the inability of the President may be established by declaration in writing of the President. In the event that the President does not make known his inability, it may be established by action of the Vice-President or person next in line of succession with the concurrence of a majority of the Cabinet or by action of such other body as the Congress may by law provide;

(4) the ability of the President to resume the powers and duties of his office shall be established by his declaration in writing. In the event that the Vice-President and a majority of the Cabinet or such other body as the Congress may by law provide shall not concur in the declaration of the President, the continuing disability of the President may then be determined by the vote of two-thirds of the elected members of each House of Congress; and

(5) when a vacancy occurs in the office of Vice-President the President shall nominate a person, who, upon approval by a majority of the elected members of Congress meeting in joint session, shall then become Vice-President for the unexpired term.

I found the meetings stimulating. ABA president Craig made clear that no one was too young to participate.24 At the meetings, I sat near Paul Freund and Senator Birch Bayh. This contributed to a once in a lifetime opportunity to come to know them. Freund was America’s preeminent constitutional scholar and later would write the foreword to my first book on presidential succession, and Bayh would write the foreword to my second book on the Amendment itself.25 I found fascinating the openness of the discussions, the way everyone respectfully challenged each other’s points of view, and the spirit that prevailed of reaching a consensus. The need for substantial reform had no doubters in the group. Some favored giving Congress a broad power to legislate with respect to this area, while others, including myself, were fearful of this approach because of the possible political uses of such a power. Professor Freund, gentle and soft-spoken with an angelic quality to him, wondered out loud whether a disability commission with a mixed composition might be worthy of consideration. I remember commenting, shyly, that such a commission would not be compatible with the principle of separation of powers, a subject I had studied at Fordham College. He said, without explanation, “I agree” and thereafter did not press this idea. Vincent Doyle of the Library of Congress, an invited guest, suggested we combine both approaches in a constitutional amendment, a specific body such as the Cabinet and a power to establish another body, leading to the wording that is contained in Section 4, which combines the Vice President with the Cabinet or with “such other

The “other body” expression reflected the approach of S.J. Res. 35, then pending in Congress, sponsored by Senator Kenneth B. Keating of New York State, and supported by the ABA, the New York State Bar Association, and the New York City Bar Association. The Senate champion of the first approach was a new and young (35) Senator from Indiana, Birch Bayh, who had succeeded Kefauver as chair of the subcommittee on constitutional amendments. Bayh’s approach was reflected in a draft he had with him of S.J. Res. 139. As we left the consensus meeting, Doyle said to me that he was helped coming to his view from reading my Fordham article.

Unlike the subject of presidential inability, it was not difficult at the Conference to reach a consensus how to fill a vacancy in the vice presidency. The approach of point (5) of the consensus mirrored the practice that had developed of presidential candidates selecting their running mate. The provision calling for confirmation by both houses of Congress was seen as a way of expressing a national consensus in support of the President’s nominee for the position. Almost as an afterthought, someone pointed out that the determination of an inability by the vice president in point (3), with the approval of the cabinet or another body, would not work if there were a vacancy in the vice presidency. A suggestion was made and accepted and placed in point (1) that the person next in line of succession should perform that role. I recall noticing on the second day, as we were about to conclude, that the draft was not clear on whether a president declaring his own inability could be prevented from resuming his powers and duties by the check of the vice president and cabinet (or another body). Such a check appeared in proposals at the time. A suggestion I made for eliminating such a check, where the president declared his own inability (reflecting some proposals at the time and a point made in my article), was not accepted. Later, in a letter dated March 29, 1966, to Larry Conrad, chief counsel of the Senate’s Subcommittee on Constitutional Amendment, who asked me for a chronological listing of my activities, I said:

At the consensus sessions I strongly advocated a constitutional amendment embodying a specific method of determining inability, and spoke in favor of the determination of inability being made by the Vice-President and, if another body was considered necessary, by the Cabinet. Participated in the drafting of the consensus at an informal session after the formal session on January 20, and at a breakfast conference on January 21. Emphasized at the informal session of January 20, when it was not clear whether a consensus existed, that it was incumbent upon the panel to propose a method of determining inability. At formal session of January 21 I suggested a two-thirds vote of each House to prevent the President from resuming his powers and duties.

Building a National Consensus

Following the ABA conference, Senator Bayh and members of Congress responded favorably to the consensus recommendations, with some exceptions. The use of a joint session of Congress for filling a vacancy in the vice presidency was not adopted nor was the idea of the person next in the line of succession having authority to act with the Cabinet when there was a vice presidential vacancy. A number of the recommendations ran parallel to ideas already in the draft S.J. Res. 139 and earlier legislative proposals. The consensus was presented to the Senate
Subcommittee on Constitutional Amendments on February 28, 1964 by Walter Craig and Lewis E. Powell. I was invited to testify in my own right on March 1964 were other members of our group. Present on the occasion of my testimony were Senators Bayh, presiding, Johnston of South Carolina, Keating of New York, and Fong of Hawaii. I presented a statement and then responded to questions. Below are some of the major points of my testimony:

The circumstances surrounding the death of President Kennedy should have taught us that we can no longer afford the uncertainty that presently exists regarding the critical problem of Presidential inability. I am convinced that this problem can be solved. To miss this opportunity and again leave unsolved one of the most serious problems ever to confront Congress would be to trifle with the security of this great nation. Therefore, we must make every human effort to agree on a workable solution. A tremendous advance in the effort at agreement was made a little over a month ago. At that time the most workable solution which I have seen to date was proposed by a group of lawyers who were called together by the American Bar Association. The very fact that 12 individuals who represented nearly as many points of view could reach such a consensus is, in my opinion, a tremendous thing. I support it wholeheartedly.

First, the panel agreed that a constitutional amendment is necessary to solve the problem. Some members of the panel believed that Congress has no power at all to legislate on the subject—that it merely has the power to legislate on the line of succession beyond the Vice President. Most of the panel believed that the Vice President now has the constitutional power to determine inability, and therefore, this power could not be, constitutionally, taken from him by legislation. The panel further believed that if a legislative solution to the problem were enacted, it would be subject to constitutional challenge which would come very likely during a time of inability—when we could least afford it.

Second, the panel recommended that an amendment make it clear that in cases of inability the powers and duties of the Presidency devolve on the Vice President for the duration of the inability, while in cases of death, resignation, and removal, the office of President devolves for the rest of the term. This would eliminate the fear that the Vice President would oust the President if he acted as President in a case of inability. It would also give constitutional recognition to the Tyler precedent. (Vice President John Tyler became President when William Harrison died in office)....

Third, the panel recommended that the President be able to declare his own inability in writing. There is no good reason why this should not be....

Fourth, to meet the case where a President is disabled but is unwilling or actually unable to make a determination, the panel would give the decisive role to the Vice President and the Cabinet. In such a case, the Vice President with majority approval of the Cabinet could make the determination. The panel believed that the Vice President should not have the sole power as he would be an interested
party and, therefore, too reluctant to make a determination. On the other hand, it was felt that he should not be eliminated as it would be his duty to act as President and, therefore, he should have a say in determining when to act. The Cabinet was thought to be the best possible body to assist him in making the determination. That Cabinet members are close to the President, that they would likely be aware of an inability and would know if the circumstances were such that the Vice President should act, that they are part of the executive branch, and that the public would have confidence in the rightness of their decision were reasons for the selection of this body. A primary consideration for (this) approach was that it would involve no violation of the principle of separation of power. It has been said that Cabinet members, out of loyalty or fear of losing their jobs, might be too hesitant to find the President disabled. This is flatly contradicted by the fact that the Garfield and Wilson Cabinet actually urged the respective Vice President to act as President.

Fifth, the panel recommended that the President should be able to resume his powers and duties upon his own declaration in writing. Because of the possibility that a President might say he was able when he was not, it was the panel’s consensus that the Vice President, subject to approval by a majority of the Cabinet, should have the power to prevent him from acting in such a case.

In a case where the Vice President and a majority of the Cabinet disagrees with the President’s declaration of recovery, review by Congress would be required. The Vice President would continue to act in the interim, however. It would take a two-thirds vote of both Houses of Congress to keep the President from resuming his powers and duties. A two-thirds vote was decided upon in order to weight the provision heavily in favor of the President and also because it would conform with the two-thirds vote required by the Constitution to remove a President from office.

Sixth, the panel recommended the inclusion of a provision that Congress could change the Cabinet as the body to function with the Vice President. It was felt that this had the advantage of flexibility so that if it should become necessary to do so, Congress could, by legislation, change the procedure relatively quickly without having to resort to a constitutional amendment. (I personally did not agree with giving Congress such a power).

Seventh, the panel recommended that the Vice Presidency be filled at all times. It suggested that the President be allowed to nominate a new Vice President subject to confirmation by the Congress. My own examination of all the debates surrounding the various succession laws…suggests that the best way to solve the succession problem is by filling the Vice Presidency…

The remainder of my written statement addressed objections that had been raised to the panel consensus and offered positive reasons for a detailed amendment, concluding that the ABA consensus “without further legislation … is complete, is practical, is consistent with the principle
of separation of powers, gives the decisive role to those in whom the people would most likely have confidence, involves only persons who have been elected by the people or approved by their representatives, and embodies checks on all concerned—the President, Vice President and the Cabinet. Finally, since it would be embodied in a constitutional amendment, there would be no question about its constitutionality.” I then answered questions put to me by Senators Bayh and Johnston, appreciating as I did Senator Johnston’s statement, “I am very much pleased with your remarks.” I would later have other experiences testifying before Congress, but there was nothing quite like the first time.

The Post Hearing Period

Following the subcommittee hearings, I began to assist the Washington Office of the ABA, headed by Donald Channell and his deputy, Lowell Beck, in promoting the amendment, and assisting as well Larry Conrad, chief counsel of the subcommittee, in the formulation of the amendment, and in time also Congressman Richard Poff of Virginia of the House Judiciary Committee. The ABA essentially set up a clearinghouse in its Washington office, receiving calls from members of Congress and their staffs and from bar leaders and the media regarding the proposed amendment. They sent material to members of Congress and their staffs, called on state and local bar leaders to lobby their congressional members, and made regular visits to Congress and key judiciary staff. I frequently was on the phone with Channell and Beck, and also their talented assistant, Michael Spence, as the amendment worked its way through Congress in 1964 and 1965 and then the state legislatures. I gave speeches to bar and citizen groups, explained the proposed amendment to journalists and lawyers who were assisting in the effort, wrote articles for bar journals, and appeared before the New York City Bar’s influential Federal Legislation Committee, to advocate a change in its position. I also began to write a book on the history of Presidential succession, at the suggestion of my law school professor and mentor, Leonard Manning, after I had written a second Fordham article in 1964, entitled, “The Vice-Presidency and the Problems of Presidential Succession and Inability.” His advice to me was to begin the book by combining my two Fordham Law Review articles. He also introduced me to the Fordham University Press and its head, Father Edwin Quain, S.J., who expressed an interest in publishing such a book.

26 Presidential Inability and Vacancies in the Office of Vice President: Hearings Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary, 88th Cong. 154 (1964).
27 See John D. Feerick, The Problem of Presidential Inability—It Must Be Solved Now, 36 N.Y. St. B.J. 181 (1964); John D. Feerick, Presidential Inability: The Problem and a Solution, 50 A.B.A. J. 321 (1964). I was required by the State Bar’s Journal to remove my point of view from the article because it was not consistent with the State Bar’s position. See letter dated from me to Eugene Gerherdt.
28 In December 1963 Representative Emanuel Celler of the House Judiciary Committee, addressed the Legislation Committee, encouraging it to study the problem of presidential inability and succession. The committee started its review by creating a subcommittee and securing copies of my 1963 Fordham article, brought to their attention by my law firm colleague, Barry Garfinkel. I was asked to address the bar subcommittee and strongly urged at its meeting of early February 1964 to change its existing position and adopt the ABA consensus. The full committee came to adopt the ABA consensus, with a few suggested modifications, in its report of May 1, 1964, which was approved by the City Bar Association at its annual meeting of May 12, 1964.
Other requests came my way in the 1964 period including doing an analysis for the American Enterprise Institute of the pending legislative proposals on the subjects of presidential inability and vice presidential vacancy. Emalie became the glue for me on this project writing out a summary of the proposals.\textsuperscript{30} We discussed little else than presidential succession in the very early years of our marriage, except our desire to have a family. Another request I received was to serve in an advisory capacity to a prominent committee of business leaders of the Committee for Economic Development (CED), aided by distinguished political science professors. Some of the professors favored a solution different from the one offered by the ABA, making the experience a taxing one for me. As summarized in my March 1966 letter to Conrad, as follows:

Some of those who worked on (a policy) statement, particularly political scientists, strenuously opposed S.J. Res. 139. I strongly supported S.J. Res. 139’s approach and succeeded in getting much of it accepted by the Subcommittee (of CED).… The Subcommittee, however, refused to include the Vice-President in its inability solution, giving the role solely to the Cabinet. Spoke against the omission of the Vice President at the decisive meeting of the Research and Policy Committee of CED, suggesting that the Vice-President should be part of any approach and emphasizing the need for consensus (referring to the ABA Consensus) at this time in history. The Research and Policy committee agreed, so that the CED recommendation which emerged was substantially the same in principle as the S.J.Res. 139 approach.\textsuperscript{31}

As succession requests piled up, I spent whatever time I could find trying to finish my book. This would not have been possible without Emalie, who gave up her employment to help me. Pregnant with our first child in 1964, she gave the project enormous time, while I did what was necessary to keep my associate position at Skadden. She researched the congressional debates surrounding the 12th Amendment, drafted a book chapter on the hidden inability of President Grover Cleveland, made editing suggestions, helped with the development of a bibliography, and did much of the proofreading. The book, \textit{From Failing Hands: The Story of Presidential Succession}, appeared in March 1965. I was overwhelmed to see a dozen or so copies displayed in the first floor window at 302 Broadway, space then occupied by the Fordham University Press. A few months before, our first child, Maureen Grace, was born on December 29, 1964. I recall Emalie working on the index to the book, along with my brother Donald and my friend Joe Hart, and having to suddenly leave this project when Maureen was about to arrive on the scene.\textsuperscript{32}

Some months before all of this, in March 1964, the ABA set up a nationwide committee in its Junior Bar Conference (JBC) which I was asked to chair. It was given the mission to gain grass roots support for S.J. Res. 139. Another ABA committee was formed, chaired by Herbert

\textsuperscript{30} Presidential Inability and Vice Presidential Vacancies, \textsc{Cong. Q. Almanac} (1964), http://library.cqpress.com/cqalmanac/cqal641304708.

\textsuperscript{31} One exception was the recommendation that the ending of a President inability be by majority vote of the Cabinet, the President concurring.

\textsuperscript{32} The collaboration Emalie and I developed in the field of presidential succession led us to co-author a book on the Vice Presidents of the United States. Published in 1967 it was dedicated to our baby during its writing, Maureen Grace. I dedicated subsequent writings to our other children, and first grandchild, David Leblanc, and Uncle Pat, Donald, and Professor Manning.
Brownell, to buttress this effort, and also an advisory committee on which I served and took on assignments. The JBC committee with young lawyer representatives from every state reached out to members of Congress from their states promoting the passage of S.J. Res. 139. I recall Senator Bayh saying that one Senate colleague, Harry Byrd, told him to sign him up as a supporter of S.J. Res. 139 as he had never before heard from so many lawyers in his state. The work of young lawyers in particular was reflected in a June 1965 JBC report, as follows:

In the period between August, 1964, and June, 1965, the state representatives on the JBC presidential inability committee have been instrumental in getting their state and local bar associations to endorse S.J. Res. 1 (successor to S.J. Res. 139) and H.J. Res. 1, their newspapers to lend editorial support of these proposals, and their fellow citizens to write letters to members of the Congress urging action on them. Articles by Junior Bar leaders appeared in bar publications in Arkansas, Colorado, Georgia, Idaho, Illinois, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, and others. Letters to the Editor by Junior Bar leaders appeared in newspapers across the country. Literally thousands of letters by citizens and organization were sent to the members of Congress due to the leadership of junior bar leaders. Junior bar representatives appeared on radio and television in support of prompt congressional action … in Illinois, New York, Pennsylvania, etc. Numerous others delivered talks before various civic organizations. Speaker bureaus were set up in a number of states for the purpose of informing organizations of the problems … in Arizona, Colorado, Illinois, North Carolina, Ohio, Pennsylvania, South Carolina, etc. On the eve of key votes in the Senate and House, Junior Bar leaders made telephone calls and sent letters and telegrams to their Congressmen and Senators.

The report identified by name 31 state representatives who rendered “truly outstanding leadership” and another 27 individuals who made substantial contributions, including Fordham graduates James Tolan and James McGough.33

At a meeting of Brownell’s ABA committee on August 8, 1965, following the amendment’s approval by both houses of Congress, he stated that “no legislative effort in the history of the Association had brought more favorable attention to the ABA from members of Congress, the news media, and the public in general than the two year program in support of the constitutional amendment.” Young lawyers and senior lawyers, working closely with each other and members of Congress and their staffs, helped achieve a milestone, but now we all had to turn

---

33 E.g., “In Arizona, C. Kimball Rose has appointed a chairman for each congressional district in the state … [who] is active in contacting the state’s Congressmen and sending speakers to meetings of various civic organizations … R. Dale Tooley (Colorado) has succeeded in obtaining a commitment from the State Democratic Party and has set up a speaker’s bureau and publicity committee to encourage interest in the subject of presidential inability and the vice-presidential vacancy… Harold I. Levine (in Illinois) has had distributed to over 3000 young lawyers a newsletter dealing with the problems… Robert E. Drey (in Iowa) has obtained the support of 99 county chairman each of whom is charged with spearheading a massive publicity campaign within his county… Franklin Kury (in Pennsylvania) and his thirty-member committee have been extremely busy in getting commitments from Pennsylvania Congressmen, suggesting pertinent editorials to the newspapers, writing letters to the editor, speaking at meetings of various civic organizations throughout the state… Mercer Tate (vice chair of the committee) … spoke on television on the problems to an audience estimated at 95,000… Lawrence Jackson of Texas is working on a full-scale publicity program for the state, and is busy getting a chairman appointed at every bar association in the state.
our attention to the ratification of the amendment. Brownell urged that “it should be emphasized to state bar leaders that effective programs on the state level could likewise be of significant public relations to state and local bar associations.”

A January 6, 1966 report of the JBC committee, six months after the amendment had been proposed by Congress, said: “As of this writing, the proposed amendment has been ratified by . . . (identifying 13 states) . . . Members of this Committee played a large role in making the above ratifications possible . . . (listing 13 members) . . . Much groundwork for ratification in the remaining states . . . is being laid by members of this committee . . .” Six months later, in a July 18, 1966, communication to Bert Nettles, Esq., Channell said:

I realize that anyone who looks at the proposed amendment may have his own ideas as to other ways of accomplishing the best results. Certainly there were many ideas among members of Congress and we can never expect a perfect solution which would please everyone. I certainly believe that the proposed resolution which resulted from a consensus among outstanding lawyers, Constitutional scholars and members of Congress is the best approach that can be devised.

Six months later, a January 1967 JBC report said that only six states remained for ratification, adding that “since the state legislatures are now convening, young lawyer representatives of this Committee are at work to secure the ratification of the proposed amendment….Our job during the next few weeks will be to do everything in our power to accomplish this objective.” Left unsaid was the incredible work of the ABA as an institution. Throughout this entire period, the staff of the ABA was relentless and persistent, sending around the country to bar leaders kits of supporting material, including a proposed ratification model resolution and a history of the steps necessary for ratification in each state. Reprints of my articles were used in this effort plus the handout that was developed for the May 1964 Eisenhower luncheon. Walter Craig was exceptional in his efforts, as was his successor, Lewis Powell. Craig played a key role in the ratification of the amendment in Arizona, California, and Nevada and elsewhere, while Powell brokered a key meeting between Senator Bayh and Congressman Celler that broke a congressional impasse that could have defeated the amendment in Congress.34

Among the many young lawyers who made significant contributions were Mercer Tate and Franklin Kury in Pennsylvania and Richard Hansen, an ABA Conference member who gave more than 50 speeches throughout Nebraska in support of the amendment and had the joy of seeing his state become the first to ratify it on July 12, 1965. I did not focus on this seminal date until the writing of this chapter, as I was probably celebrating that day the last of my birthdays (29th) in my twenties. The late Dale Tooley of Colorado stood out as well for his remarkable leadership. He took on the task of dealing with two major newspapers, the Denver Post and Rocky Mountain News, that were pitted against each other, with the latter favoring the amendment and the former opposing it. The Post did not like the provisions of Section 4, involving it said, too many interested parties. It also complained that the provision for filling a vice presidential vacancy was undemocratic. Later-to-be District Attorney of Denver and have a plaza named in his memory, Tooley encouraged the Colorado state bar to adopt the cause as a

34 BIRCH BAYH, ONE HEARTBEAT AWAY: PRESIDENTIAL DISABILITY AND SUCCESSION (1968).
high priority, and the state’s representatives in Congress to vote for it. In a letter to Senator Bayh, dated February 2, 1966, he summarized his activities as follows, typical of other young lawyers in the country:

Copy of an article in support of the amendment which appeared in the January 26 edition of the Rocky Mountain News. As you can see, I had copies of this article reproduced and, through Representative Lisco, had them distributed to each member of the House.

Copy of a letter of January 27, 1966, which we prepared and which the Chairman of the Young Lawyers Section of the Colorado Bar Association signed, which went to each of the council members, officers, chairmen and members of committees of that section. Attached to it is a page of a letter which went to all members of the Legislative Committee of the Colorado Bar Association from Charles Gallagher, the effective and hard-working Chairman of that committee.

Additional editorial in support of the amendment which appeared in the January 31 edition of the Rocky Mountain News and a news story on the appeal by the congressman for ratification.

Finally, the editorial which appeared on January 30, 1966, which was the Sunday edition of the News. As you can see, the News has been extremely cooperative with us, and at least the Denver Post has been silent in the last few days.

Copy of a postcard which was sent last week to each member of the Colorado Bar Association under the signature of president Heinicke and a copy of a letter from Representative Rich Gebhardt in which he agreed to change his vote.

A copy of the statement in opposition to the amendment prepared by Representative John S. Carroll. This is the statement which was so effectively answered by the letter which your office prepared on behalf of Senator Bayh.

**Personal Communications**
My files are filled with communications and correspondence regarding the work of young lawyers in this grand effort at constitutional reform and also of senior lawyers and the ABA’s incredible staff. I was privileged to be part of this effort and offer below from my personal files this limited snapshot history:

By letter dated April 13, 1964, I was asked by Lowell Beck for my views concerning issues raised in a letter he received about the ABA Consensus. The writer inquired of him as to a situation involving a disabled president whose vice president had died and whether a statutory successor acting as president could nominate a new vice president under the Consensus recommendation for filling a vacancy. I expressed hesitancy about his doing so in that context as the President might recover from his inability and have his own ideas for Vice President. The writer also questioned whether a vice president and cabinet, out of loyalty or fear of reprisal, would ever use their power to declare a president disabled, except in extreme circumstances.

By letter dated May 22, 1964, to Larry Conrad, responding to his request, I explained the Consensus recommendation that the Vice President should continue to act as President during the period in which Congress had to resolve a presidential inability disagreement, noting that the ABA’s view was “premised on the thinking that Congress would act immediately to decide the issue.” I noted the possibility that Congress might delay doing so but reasoned that it would be under pressure from the people to act and it also would have a “moral and legal obligation” to do so. To cover this situation, after reviewing past and pending legislative proposals, I suggested to Conrad the following language:

Whenever the President makes public announcement in writing that his inability has terminated, he shall resume the powers and duties of his office on the second day after making such announcement, or at such earlier time after such announcement as he and the Vice President may determine, except that if the Vice President, with the written approval of a majority of the heads of executive departments in office at the time of such announcement, transmits to the Congress his written declaration that in his opinion the President’s inability has not terminated, the Vice President shall continue to act as President and the Congress shall immediately thereupon consider the issue.

(Some of this language is reflected in Section 5 of S.J. Res. as it passed the Senate in 1964)

A letter of mine, dated June 2, 1964, to Conrad, concerning the ABA recommendation for filling a vice presidential vacancy, stated:

The Constitution states in Article 2 that the Vice President of the United States shall be ‘elected’ in a certain manner. Thus to fill a vacancy in the Vice Presidency by statute would clearly violate this Article.
It may be that Congress has the power to create an office of Acting Vice President, as some suggest, under the Necessary and Proper Clause and to make the Acting Vice President the Officer next in line of succession under Article 2, Section 1, Clause 6. However, the Acting Vice President would not be able to preside over the Senate in that capacity, since the function is given only to the Vice President provided for in the Constitution. A mere statute could not make it otherwise. Whether or not Congress has the power to fill a vacancy in the Vice Presidency is subject to considerable doubt so that a constitutional amendment is necessary to resolve all doubt on the subject.

A letter of mine, dated June 5, 1964, to Robert Nordhord, Esq., a staff member of the office of legislative counsel in the House of Representatives, responded to subjects I was asked about in a telephone conversation with him of the same day. These subjects included the consensus recommendation for a two-thirds vote in a joint session of Congress (for which he said there were no rules for such a session) and the required vote in Congress for filling a vice presidential vacancy (I suggested a majority of a quorum, as with other nominations). With respect to an inability disagreement between the President, the Vice President and the Cabinet, the letter said:

The Vice President would . . . act as President until Congress had decided the issue. The ABA consensus contained no specific recommendation as to how the disagreement issue might be presented to Congress. It is my feeling that the Vice President should be required to transmit to the Congress, in writing, a disagreement declaration within a certain period of time. If Congress were not then in session, he would be obliged to convene a special session before such period has expired. If he failed to transmit a declaration to Congress within this period, the President would thereupon resume his powers and duties as soon as the period has ended. Assuming that a declaration was presented to Congress in time, Congress would be required to decide the issue, not within any specified period of time, but as soon as possible. If the Congress failed to decide the issue, or delayed for an unreasonable amount of time, the Vice President would still continue to act as President under the ABA consensus. This is one of these areas, I submit, where we must assume that Congress would act immediately. It would be directed by the Constitution to do so and the people would not tolerate a different course of action.

On June 23, 1964, I responded to a letter from Channell asking why the Supreme Court was given no role in determining a President’s inability under the ABA consensus. I made reference to separation of powers, the views of Chief Justice Earl Warren in opposition to Justices’ serving on a disability commission, the analogy of the impeachment process involving only Congress, and the desirability of having a body like the Cabinet which “could act quickly and unanimously.” Channell’s letter was likely influenced by a resolution of the Massachusetts Bar calling for the Supreme Court to decide a president’s inability and when he might resume his powers and duties. Most other state bars supported the Consensus.

---

35 See FEERICK, supra note 24, at 248.
S.J. Res. 139 was approved by the Senate Subcommittee on Constitutional Amendments on May 27, 1964, with amendments, and then was approved by the full Judiciary Committee on August 4, which issued a supporting report on August 13, 1964. The amendment was approved by voice vote in the Senate on September 28, 1964 (with only a few Senators present), and again the following day, 72-0. It was re-introduced in the 89th Congress as S.J. Res. 1, in a form identical to H.R.J. Res. 1, also introduced in January 1965.

By letter dated January 5, 1965, to House Judiciary Chair Emanuel Celler, Channell noted: “A press release will be issued tomorrow commending you for sponsoring the proposed amendment and there will be a story on the American Bar News which is sent to 118,000 members. Also, I plan to devote considerable space to this subject in the Washington Letter which is sent to all bar associations and to 6000 bar leaders.”

By letter dated January 25, 1965, I informed Channell of a meeting I had with Senator Hurska’s assistant, and possibly Hruska himself, hoping to persuade the Senator not to oppose S.J. Res. 1. The Senator had expressed concerns about the wording of the provisions giving Congress a role in determining an inability in the event of an inability disagreement and its power to substitute a different body for the Cabinet. The Senator, who spoke to the ABA consensus group, was a strong supporter of the office of the President and separation of powers, and gave strong supporting testimony concerning the proposed amendment.

In February 1965, the Senate approved S.J. Res. 1, as amended, by a vote of 72 to 0. The House Judiciary committee commenced hearings on H.R.J. Res. 1 and more than 30 other proposals for dealing with the inability problem, some with a time limitation placed on congressional action if there were a challenge to a Presidential declaration of recovery. Responding to a request from Congressman Poff for language to cover certain contingencies, I stated in a letter to him of February 7, 1965, that I saw “essentially three situations: (1) the simultaneous inabilities of the Vice-President and President; (2) the inability of an Acting President, and (3) the inability of a President when there is no Vice-President,” offering for his consideration the following provisions for H.J. Res. 1:

6: “The inability of the Vice President shall be determined in the same manner as that of the President except that the Vice-President shall have no right to participate in such determination,” and,

7: “In case of the death, resignation, removal or inability of the Vice-President, the person next in line of succession shall act in lieu of the Vice-President under Sections 4 and 5 with the heads of the Executive Departments or other body as Congress may by law provide.” (Please note that the ABA consensus had a provision along these lines.)

The letter also contained suggestions for greater clarity in the legislative history regarding the wording of the then-proposed amendment, which I felt was important. In abbreviated form, these suggestions dealt with the proposed time limit of 10 days for congressional action with respect to an inability disagreement (I thought the limit was unnecessary because of the term “immediately” in the proposal); whether the Vice President acts as President during the period in
which Congress decides a disagreement (as recommended by the ABA consensus);\(^{36}\) whether Congress would have the power to remove the Vice President from an inability determination (my view was not under the ABA consensus); the reach of the term “vacancy” for nominating a new Vice President (said that the term was limited to death, resignation, and removal); the calling of a special session by the Vice President if Congress were out of session (said it should be mandatory when a disagreement issue is raised); the need for the transmittal of an inability declaration to “Congress” to be spelled out in some manner (said rules were needed); the taking of the presidential oath of office by an Acting President (should be the case); whether an Acting President can preside over the Senate (not under the Constitution); and the salary for a Vice President acting as President (recommended that it be at the presidential rate).

On February 13, 1965, I wrote to Lowell Beck, as he requested, to offer comments on the testimony given by Attorney General Nicholas Katzenbach that a proposed amendment should make clear that a President declaring his own inability can resume his powers and duties upon his recovery declaration without any check by the Vice President and Cabinet. As recalled in my Conrad summary letter of March 1966:

> I think it is important to note that I made a motion to this effect on the second day of the Washington Conference in January 1964, and that motion was (except for my vote) unanimously defeated. The panel took the position that the recovery provisions should apply whenever a disabled President sought to resume his powers and duties, regardless of how his disability had been determined. Personally, I am in favor of the clarification (though I think language is required to carry it into effect) but, for the record, it is not consistent with the consensus.

The ABA leadership accepted the proposed clarification to have no check on a president declaring his own inability.

By letter dated February 16, 1965, Poff said: “Your letter of February 7 has been extremely helpful to me. During the course of interrogation, I have tried to write some of the legislative history you suggested.”\(^{37}\)

On April 1, 1965, Channell wrote that substantial opposition could develop in the House of Representatives, given a 6-4 vote in the House Rules Committee to grant only a four-hour open rule for debate on the floor of the House. He said that “most members of the House of Representatives are not fully advised as to the need for this amendment.”

\(^{36}\) My letter of February 7 also stated that Section 5 of the proposed amendment was not clear as to “who is entitled to exercise presidential power after the President declares his ability and before the Vice President brings the matter before Congress. The Vice President is intended to act in that period, I am sure, but the . . . language does not and will not permit him to do so. Since Section 5 is designed to meet an extraordinary case such as that of an insane President, it would be extremely dangerous to leave a gap here as such a President might declare himself able and immediately discharge the heads of the Executive Departments, thus preventing the Vice President from taking the necessary steps to get the matter before Congress.”

In a letter to Poff of April 5, 1965, as action approached in the House, I suggested that he give consideration to using the wisdom of Benjamin Franklin from the Constitutional Convention of 1787:

… I agree to this Constitution with all its faults, if they are such; because I think a general government necessary for us . . . I doubt . . . whether any other Convention we can obtain may be able to make a better Constitution. For when you assemble a number of men to have the advantage of their joint wisdom, you inevitably assemble with those men, all their prejudices, their passions, their errors of opinion, their local interests, and their selfish views. From such an assembly can a perfect production be expected? It therefore astonishes me . . . to find the system approaching so near to perfection as it does… Thus I consent . . . to this Constitution because I expect no better, and because I am not sure that it is not the best…On the whole, Sir, I cannot help expressing a wish that every member of the Convention who may still have objections to it, would with me, on this occasion doubt a little of his own infallibility, and to make manifest our unanimity, put his name to this instrument.38

In an acknowledgment, dated April 7, 1965, Poff said:

Frankly, John, looking back down the corridor of the years of labor and scholarship which have finally brought us to this point so near to success, I am a little aghast at the dimensions and weight of the responsibility which is mine. What, if after all this struggle, we should fail to persuade two-thirds? The thought has kept me awake at night. I am sure, with so much of yourself invested in this chore, you must share the anxiety I feel.

I felt his anxiety. He added that the Franklin quote was “very helpful” and that “it fits precisely into the speech I want to make while the rule is under consideration.”

On April 9, 1985, I sent a detailed letter to the editor of the *Wall Street Journal* concerning its editorial of April 5, 1965, opposing the amendment. I corrected a number of errors in the editorial as I saw them. My letter was not published but the points contained in it were reflected in discussions I had with ABA staff members and congressional staff in this period.

Another letter of mine on April 9 to Representative Charles Mathias, following a call with him, was designed to dispel his concern that the amendment might repeal Congress’s line of succession authority under Article II. I assured him that there was no intention to change such authority, and therefore there was no need for such authority to be written into the 25th Amendment. Despite this effort at persuasion, Mathias did not vote for the proposed amendment, but later as it was being reviewed for ratification by the Maryland legislature, he

38 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 642-43 (Max Farrand ed., 1911).
declined to speak against it, as he had planned to do, in the face of strong support for the amendment in that body.  

On April 13, 1965, the House approved its version of the amendment, 368 to 29, on this occasion with a 10-day time limit for congressional action in the event of an inability disagreement. Poff also sent me a gracious letter about my participation and asked that I give consideration to the matter described in a letter he sent that day to Channell, on which he copied me along with Brownell and Powell. He said that on the date of the House vote the following occurred:

Late in the afternoon the Speaker came to the Republican committee table and paid me a warm personal tribute for which I was very grateful. In the course of the conversation, he asked if I would introduce the “forty-eight hour” amendment. I told him that Chairman Celler had discussed it with me and I had agreed to introduce it. As the Congressional Record shows, the Speaker took the floor to urge support of the amendment. The Speaker’s address, eloquent and persuasive as well as dramatic, was the factor which made our margin of success possible.

Poff added that the amendment he offered was a “tactical expression” and “nothing more than that.” He said that he thought it was “unneeded” to accomplish what the Speaker wanted, adding “that it may be a complicating factor which might cause serious problems at a critical time.” I had shared earlier with Poff and others such a concern on my part.

In a letter to Poff dated April 19, 1965, as the conference committee of the two houses was about to attempt a resolution of their differences, I shared my views, summarized as follows: First, the 48-hour provision, while unwise, should remain as it was favored by McCormack, and the provision for placing a ten-day time limit on congressional action in the event of a disagreement, then strongly opposed by the Senate, should have a longer time period like 15 days. Changing my earlier view on the subject of a limit, I said it would be a “safeguard for the disabled President.” “If the Vice-President and Cabinet disagreed with a presidential declaration of recovery,” I reasoned, “the Congress would be obliged to decide the issue as soon as possible, giving the various parties ample opportunity to be heard.” I concluded: “It would appear to me that if after a conference you had to give up the 48 hour provision in order to retain the ten day provision (perhaps as extended), Speaker McCormack would be pleased as the House measure would have, in the main remained intact.” I also noted as desirable the change made in the language of Section 3 that a voluntary declaration by the President gave him the ability to resume his powers and duties on his own initiative without any check.

By letter dated April 23, Poff commented:

---

39 I discovered in the national archives in writing this book a reference to my 1965 Fordham article being helpful in explaining the amendment to state legislators in Maryland.
40 Poff’s letter dated April 19, 1965
41 Section 4 of the Amendment as adopted, states: “Thereupon Congress shall decide the issue assembling within forty-eight hours if not in session.” I worried about the effect of Congress not assembling until after that forty-eight hour period.
Your letter of April 19 illustrates that you are not wholly without political ‘savvy.’ Why is it, John, that most people, particularly intellectuals, seem to derive some particular pride from a confession of political naiveté? As a practical politician, I can only hope that this is a Freudian scream of secret admiration for things political.

He probably was right, but I also was a 28 year-old, humbled by everything and not wanting to appear presumptuous. Poff’s letter noted my agreement with him on the use of a time limit, indicated his flexibility on the time period itself, and asked if I knew anyone who could approach the Speaker on the 48 hour provision. I left the latter alone!

On April 20, 1965, in response to his request for my views, I wrote Brownell advising that the 10 day provision would not be inconsistent with the ABA consensus.

In the weeks that followed Poff and I had other communications, mainly with a focus on the time limitation. By memorandum dated May 20 from Lowell Beck, I learned that the “conferees had a heated discussion regarding the 10 day provision, with the House not wanting to go beyond 14 days with Rep. McCulloch the main line of resistance.” By letter dated, May 27, 1965, I wrote Poff, when I learned that the two houses were at an impasse on whether it should be 14 or 21 days. I gave my reasons why there was not much difference between 14 and 21 days, stating that 21 days was not “an unreasonable outside limitation for that most extraordinary situation where Congress might delay, without good cause, in deciding a disagreement issue,” and suggesting to him that since 21 days “would allow for a more complete investigation than either 10 or fourteen days I would be inclined to go along with such limitation...” I sent copies of my letter to Bayh, Brownell, and Beck, concluding: “I send you these thoughts in the hope that they may have some value.” By letter dated May 28, Poff wrote me and stated: "Since I am one of the conferees and since what I am about to say would have the effect of weakening our bargaining power, I must ask you to keep it in confidence. I would certainly accept 21 days if failure to do so would mean the loss of the amendment.” On June 1, I learned from Channell that Poff and William McCulloch, then the ranking Republican on the Judiciary Committee, had agreed to 21 days.

By memorandum dated June 2 Channell advised that Bayh and Congressman Celler had met that day and had agreed on a time limit of 21 days but “this is to remain confidential because they needed to discuss the matter with their respective conferees.” As a historical note, it appears that the Senate's willingness to accept a time limit of 21 days was due to Senator Sam Ervin, Jr. of North Carolina according to a document in my possession. He had dug in on 21 days, accepting an unprecedented limitation on Senate action. Bayh and Senate Minority Leader Dirksen also agreed on this limit. By confidential memorandum of June 14 from Channell he advised that all of the conferees but Rep. McCulloch had agreed to the 21-day provision. It was unclear why McCulloch was opposed to 21 days given his earlier acquiescence in 21 days and Poff’s letter of May 28th.

In the late spring of 1965, as passage of the amendment was imminent, I was asked by the ABA Journal to write an article for the bar of the country, explaining the amendment. I did
so and followed up with a more detailed explanation for the Fordham Law Review.\footnote{See John D. Feerick, Proposed Amendment on Presidential Inability and Vice-Presidential Vacancy, 51 A.B.A. J. 915 (1965); John D. Feerick, The Proposed Twenty-Fifth Amendment to the Constitution, 34 FORHAMD L. REV. 173 (1965).} Other troubling issues, however, surfaced at this time.

In early June 1965, Channell asked me for drafting suggestions with respect to a disagreement that had arisen between the Senate and the House conferees as to whether the 21-day provision should run from when Congress assembled, if not in session, or from the date when the Vice President and Cabinet had raised the inability issue by written declaration. The Senate conferees wanted the former and apparently the House the latter. Channell asked me to call him on Sunday night, June 7, as the conferees would be meeting on Monday or Tuesday of that week. I called with my suggestions and followed up the next day by letter. The language I advanced was passed along to Conrad and became part of the Section 4 drafting process, Channell noting by letter dated June 9, 1965, that he had discussed my suggestions “with Larry Conrad and believe they were very helpful to him.”

The language I received to review provided:
Thereupon, Congress shall decide the issue, assembling within 48 hours for that purpose if not in session. If the Congress, within 21 days after the receipt of the written declaration of the Vice President and a majority of the principal officers of the executive departments or such other body as Congress may by law provide, determines by 2/3 vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

The language I suggested was as follows:

Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the said declaration, or, if not in session, within twenty-one days after such assembling, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

The final wording was:

Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.
By letter dated June 16, 1965, which followed issuance of the joint conference committee report resolving the differences between the Houses, I wrote a note of thanks to twenty-nine members of the JBC Committee and suggested to Lewis Powell that he do the same. This turned out to be premature, however. On June 25th, I saw the final conference committee’s version of the amendment, reprinted in a *New York Times* article, and issues jumped out at me right away. As summarized in my March 29, 1966, letter to Conrad:

By letter to Don Channell dated June 25, 1965 (see copy attached) advised that the "either/or" language was ambiguous and suggested different language. Was advised later in week that it was ‘too late’ for any changes and that those consulted on the point thought there was no ambiguity. On July 1, 1965, while on vacation in Southampton, Long Island, I received a call from Don Channell of the ABA to the effect that Senators Gore, McCarthy and others had succeeded the previous day in postponing debate on the amendment, having argued that the "either/or" expression was ambiguous. Spoke later in the day with you {Conrad} and spent the next few days doing legal research in the Suffolk County Law Library to support the use of the "either/or" expression. Results (case citations) telephoned in to you {Conrad} on Saturday, July 3 and Monday, July 5.

What I telephoned in to Conrad, based on my research, was that the use of “either/or” meant that only one body could have such power, either the Cabinet, as in the amendment, or another body created by law to replace the Cabinet (i.e. the heads of the executive departments). I rejected a possible construction, not intended by the ABA consensus, of two bodies being in existence at the same time each with the power to declare a President disabled. The “either/or” language, I was told, came from an assistant to Senator Hruska, reflecting Hruska’s concern that the existing language might enable Congress to remove the Vice President from the process of determining a President's inability.

Finally, I remember being startled again when, at the last moment, I noticed a scrivener’s error in the draft of the conference report. When I reached Senator Bayh’s staff by telephone, possibly on July 6th, with my observation, I was told that the amendment had just been approved by the Senate, 68 to 5, and was on its way to the states for ratification. In other words, the amendment was beyond rescue for correction.

On July 7, 1965, I sent a letter of congratulations to Poff on the passage of the amendment, stating that the “time limitation of Section 4 can properly be referred to as the ‘Poff provision.’”

On July 8th, Poff wrote me a poignant letter asking:

Why the Washington press has so studiously avoided any mention of any Republican on either side of the Capitol in connection with this project... As you know, our party is so

---

43 The House approved the amendment by voice vote on June 30, after explanation by Poff.
44 It should have used “executive departments” twice in Section 4 instead of “executive departments” and “executive department”, the later expression creating an ambiguity. See William Safire, *Desecration*, N.Y. TIMES MAG. (July 31, 2005), http://www.nytimes.com/2005/07/31/magazine/desecration.html. He referred to it as “the Ineradicable Typo.”
frequently and mercilessly condemned as negative that it does seem that when we assume a positive posture and make a positive contribution, we should be accorded at least minor recognition. Do you think I am unreasonable?

I subsequently responded to Poff, noting that the ABA gave credit to both political parties and that no amendment would have happened without President Eisenhower, Attorney General Brownell, and other Republicans, including Poff especially and Congressman William McCulloch. Later Poff would write a very thoughtful review of my book, in which he provided important perspectives on the differences between the two houses in the development of the amendment.45

A memorandum of July 9th, which I sent to the young lawyers of America, stated optimistically: “President Lewis Powell and former Attorney General Herbert Brownell . . . firmly believe that your outstanding work was instrumental in the overwhelming vote in the House of Representatives and the Senate… The task of getting this measure ratified is largely ours… Packs of ratification material will be forwarded to you shortly.”

The day before I attended a celebratory gathering at the Washington office of the ABA and made a memorandum for my files of a conversation I had with Senator Bayh, in which he stated that “problems kept occurring up to the time the amendment was voted upon which left the outcome in doubt.” He mentioned an Alabama editorial which said that under the amendment if Johnson died, Humphrey could nominate Martin Luther King for Vice President. As a result of this editorial a number of Congressmen from Southern States apparently informed Bayh that they would have to vote against the amendment. Bayh dissuaded them from doing so. Bayh also mentioned a voting strategy of moving the amendment immediately after Senators Gore and McCarthy voiced their objections to the use of “either/or”. According to Conrad, Bayh accused McCarthy a week before the vote of trying to “kill the amendment” to which McCarthy replied in the negative and said he would vote for it but he did not do so on July 6th.

I add a few additional communications bearing on the ratification of the Amendment:

By letter dated August 19, 1965, from Donald Channell to Young Lawyer chair in Pennsylvania, Franklin Kury, he stated: “We are extremely pleased that Pennsylvania has ratified the proposed constitutional amendment… I feel that your state was better organized than any to carry forward with the proposed amendment.” Every congressman from Pennsylvania, but one, supported the amendment including the state’s two Senators.46

---

45 Honorable Richard H. Poff, Book Reviews: From Failing Hands: The Story of Presidential Succession, 67 COLUM. L. REV. 399 (1967). In addition, he said of the book “that it was an important background study for the 89th Congress in its successful attempt to write a constitutional amendment nearly two years after an assassin's bullet again demonstrated the importance of continuity in Executive power.” He was generous in his words about my book, made possible by Emalie’s help.

46 Kury became a State Senator in Pennsylvania and led an effort to have adopted in his state a gubernatorial disability provision which subsequently was implemented. See FRANKLIN L. KURY, CLEAN POLITICS, CLEAN STREAMS: A LEGISLATIVE AUTOBIOGRAPHY AND REFLECTIONS 103-06 (2011).
By letter dated October 28, 1965, I responded to Senator Bayh's request for my views on amending the statutory line of succession, stating: “in order to avoid confusion I would be inclined to defer such action until the proposed Twenty-Fifth Amendment was ratified. I think it would be appropriate, however, at that time to add the Secretary of Health, Education and Welfare and the Secretary of the Housing and Urban Department.” (S.J. Res originally dealt with the line of succession and then removed the provision.) I also suggested that provision be made to compensate the Vice President at the presidential rate whenever he acts as President.

A memorandum in my file of January 18, 1966, records a call from Larry Conrad on that date for permission to distribute my 1965 Fordham article to members of the West Virginia Legislature because some members were confused “as to the meaning of the amendment to such an extent that ratification was in doubt.” I gave permission and copies were thermofaxed for distribution in that state. Two days later the amendment was ratified in the state of West Virginia.

By letter dated February 13, 1967, Bert. S. Nettles of Alabama noted the ratification of the 25th amendment and expressed “regret that we were unable to be of more assistance here in Alabama.” Nettles did an outstanding job in rallying the support of the bar in favor of the amendment but the bar of his state held back in the end so as not to give Governor George Wallace a forum for using the amendment as a “whipping boy” for his political agenda.47

In a letter dated June 17, 1967, sent to Young Lawyer Stanley Burdick of Connecticut, enclosing the final report of the young lawyers committee, I said: “The work of the American Bar Association in the formation, promotion, and ratification of the Twenty-Fifth Amendment is now history. I am pleased to say that the work of this committee is part of that history…Those who had a part to play in that work can take pride in the fact that today we have procedures for handling a case of presidential inability and filling a vacancy in the office of Vice-President.”

The amendment, as proposed, contained a seven-year time limit for ratification, following a similar time limit established for other constitutional amendments in the twentieth century. It was ratified on February 10, 1967, when Minnesota and Nevada added their approval, giving rise to the question which one placed the amendment in the Constitution.48 All told, 47 states have ratified the amendment. The three not to do so were Georgia, North Dakota, and South Carolina.

Special Moments

Looking back, several moments remain vivid. One involves a communication of February 2, 1966, that I received from incredible energetic Dale Tooley, in which he noted that the ratification vote in Colorado “will be extremely close, and we are bending every effort to contact those who have indicated a willingness to reconsider their opposition to the amendment. As well as all of the others who voted ‘no’ on second reading. You will probably see the results of the vote in the press…” On the following day, February 3, I was surprised to read, undoubtedly the handiwork of Tooley, a story in the rocky Mountain News reporting on reprints

48 See id. at 107.
of an article of mine being widely distributed in the state. The article\textsuperscript{49} provided an analysis of every section of the amendment, it concluding with this rallying cry, as quoted in the press story:

\begin{quote}
Despite widespread recognition of the serious need for a method of determining presidential inability and, despite a long search for an acceptable method, none has ever been found and proposed by Congress. It is doubtful that a better proposal could be devised, considering the complexity of the problems involved and the great diversity of views. The proposed twenty-fifth amendment has been made possible because of the willingness of Democrats and Republicans alike to compromise in the best interests of the Nation. It remains for the state legislators to ratify it and to make it a permanent part of the Constitution. The nature of the subject dictates that this be done with all due speed.

These words reflect the strong influence of Benjamin Franklin’s clarion call of September 17, 1787. On February 3, 1966. Colorado became the eighteenth state to ratify the amendment.
\end{quote}

As for New York, although my letter to the Speaker of the State Assembly elicited his statement that the amendment would be approved shortly by his body, the chair of the Senate judiciary committee wrote that the committee had more pressing items on its agenda. I passed along this letter to Brownell, who immediately wrote a letter to the chair with a different result: The committee would take up the subject shortly, and it did, with the result that the amendment was ratified in New York State on March 14, 1966. Prior to its approval, I lobbied the leadership of the City Bar to adopt a resolution favoring the amendment, reflecting the position it had taken based on the work of its Federal Legislation Committee. It adopted such a resolution and sent it on to the legislature and Governor Rockefeller.

On November 15, 1966, Herbert Brownell and I received, at a meeting of the New York City Bar Association, a special award from ABA president Orison Marden for our work in the development of the amendment. It was presented to us in the main meeting room of the Association’s building on West 44th Street, a floor below where Emalie had done her research in connection with the writing of \textit{From Failing Hands}. And, in this time period Emalie and I decided to write a book on the vice presidents for high school students, accepting an invitation from Franklin Watts, Inc., of Grolier Publishing Company, as part of its First Book series.

\textbf{The White House, February 23, 1967}

When the 25th Amendment was ratified on February 10, it became part of the Constitution. Although the President of the United States has no role in approving an amendment, President Johnson, nonetheless, wished to have a White House ceremony to announce it and issue an accompanying proclamation. I was invited to this historic event, scheduled for February 23, 1967. On the designated day, I arrived at LaGuardia airport early for an Eastern Airlines shuttle to Washington, D.C. But upon my arrival, I learned, because of the snow falling, that no flights would be leaving. I was comforted, however, when I saw Orison Marden, believing that his presence meant a plane would be leaving after all. This did not happen, and after greeting me, he turned around and said he was going to his New York City law

\footnote{49 See Feerick, supra note 42, at 203.}
office. I waited and waited, and then, to my utmost surprise, I heard the announcer say a flight to Washington would be taking off shortly. I got on that flight, and when it arrived in Washington, the White House ceremony had already begun. I hailed a cab immediately, and it raced to the White House.

Arriving at the gate with the invitation in one hand and a small attaché in the other, I was waved through by the guard(s) and within seconds I was at the door of the White House. Upon opening it, I saw the President emerge from the East room, where he had given remarks marking the ratification which I later read in his official papers.\(^50\) He rushed to the Blue Room followed by many people, including Congressman Poff, who signaled to me to join him near the front of the line to greet the President. Before I could do so, security pulled me aside, took my attaché case, and asked what I was doing there. I explained and was then allowed, without the attaché case, to join Poff on the line. The picture I subsequently received, signed by the President, showed me shaking his hand with my eyes closed and in a suit badly in need of pressing. Its baggy nature was due to the inclement weather while my facial expression reflected the exhilaration of meeting the President. Nonetheless, the picture was good enough for me and today it adorns a room in my office. Poff subsequently wrote me a letter and said the picture should have had at the bottom, “From Failing Hands.”

The Implementation of the Amendment

Six years later I was shocked to see the amendment implemented, in circumstances I never expected: the resignation of an elected Vice President followed by his replacement under Section 2 of the amendment; then the resignation nine months later of the President of the United States and the succession to the Presidency of the replacing Vice President pursuant to Section 1, following which another Vice President was chosen under Section 2, nominated by President Ford. The presence in the highest offices of two appointed officials, while unprecedented, gave the country enormous stability and continued party continuity in the White House. As these events were occurring, I provided assistance to the Senate Judiciary Committee in the implementation of the amendment, at the request of Senator Bayh, doing a legislative history memorandum for the Committee’s Subcommittee on Constitutional Amendments, which became part of the record in those proceedings.\(^51\) On March 11, 1975, I was privileged to testify about the applications of the amendment before the Subcommittee along with Professor Paul Freund and George Reedy, who was then dean of the journalism department of Marquette University. We all supported the first implementations of the amendment. Reedy said:

When I was preparing for this hearing, I consulted a number of my friends and people who have studied the matter, and the general conclusion I came to is that the workings of the amendment are so well accepted, and the legitimacy of the present President is so

\(^{50}\) He began by quoting John Dickinson from the Constitutional Convention and concluding, after singling out many individuals and organizations and “particularly leaders of the American Bar Association,” with the statement that “they have perfected the oldest written constitution in the world. They have earned the lasting thanks of the American people, for whom it has so long secured the blessings of liberty.”

\(^{51}\) See S. Doc. No. 93-42, at 279-300 (1973). Several of my articles were reprinted in this report.
well recognized, that it does not occur to anyone, except to people who do not like the current President, to challenge the workings of the Amendment.\textsuperscript{52}

Professor Freund testified “that no persuasive case has been made for repealing or altering section 2 of the amendment.”\textsuperscript{53} My testimony explained the legislative history of the amendment. It concurred with other witnesses who said that a succeeding Vice President appointed under the 25th Amendment, as well as a statutory successor such as the Speaker, could nominate a successor Vice President. Freund agreed with that conclusion, as did James Kirby in his separate testimony. I also advanced in my testimony, on behalf of the ABA, a recommendation that in future invocations of Section 2, joint rather than separate hearings of the two Houses of Congress should occur, even though the Houses would vote separately on the issue of confirmation, in order to facilitate the selection of a new Vice President and reduce the risks associated with a vacancy in that office. Unlike another occasion when I testified in support of the ABA’s electoral college position, Senator Thurmond had only one question of me: “Mr. Feerick, from your statement I conclude that the American Bar Association had an active part in the formulation of the 25th Amendment; and it is the position of the American Bar Association, and your personal position too, that it has worked, and there is no need to change, is that correct?”\textsuperscript{54} I replied, “Yes, Sir.”

\textbf{Changing the Amendment}

In the 1990s, I found myself immersed in the question of the amendment’s adequacy. This came about as a result of a recommendation in 1994 by President Jimmy Carter that the American Academy of Neurology organize a forum on presidential disability. This resulted in the convening of a working group on Disability in U.S. Presidents. I declined to participate in its early going, believing I was too fixed in my points of view about the adequacy of the amendment. As explained to me when I was invited to participate, there was a general view by the organizers of the group, that the amendment was not adequate, almost suggesting, as I remember the conversation, that its approach should be changed. From a conflict of interest perspective, I felt it best that I not participate, and when asked by the ABA to be its representative, I instead recommended that Professor Joel Goldstein be its representative, as he became.

This working group subsequently organized major sessions at the Carter Center in January 1995, Wake Forest University in November 1995, and the White House Convention Center in Washington, D.C., in December 1996. In the following year, a very impressive volume was published by the working group, entitled “Presidential Disability—Papers, Discussions and Recommendations on the Twenty-Fifth Amendment and Issues of Inability and Disability in Presidents of the United States,” edited by James F. Toole and Robert J. Joyn.\textsuperscript{55} I was encouraged to participate in both the Wake Forest Conference’s Plenary Session and at the Convention Center meeting where the final recommendations of the group were actively

\textsuperscript{52} Examination of the First Implementation of Section Two of the Twenty-Fifth Amendment: Hearing on S.J. Res. 26 Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary, 94th Cong. 134 (1975).
\textsuperscript{53} Id. at 136.
\textsuperscript{54} Id. at 147.
\textsuperscript{55} For a summary of this fine work, see FEERICK, supra note 47.
considered. The Wake Forest Conference is memorable because I participated along with Senator Bayh and two distinguished members of the medical community who shared a different point of view of the amendment from the one held by Bayh and me. The session was opened by President Gerald Ford who, in a friendly aside beforehand with Senator Bayh, asked him what to say (though the President already had his prepared remarks) to which Bayh pointed to my article to be published in the *Wake Forest Law Review* in support of the amendment and to be summarized in my part of the panel discussion.  

At the White House Convention Center, I found myself uncomfortable, because I ended up at this meeting opposing some aspects of the recommendations on the table for discussion. One called for a separate determination by doctors of “presidential impairment” before a political judgment of “presidential inability,” which caused me to join in a minority opinion as to the desirability of such a recommendation. I was joined in that opinion by both Professor Goldstein and Senator Bayh. We concluded with the statement that “decisions regarding the exercise of executive power under the Twenty-Fifth Amendment... should be made by accountable constitutional officials, not by doctors, attorneys, or others who have not been elected by the people or confirmed by their representatives.”

From time to time since this review of the amendment, I have returned to this subject, helping develop Fordham programs on our presidential succession system and then a presidential succession clinic at Fordham, followed by articles with my current perspectives. In 2017, the amendment took on a special examination by the media, in a heightened political context, in which I sought to educate others. As I wrote in a personal document in February 1967, the meaning this field has given my life cannot be captured in words.

---


57 See *Archives of Neurology* for October 1997, p. 1260.


“A Dr. Strangelove Situation”: Nuclear Anxiety, Presidential Fallibility, and the Twenty-Fifth Amendment

Rebecca C. Lubot

This article is a revisionist history of the ratification of the Twenty-Fifth Amendment, which establishes procedures for remedying a vice presidential vacancy and for addressing presidential inability. During the Cold War, questions of presidential succession and the transfer of power in the case of inability were on the public’s mind, and, in 1963, took on additional urgency in the shadow of the Cuban missile crisis. Traditional legal histories of the amendment argue that President John F. Kennedy’s assassination was both the proximate and prime factor in the development of the amendment, but they do not take into account the pervasive nuclear anxiety inherent in American politics and culture. Oral interviews of key actors, such as former Senator Birch Bayh of Indiana, the amendment’s architect, as well as examination of the Lyndon B. Johnson papers, Subcommittee on Constitutional Amendments files, and other previously unexamined archives, offer new insight into the anxiety and thought processes of the president, Congress, and state legislators. With the Twenty-Fifth Amendment’s ratification on February 10, 1967, the nuclear anxiety of the era became ingrained in the Constitution itself. The framers of the amendment adjusted America’s foundational document not as dictated by a momentary whim, but by the exigencies of the times.¹ With the goal of expanding the field of legal history by examining cultural and political factors, this article argues that nuclear anxiety provides the best explanation for the incorporation of the amendment.

¹ In Explicit and Authentic Acts, David Kyvig engages in the debate over whether the Constitution continues to serve as the “sovereign will of the people as to their governance” or if it is “unable to check the momentary whims and excess of transitory power.” DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE CONSTITUTION, 1776-1995 XVIII (1996).
Table of Contents

I. Introduction

II. Nuclear Anxiety in Congress
   A. “This is the Time to Do It”: Legislative Precursors 1958-1963
   B. “He and He Alone Has the Authority to Push the Vital Button”: Drafting and Passage through Congress 1963-1964
   C. “The Nightmare of Nuclear Holocaust… the Potential of Paralysis… Requires Us to Act – and To Act Now”: Passage through Congress 1964-1965

III. Nuclear Anxiety in the State Legislatures 1965-1967
   A. “Let Us Not Rush Pell-Mell Down the Road to Madness”: Ratification in Pennsylvania
   B. “The Possibility of a Simultaneous Death of All in the Line of Succession is a Nuclear Age Reality”: Ratification in Arkansas
   C. “[Nuclear Anxiety] and [Presidential Continuity] are Not Unrelated in the Thoughts of the Public”: Ratification in Colorado

IV. Conclusion
I. Introduction

“This is a true Dr. Strangelove kind of situation,” Senator Birch Bayh, the Twenty-Fifth Amendment’s author, said to his fellow congressmen when assessing the outcome of the first invocations of the Twenty-Fifth Amendment. The 1964 film, Dr. Strangelove or How I Stopped Worrying and Learned to Love the Bomb, dramatized an inconceivable event, nuclear catastrophe, with black humor. Dr. Strangelove represented a scientist – an individual in a field Americans love to trust – that had become “strange,” or gone insane. In invoking the popular film, Bayh pointed to Cold War anxieties about the collision of military and scientific power, as it focused on the ability of the president who wielded that power. The Twenty-Fifth Amendment was designed to secure the line of presidential succession in cases of disaster such as a sudden strike, and at the same time, prevent a president who had become crazy or inabled from having control of the bomb.

From the nation’s founding until the mid-1940s, questions of presidential succession had frequently tapped into deep-seated anxieties about the durability of democratic government, and specifically whether it could withstand the threats posed by disruptive, unplanned changes to the nation’s highest office. Following the United States’ use of atomic bombs against Japan at the end of World War II, however, those anxieties took on a new gravity. “Merely by existing [nuclear weapons] have already set off chain reactions throughout American society and within every one of its institutions,” stated the Bulletin of Atomic Scientists. The Bulletin recognized


\[3\] The fact that Dr. Strangelove is listed on the National Film Registry of the Library of Congress underscores the plot’s enduring cultural significance.

that nuclear anxiety had become a staple of American popular and political cultural overnight, but also that it was difficult to quantify. In response, they designed the Doomsday Clock in 1945 as a gauge of how close mankind is to destroying itself, with midnight being the apocalypse. The president had the Zeus-like power to destroy entire nations and snuff out millions of lives with the press of a button in an instant; all other powers were trivial by comparison.

At the same time as Congress granted this cosmic authority solely to the president with the 1946 Atomic Energy Act, Congress was debating President Harry Truman’s Presidential Succession Act. Franklin D. Roosevelt’s sudden death had brought attention to succession and inability issues at the dawn of the nuclear age. The act clarified the line of succession beyond the vice president amending an 1886 act (the last action on the succession issue) by reversing the order of a 1792 act, which placed the Senate president pro tempore third and the speaker of the House fourth in line, to make the speaker third, ahead of the president pro tem. Both the president and Congress deemed a congressional line of succession more democratic (because the speaker is elected by the people of his district and then chosen by his cohort) than the Cabinet line of succession in place at the time. Truman’s Presidential Succession Act became law in 1947 and the Soviets exploded their first atom bomb just two years later, in 1949.

After the development of more powerful bombs by both the U.S. and the U.S.S.R. and a method to deliver them with the Soviet’s launch of Sputnik in 1957, nuclear anxiety had begun to spur government officials in Congress and the Eisenhower administration to find a solution to the presidential inability problem that had been elusive since the Constitution’s ratification. Eisenhower and Nixon signed a letter agreement, released to the public on March 3, 1958 under the specter of the arms race. No president or vice president in U.S. history had come to such a
public agreement over the issue of presidential inability before Eisenhower and Nixon.\(^5\) That they publicly acknowledged the possibility of an incapacitated president suggests that the conversation about the need for a clear chain of command had become urgent. Kennedy and Johnson signed a similar letter on August 10, 1961:\(^6\) even the youthful Kennedy was anxious about ensuring the orderly transfer of power in the nuclear age, when minutes mattered.

Heightened tensions between the superpowers during the Kennedy administration – in particular, the Cuban missile crisis of October 1962 – focused policymakers and the public on the fact that the president might be forced to decide the fate of millions in a matter of mere minutes. This time element is what made a more permanent solution to presidential succession and inability issues urgent. Even if total annihilation did not occur, a nuclear attack could suddenly destabilize the American government; structural and procedural safeguards were needed to guard against that possibility. Nuclear anxiety flourished even more intensely after Kennedy’s assassination and the specter of a nation without firm leadership during a time of nuclear crisis ultimately provided the impetus to resolve the issue.

The nuclear issue set the sudden transition from John F. Kennedy to Lyndon Johnson apart from other unexpected presidential successions in the past. Although seven other presidents had died while in office, Kennedy was the first to die instantaneously, fatally wounded by an assassin’s bullet.\(^7\) But Kennedy’s immediate death — coupled with Johnson’s presence in the same motorcade where JFK was shot, rendering him potentially vulnerable as well — highlighted the long-standing concern that the passage of power to the vice president might not

\(^5\) RICHARD M. NIXON, SIX CRISIS 178 (1962).
always run smoothly. The presidential assassination had resulted in a sudden transfer of power to a vice president whose own health was subject to question.  

For this reason, traditional legal histories, such as that of David Kyvig, have argued that the Twenty-Fifth Amendment, though a product of “long-standing concerns about presidential disability and succession,” was most immediately “a reaction to the assassination of President John F. Kennedy.” Yet the assassination does not fully explain the amendment’s sinuous journey through Congress and its ratification almost four years after Kennedy’s death in 1967. For a more complete account, the climate of nuclear anxiety evident in culture and politics from 1945, the advent of the atomic bomb, through 1967 must be factored into the ratification of the Twenty-Fifth Amendment.

Bayh’s determination to alter the Constitution to solve this issue reflected the widespread belief that the American public and its government could no longer tolerate a potential absence at the helm during this era of nuclear apprehension. Because the president wielded the power of the bomb, he literally had the power of life and death, and the continuity of mankind was in his hands – something that never could have been imagined by the framers of the Constitution. In the midst of the growing nuclear anxiety, Eisenhower’s brief illnesses and Kennedy’s sudden death exposed the paradox that the president was at once both powerful and mortal. Asked years later if tense international confrontations such as the Cuban missile crisis and nuclear anxiety – defined here as fear of nuclear war and its consequences – were in the back of his mind as he began work on what became the Twenty-Fifth Amendment, Bayh replied: “I think it was impossible for it not to be on the forefront, not the back of [my] mind.” The Cuban missile crisis

---

8 Johnson suffered a heart attack in 1955, the same year as Eisenhower.
9 KYVIG, EXPLICIT AND AUTHENTIC ACTS 357 (1996).
“was very much a reason” for the amendment, he said. Bayh perceived that the framers had not anticipated the effects of nuclear weaponry on the presidency and this coupled with the fallibility of any individual president led him to conceive that the time was right for an amendment to address succession and inability issues.

From December 1963, when Bayh introduced his draft of the amendment, through February 1967, references to the shock of Kennedy’s assassination lessened, but direct and indirect allusions to the nuclear anxiety that permeated American culture and politics continued unabated. It was this nuclear anxiety that contributed to each stage of the process from Bayh’s original drafting, passage through committees and the Senate in 1964, debate over time limits, the passage through both Houses of Congress in 1965, and finally ratification in the states in February 1967. But while the urgency of concern about presidential stability amid the real possibility of instant nuclear destruction directly contributed to ratification, it also complicated the process of ratification in states such as Pennsylvania, Arkansas, and Colorado. Despite sometimes opposing reactions to the prospect of nuclear destruction, after more than two decades at the forefront of America’s psyche, nuclear anxiety became part of the framework of American government.

II. Nuclear Anxiety in Congress

A. “This is the Time to Do It”: Legislative Precursors 1958-1963

A year after the Sputnik launch, and after Eisenhower and Nixon signed their letter agreement on March 3, 1958, Senator Estes Kefauver of Tennessee, chairman of the Judiciary Committee’s

---

10 BIRCH BAYH, Interview with Author, November 11, 2014. This definition of nuclear anxiety can be found in: TOM W. SMITH, A Report: Nuclear Anxiety, 52 THE PUBLIC OPINION QUARTERLY 557-75 (1998).
Subcommittee on Constitutional Amendments, had made it clear that he believed the time had come to pass inability and succession legislation. In April 1958, Kefauver had introduced Senate Joint Resolution 28, which embodied the spirit of the letter agreements with few modifications. He reintroduced the bill in the 86th Congress (1959-1960). Both times, the chairman was able to move the bill out of his subcommittee to the wider Judiciary Committee, but no further. Congress adjourned in 1960 with the legislation still on the committee’s agenda.

Then, in 1962, Kefauver announced that he would join Republican Senator Kenneth Keating of New York to co-sponsor a bill, Senate Joint Resolution 35, endorsed by the American Bar Association, that “simply authorizes Congress to pass laws on how to decide when a president is disabled,” or, in other words, enabled Congress to establish procedure.11 The thrust of the release was that “this is the time to do it – when we have a young, healthy president, when extensive hearings on this subject would not be embarrassing to anyone.”12 A healthy president would not taking succession planning as a slight. Legislating a solution now was imperative.

On June 10 and 18, 1963, the Senate Subcommittee on Constitutional Amendments held hearings on presidential succession and inability bill S.J. Res. 35. The bill was less detailed than many pieces of legislation pending in the Subcommittee, drawn up that way in the hope that Congress would be more inclined to pass a less-complicated piece of legislation. It had the tacit support of former Vice President Richard Nixon, who experienced first-hand the issues involving an incapacitated president when Eisenhower was ill. Nixon wrote to Kefauver before the hearings began, saying: “With the advent of the terrible and instant destructive power of atomic weapons, the nation cannot afford to have any period of time when there is doubt or legal

12 Id.
quibbling as to where the ultimate power to use those weapons resides.”

Pointing to the “constitutional defect” in his opening statement, Keating agreed with the former vice president: failing to take action in this era could result in paralysis at the very time that quick and cogent decision-making was imperative. With these fears in mind, the subcommittee as a whole came to that conclusion as well; the bill was voted out of the subcommittee to the full Judiciary Committee.

On August 10, 1963, two weeks after his sixtieth birthday, Kefauver died of a heart attack; the hope of a more solid succession and inability plan almost died with him. Senator James O. Eastland, chairman of the Senate Judiciary Committee, decided to dissolve the panel. Yet a memorandum written in round cursive handwriting on United States Senate letterhead in the last of Kefauver’s files noted, confidentially, that presidential disability had “prospects at this time.”

Concomitantly, Birch Bayh and his staff were searching for their own opportunities to resolve the succession and inability issue, hoping to fill the void Kefauver’s death created. Bayh convinced Chairman James O. Eastland to make him the new Chairman of the Subcommittee on Constitutional Amendments. and on September 30, 1963, the Judiciary Committee ratified his appointment.

B. “He and He Alone Has the Authority to Push the Vital Button”: Drafting and Passage through Congress 1963-1964

---

15 “United States Senate Memorandum,” NA, CJ, SCA, Box 4, Folder “88th-Kefauver, Memos- Briefs on Amendments.”
16 BOB KEEFE, Interview with Author, November 5, 2014.
Kennedy’s sudden death elicited calls for legislation to remedy the confusion surrounding presidential succession and inability; these were coupled with direct and indirect references to the tense cultural and political mood of the era surrounding the potential for nuclear war. “Has the Congress prepared the presidency adequately for the possibilities of a violent age?” James Reston, columnist for The New York Times, asked on December 5, 1963. He continued, “Is the rule of presidential succession satisfactory for these days of human madness and scientific destruction?” Similarly, a Washington Post editorial insisted that the problem of presidential succession “needed a fresh analysis” because “in these days of hair trigger defense few things would be more perilous than uncertainty as to where the powers of the presidency would lie in case of disaster.” These articles served as a motivating factor for Bayh.

Bayh had been thrust into a centuries-old constitutional conundrum. On December 4, after listening to debate in a Judiciary Committee meeting that focused mainly on other matters but included references to the succession bill that Kefauver and Keating had introduced earlier in the year, Bayh decided to draft his own measure. The second week in December, the senator gathered his team together and began the herculean undertaking. An integral member of the team, John D. Feerick – author of a paper entitled “The Problem of Presidential Inability: Will Congress Ever Solve It?” published in the Fordham Law Review Journal in 1963 – became the chair of the American Bar Association’s Junior Bar Conference in the spring of 1964, and made it the Junior Bar Conference’s mission to garner further support for a presidential succession and

17 JAMES RESTON, The Problem of the Succession to the Presidency, THE NEW YORK TIMES (December 5, 1963).
19 BIRCH BAYH, ONE HEARTBEAT AWAY 32 (1968).
20 BAYH, supra note 19, at 301.
inability amendment.\textsuperscript{22} Lowell Beck, Donald E. Channell, Jim Kirby, Martin Taylor, Dale Tooley, Michael Spence and other members of the ABA would become instrumental in conducting the campaign – in Congress, among the state legislatures, and with the public – to get presidential succession and inability measures written into the Constitution.

In his book \textit{One Heartbeat Away}, Bayh wrote that his reason for proposing succession and inability legislation was inspired by Kennedy’s murder. But in his press release of December 12, 1963, no mention was made of the assassination. Significantly, the statement referred to the increased pace of communications and technology (and therefore warfare) in the modern era of globalization, and concluded that that the tense international atmosphere called for immediate action: “The accelerated pace of international affairs, plus the overwhelming problems of modern military security, make it almost imperative that we change our system to provide for not only a president but a vice president at all times.”\textsuperscript{23} Bayh’s statement highlighted the increased importance and responsibilities of the vice president during the Cold War.\textsuperscript{24} In testimony later, members of the public and Congress alike would amplify Bayh’s point: even if it had not been the case in the past, now, during the atomic age, having a successor in at all times was vital to the nation’s security.

Nuclear anxiety was a key motivating factor driving the amendment forward from the outset. As Bayh got to work with his team to perfect his first draft, he reflected that, for the sixteenth time in U.S. history, the nation was without a vice president, but that, as Bayh wrote, “this was a different and dangerous age. The possible consequences of inaction were…

\begin{flushright}
\textsuperscript{22} JOHN D. FEERICK, \textit{Letters to the Times: Fixing Presidential Succession}, THE NEW YORK TIMES (November 17, 1963).
\textsuperscript{23} “Speech by Senator Birch Bayh proposing an Amendment to the Constitution of the United States regarding the Offices of President and Vice President,” NA, CJ, SCA, Box 9, Folder “88\textsuperscript{th} Congress PI- Press Releases (Bayh) 1963.”
\textsuperscript{24} “Statement by Senator Birch Bayh,” NA, CJ, SCA, Box 8, Folder “88\textsuperscript{th} Congress, PI- Hearings- Statements-Bayh, Birch, 1964 Jan 22.”
\end{flushright}
terrifying.” They began by using the letter agreements as a template for the amendment. Bayh introduced Senate Joint Resolution 139 on December 12, 1963. Concerns at this time revolved around a perceived weakness in the 1947 succession law: the potential for the presidency to switch parties suddenly during the nuclear age. In a document entitled simply “Top U.S. Priority in a Nuclear Age – Presidential Succession and Inability,” the Committee for Economic Development, a public policy think tank, suggested avoiding a potential sudden switch in parties by altering the line of succession so that Congress was eliminated. In the think-tank’s proposal, the secretary of Defense would be third in line behind the vice president and secretary of State, removing the speaker of the House and Senate president pro tempore put in place by the 1947 law. Notably, the proposal pointed out the president’s unique position in that he must keep his finger on the nation’s nuclear trigger. “If that grip should loosen even for a brief period the resulting slowness of our response to nuclear aggression might well prove disastrous,” the think tank wrote. The proposal underscored the urgency of finding a solution to presidential succession and inability because of the power the president had at his fingertips.

Bayh invited star witnesses who understood the urgency firsthand to testify at the subcommittee hearings that began on January 22, 1964. Former President Dwight Eisenhower – whom Bayh believed was “the only person alive that could adequately describe the need for an inability amendment” – did not appear in person but agreed to submit a statement for the record. In that statement, Eisenhower pointedly did not suggest that the letter agreements signed by himself and Nixon in 1958 would suffice to solve the succession and inability problem. Instead,

25 BAYH, supra note 19, at 34.
28 BIRCH BAYH, Interview with author, November 11, 2014.
he said that the “bothersome” possibility of a disaster removing the president and vice president simultaneously meant that changes should be made by constitutional amendment.29

Testimony from members of Congress on both sides of the aisle was rife with similar remarks that nuclear war was a grim possibility, and, as such, the U.S. required an immediate solution to the succession and inability problem. Republican Louis C. Wyman of New Hampshire went on at length, stating that a “crippling inability is a daily possibility with any president” and concluded that Congress must act because “in this atomic era seconds can be crucial.”30 Republican Senator Jacob K. Javits of New York stated “the split-second exigencies of this nuclear age do not permit the luxury of further incomplete solutions.31 LeRoy Collins, a former governor of Florida who served as permanent chairman of the Democratic National Convention in 1960, reminded those present, “that the responsibilities of the presidency are far more awesome [sic] in this atomic age.” Of the age itself, he said, “we live on a thin line between the possibility of cataclysm on the one hand, and the greatest era of human progress of all time on the other. Any missing gap in our leadership thus contributes to the peril…”32 And Senator James B. Pearson, Republican of Kansas, argued that “in an era when defense of the entire free world through the use of our nuclear deterrents,” relies on just one man, the president, “we cannot leave any doubt about the fact of succession or the capabilities of the president's successor.”33 The Kennedy/Johnson letter agreement of August 10, 1961 was included in the testimony. The agreement had concluded by underscoring that “obviously,” not having a plan in

29 “Letter from Former President Dwight D. Eisenhower… Included in the Record of March 5 Hearings,” NA, CJ, SCA, Box 9, Folder “88th Cong. - PI- Hearings- Statements For the Record: Eisenhower, Dwight D.”
31 “From the Office of Jacob K. Javits,” NA, CJ, SCA, Box 8, Folder “88th PI Hearings Statements: Javits, Jacob K.”
place “is a risk which cannot be taken in these times.” The voices calling for action were building.

One expert witness, Professor Ruth Miner of Wisconsin State College, was insistent that a solution to the issue was needed because of the tense public mood of the era, and suggested – due to her worry that an atomic attack would occur when all officials in the line of succession were in Washington D.C. – that the line of succession after the vice president include state governors. These governors would be chosen in the order of their states’ population. Yet the governors who testified did not discuss Miner’s succession idea. Governor Edmund Brown of California said that it “would be tragic, in this day of nuclear weapons when foreign policy decisions literally can mean life or death, not to provide the machinery in all contingencies for a sure and smooth transition of executive power.” And Governor Nelson A. Rockefeller of New York echoed Brown’s sentiments: stating that the present arrangements did “not adequately cope with the nation’s needs at a time of international crisis and tension when the ‘hot line’ to Moscow might have to be used on short notice by the nation’s Chief Executive.” Like the other witnesses, these governors argued that the 1947 act was inadequate in light of nuclear anxiety.

The only witness to eclipse Rockefeller’s star power, former vice president Richard Nixon, was even more adamant than in his earlier letter to Senator Kefauver that the existence of

---

36 Id., at 587.
atomic weapons made it imperative to ratify an amendment. After stating that the president was
the defender of the free world, Nixon continued: “The United States and the free world can't
afford 17 months or 17 weeks or 17 minutes in which there is any doubt about whether there is a
finger on the [nuclear] trigger.” Nixon also made the case in an essay for the Saturday Evening
Post: “Fifty years ago the country could afford to ‘muddle along’ until the disabled president
either got well or died,” he wrote. “But today when only the president can make the decision to
use atomic weapons in the defense of the nation, there could be a critical period when no finger
is on the trigger because of the illness of the chief executive,” he added. Those that had the
experience of being in the presidential line of succession shared the belief that lack of planning
for such a crisis was unacceptable.

But nobody knew the flaws in the succession process better than President Johnson
himself. Johnson had not provided any support during the subcommittee hearings, however,
forcing Bayh to incorporate an earlier letter of Deputy Attorney General Nicholas deB.
Katzenbach’s dated June 18, 1963, into the record in the hopes that critics of his succession and
inability bill would not make note of the administration’s silence. Katzenbach had expressed
support for the Kefauver-Keating succession legislation prior to Bayh’s introduction of S.J. Res.
139. Katzenbach’s main reason for supporting the earlier bill, Bayh knew, could also be applied
to S.J. Res. 139. “The primary purpose,” the Attorney General had said, “is to confer broad
discretion on the Congress” when the president and vice president disagree on inability “or an
atomic attack or like holocaust prevents communication and agreement between the president

39 Nixon testified on the final day of the hearings, Thursday, March 5, 1964. “31-160 541,” NA, CJ, SCA, Box 8,
40 “Speaking Out: We Need A Vice President, by Richard M. Nixon, From Saturday Evening Post, Jan. 1, 1964,”
and vice president.” Yet Johnson recognized that some members of the House would not vote favorably for S.J. Res. 139, despite fears of a chaotic transfer of presidential power in the nuclear age, out of respect for House Speaker John McCormack (who was next in line due to the vice presidential vacancy created by Johnson’s accession to the presidency). The Massachusetts media was lambasting the seventy-one-year-old speaker as a leader who was past his prime and usefulness and, therefore, congressmen would be inclined to stand by him. Johnson relayed this advice to Bayh in late March 1964, after the hearings were finished.

Two months later, on May 27, 1964, S.J. Res. 139 was reported out of the subcommittee to the full Senate Judiciary Committee. The Congressional Quarterly noted that a senate subcommittee had approved a measure that “would provide a means of filling vice presidential vacancies, unsolved problems of paramount importance in a push-button-war age, in the opinion of some.” With Johnson’s advice in mind, however, Bayh was content to see S.J. Res. 139 unanimously pass the Judiciary Committee on August 4, 1964, and then pass the Senate with a roll call vote of 65-0 on September 30, 1964, about five weeks before the presidential election and only days before Congress adjourned for the campaign season on October 3. Bayh now intended to “introduce the amendment at the beginning of the following session, pass it rapidly through the upper chamber, and bring [the] entire effort to bear upon the House of Representatives.”

C. “The Nightmare of Nuclear Holocaust… the Potential of Paralysis… Requires Us to Act – and To Act Now”: Passage through Congress 1964-1965

---


43 Supra note 28.

44 “Presidential Inability and Veep Vacancies,” NA, CJ, SCA, Box 6, Folder “88th Congress, PI- Correspondence 1965-64 CQ Congressional.”

45 BAYH, supra note 19, at 98.
Bayh felt the administration’s support was crucial to passage. Because of lobbying by Bayh and the ABA, the president dedicated eighteen words to the succession and inability issue in his State of the Union address on January 4, 1965, saying: “I will propose laws to insure the necessary continuity of leadership should the president be disabled or die.”46 Three weeks later, after additional lobbying, Johnson officially endorsed Bayh’s amendment (Senate Joint Resolution 1/House Joint Resolution 1 in the new 89th Congress), sending a support message to Congress on January 28, 1965 that emphasized that a nuclear holocaust or other such catastrophe required planning in the form of an amendment. Thanks to Providence alone, America had avoided a chaotic transfer of presidential power, Johnson contended. But, he said, “It is not necessary to endure the nightmare of nuclear holocaust or other national catastrophe to identify these omissions as chasms of chaos into which normal human frailties might plunge us at any time.”47 He continued, “The potential of paralysis implicit in these conditions constitutes indefensible folly for our responsible society in these times. Common sense impels, duty requires us to act – and to act now, without further delay.”48 Highlighting the tense cultural and political mood, he urged: “Action on these measures now will allay future anxiety among our own people, and among peoples of the world.”49 With his finger not only on the trigger, but on the pulse of the nation, the president was clearly prompting Congress to act before nuclear disaster struck. The president’s support proved effective when, on February 1, 1965, S.J. Res. 1 was reported favorably to the Senate Judiciary Committee by the Subcommittee on Constitutional

47 “For Release on Delivery to the Senate,” Box 3. Office Files of Bill Moyers: Special Message on Office of the President. LBIL.
48 Id.
Amendments and three days later, the Judiciary Committee approved the resolution, sending it to the entire Senate.

The same week the Senate Judiciary Committee approved the amendment, the House Judiciary Committee held its own hearings (on February 9, 10, 16, and 17, 1965); the testimony was replete with references to nuclear anxiety as the reason for moving forward with the amendment. Convening the hearings, in his opening statement, House Judiciary Chairman Emanuel Celler did not mention the tragic death of the late president. Instead he stated: “One would have to be blind not to see and acknowledge the dangers” the nation was gambling with by not having a solution to the important problem. 50 Celler listed the duties of the president and argued that the nation could not leave the office unfilled, even briefly, because of these responsibilities in the nuclear age.

Bayh was one of the experts who testified before the House Judiciary Committee and mentioned a nuclear nightmare. He began by discussing time limits, focusing on the number of days that might elapse between the nomination of a vice president and the vice president’s confirmation. Bayh shared what the Senate Judiciary Committee was thinking, posing a nuclear holocaust scenario as follows: “What if we were engaged in nuclear war and the seat of government is destroyed? There would be a time element involved finding a place where the Congress could meet and convene despite rapid travel we take for granted. 51 Nuclear war could cause numerous problems for presidential continuity – not the least of which was convening Congress to determine a president’s inability if the president and vice president disagreed – but predicting the hardships that would come in the aftermath of a nuclear attack was difficult.

51 Id, at 67.
The issue of time limits would become the greatest point of contention when ironing out the differences between the Senate and House versions of the bill in the Conference Committee, and this debate also centered on the fact that the age was one of anxiety. Colorado Congressman Byron G. Rogers, a member of the Judiciary Committee, raised the issue of the need to include provisions for dual presidential and vice-presidential inabilities. “Since your committee finds a need to change the present posture we are in because of the nuclear age, and since it is conceivable, though remote, that some situation like [dual inability] might occur,” Rogers noted. Focused on the specter of nuclear war, Democratic Congressman Abraham J. Multer of New York reminded the Committee of policymakers’ unease around Eisenhower’s illnesses saying, “I need not document the circumstances of these occasions, for we can all recall the danger than can be sensed when a president is incapacitated, particularly in the nuclear age.”

Howard W. Robison, another Representative from New York, suggested not only ratifying an amendment, but including a statute to specify additional procedures in the event of disability. One of the provisions Robison stipulated was a commission with the responsibility to declare the president inabled. He said, “I feel the latter contingency is important in view of the perilous nuclear-threatened world in which we live.”

In another statement, California Congressman Edward R. Roybal, expressing his support for H.J. Res. 1, also tied the need for the amendment to the nuclear age. “I am sure the members of this Committee fully realize that we can no longer afford, in this nuclear-space age, to leave the fate of or [sic] government to the whims of

53 Id., at 182.
54 Id., at 260.
chance.” Talk of time limits continue to pivot on the fact that Congress would be making the decision on inability in an age when minutes mattered.

On February 19, 1965, Bayh introduced S.J. Res. 1 on the floor of the Senate. In his speech on the Senate floor, Bayh listed the crises America was dealing with when Eisenhower had his heart attack in 1955, and then read a pertinent section of Nixon’s *Six Crises* aloud, underscoring the fact that it was the president’s job to react to these situations and it was he who had his finger on the nuclear button. In the section Bayh read, Nixon had written: “The ever-present possibility of an attack was hanging over us. Would the president be well enough to make the decision? If not, who had the authority to push the button?” The author of the amendment had not only pointed numerous times to nuclear attack as the reason for urgent passage, but was now highlighting the nuclear anxiety of the former vice president, who was once first in the line of succession.

Celler again iterated the sentiment that, because the president’s finger was on the nuclear trigger, Congress could not ignore the danger inherent in failing to enact Bayh’s resolution. He said, “One would have to be blind not to see and acknowledge the danger and the risk we are faced with at this very moment.” Celler’s statement echoed that of Johnson’s January 28 endorsement: while fate had been kind to America, Congress could not expect America’s luck to hold out. Celler noted that the resolution had the support of the ABA and reread earlier testimony into the record. These steps helped convince the Senate to deliver S.J. Res. 1 to the House on

\[55\] Id, at 289.
\[57\] Id, at 7937.
February 22, 1965. The House passed a modified version of S.J. Res. 1 by a vote of 368 to 29 on April 13, and returned the bill to the Senate on April 22.

When the House returned the bill to the Senate on April 22, moderate changes were made limiting the time in which Congress had to decide the president’s disability; Bayh used the nuclear issue to sway the decision-making. The House had added the provision that if Congress did not declare within ten days that the president was inabled, he would resume office. Bayh commented that, although he was not a doctor, time for diagnoses and discussion would be needed. He would “bet that there are some illnesses which can’t even be diagnosed in ten days, let alone enough time for congressional discussion.”58 After a ten day period, Congress could still be weighing the evidence and “we might have a president who could be completely off his rocker reassuming his powers and duties, even if it meant he could blow us all to kingdom come in an hour’s time,” he said.59 Bayh had again invoked the nuclear specter as a main argument, this time for the Senate not to cave to the House.

One other time-related difference remained between the Senate and House versions:60 in the House version, Congress was required to convene within forty-eight hours to discuss the president’s inability, and Bayh, yet again, brought up the possibility of nuclear attack. Congress convening in that last instance would only occur if the president and vice president had disagreed about the president being disabled. On this point, Bayh stated, “If we’re hit by an atomic attack and the Capitol building is destroyed, it might take more that forty-eight hours for Congress to convene.”61 The resolution moved forward in both Houses for the same reason, a strong belief that

58 BAYH, supra note 19, at 285.
59 Twenty-one days was eventually agreed upon. BAYH, supra note 19, at 285.
60 Four appears in the amendment’s final form. BAYH, supra note 19, at 283.
61 BAYH, supra note 19, at 285.
something needed to be done to provide for smooth transitions during the nuclear age, and the
differences were hammered out successfully in Conference Committee.

Going into the final vote, Bayh was nervous that the amendment would not pass, but
leveraging the nuclear issue helped see the bill through.\textsuperscript{62} Returning to the nuclear context, he
reminded his colleagues, “This is a dangerous period in which we live” when a president “can
start an atomic holocaust.”\textsuperscript{63} In his final floor speech, Bayh concluded that during other times in
history, it may not have mattered if a competent president was at the helm in times of crisis, but
because of the possibility of nuclear war, the succession and inability amendment must be passed
now. Juxtaposing the period before the bomb with the current era, Bayh stated, “Today, with the
awesome power at our disposal… when it is possible actually to destroy civilization in a matter
of minutes, it is high time that we listened to history.” The amendment would ensure “a president
of the United States at all times, a president who has complete control and will be able to
perform all the powers and duties of his office.\textsuperscript{64} After his speech that once again emphasized the
dangers of the nuclear era, the amendment passed by a roll call vote of 68-5 in the Senate on July
6.

In the end, nuclear attack provisions were not written into the amendment, but concerns
about such an attack clearly affected the language and structure of the amendment that passed.
The words of the framer of the amendment, congressmen, and expert witnesses illustrate that this
nuclear anxiety was an underlying cause precipitating passage. Because passage was urgent,
some of the suggestions – such as provisions to deal with the fact that those in the line of
succession were located in Washington, D.C. (Miner), directions in the case of the dual disability

\textsuperscript{62} Id, at 319.

\textsuperscript{63} Id, at 285.

\textsuperscript{64} Id, at 331.
of the president and vice president (Rogers), and the establishment of a commission to help
determine what constitutes “inability” (Robinson) – were not addressed by the amendment. But
Congressmen had recognized the need for an immediate solution in the nuclear age, and, by the
summer, the Twenty-Fifth Amendment went to the states for ratification.

III. Nuclear Anxiety in the State Legislatures 1965-1967

Ratification by three-fourths of the states was now all that remained for the Twenty-Fifth
Amendment to become part of the Constitution, but the amendment’s success was not
guaranteed. Following passage in the Senate, Bayh and the ABA immediately launched a
campaign to get the necessary thirty-eight states on board. Eventually, thirteen states would
ratify the amendment in 1965, eighteen in 1966, and the final seven states in January and
February of 1967. While some states ratified quickly and without issue, political and cultural
tensions determined the amendment’s success in others. The potential need for practical
application of what had originally been an academic interest of Feerick’s became obvious when
Kennedy’s sudden death drew nation-wide media attention, but that reason was not emphasized
as the amendment made its way through the states. Instead, state legislators framed their opinions
on the amendment based on the anxiety around nuclear attack.

Nuclear anxiety was most evident in the state-level ratification process in Colorado,
Arkansas, and Pennsylvania. In Colorado, previously unexamined correspondence between
Colorado State Senator John R. Bermingham and members of the ABA reveal that
Bermingham’s letters contain pleas that specific provisions be written into the amendment to
deal with a nuclear crisis. In Arkansas, the amendment’s lack of detail pertaining to a nuclear
attack also was criticized, holding up the amendment’s progress briefly. Conversely, on the floor
of the Pennsylvania House, the possibility of nuclear conflict was cited as the reason why the amendment needed immediate ratification and partisan politics had to be overcome.

A. “Let Us Not Rush Pell-Mell Down the Road to Madness”: Ratification in Pennsylvania

In Pennsylvania, the amendment passed through both houses of the legislature and through two additional readings before it met with delays related to concerns about the nuclear era. The cause of the amendment’s pause was a lone representative, Philadelphia Democrat Eugene Gelfand, whose party controlled the statehouse. Gelfand, perhaps unaware of the scrutiny and debate the amendment had undergone at the federal level, argued against ratifying Bayh’s amendment too quickly without careful consideration. But Gelfand’s colleague, Republican Representative G. Sieber Pancoast of Montgomery County, urged the Pennsylvania state legislature to back the amendment. During the floor debate, Pancoast argued that invoking the inability provisions – specifically Section 4 of the amendment that allows the vice president and a majority of the Cabinet to declare the president inabled – might lead to a power struggle within the executive branch, a struggle that was unacceptable for any “length of time in our atomic age.” Gelfand, who spoke next argued that though anxious times called for action, the House still should not vote in haste: “I know the tenor of the times is to do something,” he said, “but let us not rush pell-mell down the road to madness just for the sake of doing something, because it could mean disaster.” The amendment was not brought to a vote.

---

65 “Notes of Meeting held in Miami Florida, August 9, 1965,” Personal Files of John D. Feerick, Folder “JBC- ABA II Through Sept. 1965.”
67 Id., at 1563.
The ABA pushed back, convincing Pennsylvania legislators that not ratifying the amendment could lead to a more serious disaster in the dangerous age. It mobilized federal, state, and local bar associations, as well as other members of the Pennsylvania legislature, to put pressure on Gelfand to allow the process to move forward. Gelfand did not mention the ABA’s pressure, but in a matter of weeks, Pennsylvania became the fifth state to ratify on August 18, 1965.

B. “The Possibility of a Simultaneous Death of All in the Line of Succession is a Nuclear Age Reality”: Ratification in Arkansas

In Arkansas, Bayh and the ABA also encountered a holdup. Bayh’s personal appearance at the National Governors’ Conference in July had helped bring Governor Orval Faubus on board. After the conference, Bayh and Faubus exchanged letters. In a letter dated August 5, Faubus stated that he had hoped that Congress would pass the amendment while Arkansas had been in special session, but now it did not look likely that Arkansas would ratify before the Arkansas legislature convened next. However, Speaker J.H. Cottrell disseminated a copy of an article by Professor George D. Haimbaugh that had appeared in the South Carolina Law Review, “Vice Presidential Succession: A Criticism of the Bayh-Cellar [sic] Plan,” criticizing the amendment’s lack of specific provisions to deal with a nuclear attack. In the article, Haimbaugh brought up the possibility of a nuclear crisis and the effect it would have on succession, criticizing the amendment for not addressing it. Significantly, he wrote, “Arguments for the Bayh-Celler plan for vice presidential succession must also include a ritual reference to the thermonuclear age.”

68 “Notes of Meeting held in Miami, Florida, August 9, 1965,” Personal Files of John D. Feerick, Folder “JBC- ABA II Through Sept. 1965.”
69 “Letter to Senator Birch Bayh from Orval E. Faubus, August 5, 1965,” NA, CJ, SCI, Box 18, Folder “P In Rat Corres Govs and State Officials 1965.”
70 Id.
He continued, “The possibility of the simultaneous death of all in the line of succession is a nuclear age reality, but the Bayh-Celler plan does not meet this danger.” Haimbaugh suggested that the amendment was not useful because it was granting Congress powers it already had to designate successors to the presidency that would not be affected by a nuclear attack on Washington, D.C. He argued that under Article II, Congress has “the power to extend the line of officials to include high-ranking officials who work outside the Washington area.” In a rebuttal entitled “Vice Presidential Succession: In Support of the Bayh – Celler Plan,” also published in the South Carolina Law Review, Feerick agreed that Congress had the power to extend the line of succession, but the concern that a line of succession consisting of officials not in Washington did not need to be dealt with in the amendment. Instead, the amendment was urgent and, Feerick charged, Haimbaugh’s arguments were “invalid, inapplicable, and unrealistic.” Though readership numbers are not available, Feerick’s response may have helped move it to a vote in Arkansas. Arkansas ratified the amendment on November 4, 1965.

C. “[Nuclear Anxiety] and [Presidential Continuity] are Not Unrelated in the Thoughts of the Public”: Ratification in Colorado

The amendment began to pick up steam in the states; however, the ratification process in Colorado threatened the amendment’s overall success. In a letter to Feerick on July 21, 1965, Dale Tooley added an article he wrote in The Denver Post, a response to its article the day before, entitled “Twenty-Fifth Amendment has Serious Defects.” Tooley stated that although the paper originally supported the Colorado legislature’s passage of a memorial resolution, S.J.M. 5,

asking Congress to move forward on the amendment on presidential succession and inability in February 1965, the *Post* had reversed its earlier position and was now opposed to the amendment.\(^{73}\) One notable point of the *Post’s* was that the amendment did not deal directly with vice presidential inability. What if both the president and vice president were simultaneously unable to serve? It was a dangerous omission because a coherent Commander in Chief was needed when seconds mattered in the nuclear era, the *Post* argued: “In a nuclear age, the presidency must be occupied at all times by a man in full possession of his faculties.”\(^{74}\) In Colorado, it looked like a lack of specifics around vice presidential inability during the nuclear age might prevent ratification.

Colorado State Senator John R. Bermingham also worried about the proposal’s failure to contend with a nuclear catastrophe. Once a supporter and now opposed, Bermingham’s concerns also made the Colorado papers.\(^ {75}\) In his first letter to the ABA dated August 10, 1965, Bermingham made clear that he wanted provisions explicitly written into the Twenty-Fifth Amendment in case of a nuclear crisis. He questioned “why no provision was included in the proposed amendment to cover the situation that would occur if an atomic bomb wiped out the entire city of Washington while all our high officials were present.” And he wondered, “How would the government get started again?”\(^ {76}\) The senator would continue this focus on the lack of detail in the event of a nuclear attack for months.

Michael Spence, Tooley’s assistant, responded to Bermingham ten days later noting that Bermingham was not the only one to have raised questions about whether the succession and


\(^{74}\) Twenty-Fifth Amendment Has Serious Defects, *THE DENVER POST* (July 22, 1965).

\(^{75}\) *GOP Senator Explains Vote on Amendment*, *THE ROCKY MOUNTAIN NEWS* (July 22, 1965).

inability amendment addressed nuclear attack. Spence stated that although the drafting committee did consider that possibility, the amendment “could not cover every possible situation which might be imagined.” The amendment was designed to deal only with problems “which history has indicated might be likely to occur,” he said.77 He went further, stating that the amendment “does not deal with the subject of atomic holocaust specifically” but admitted that “The occurrence of atomic destruction under any circumstance would be chaotic.”78 He concluded by saying that the amendment would not cause problems during such events.

This was not the assurance that Bermingham wanted. He wrote again to Spence stating that the huge sums spent annually on defense against atomic attack were proof that the nuclear issue was an important one.79 He then concluded his letter by asking more pointedly why the amendment could not cover an atomic attack: “Do I interpret your remarks correctly in concluding that our laws make no provision whatsoever for continuity or succession in our government [in the event of an attack]?” He continued: “Is there any reason why the succession law could not be amended to cover an atomic holocaust?”80 Bermingham’s salient points did not take into account the fact that if the amendment was redrafted to include any provisions for a nuclear attack, it would have to start again at the beginning, in a congressional subcommittee.

Michael Spence, by responding that Section I of Article 2 of the Constitution allows Congress to legislate on succession and that to provide for “contingencies such as the atomic holocaust you suggest,” succession law could be amended in the future, did not fully satisfy Bermingham. Spence – attempting to drive a wedge between the two issues that legislators at

77 Id.
80 Supra note 79.
both the federal and state levels saw as intricately linked – added that the problem of an atomic holocaust was separate from the problems the amendment addressed. Bermingham, however, emphasized the importance of the nuclear issue to the public, and that it was Congress’ duty to legislate on both. Bermingham wrote, “Nevertheless, they are not unrelated in the thoughts of the public and it seems to me that Congress has as much duty to take action with respect to the one problem as the other.” At this point, Bermingham did not continue the battle to add language to the amendment to cover a nuclear attack.

But Bermingham could have held up the amendment in Colorado, similar to what happened in Pennsylvania and Arkansas. On January 27, 1966, the ABA sent cards to every member of the Colorado legislature asking that they support ratification and Bayh’s office also dictated a defense of the amendment that was distributed by the ABA to each member the following week. They feared a domino effect: that if the amendment was not ratified in Colorado because the language was deemed deficient in some way, other states would block ratification as well. Yet after intense focus on the nuclear issue, Colorado ratified the amendment on February 3, 1966. Additional states began to fall into line rapidly. Whether these state legislators were for or against the addition of specific language in the amendment that would prepare the country for a sudden presidential transition during a nuclear war, virtually every last one was in agreement that a permanent solution was needed to solve the succession and inability issue because of that possibility.

83 BAYH supra note 19, at 340.
84 The remaining states ratified the amendment without issue. Id. at 341.
IV. Conclusion

With the thirty-eighth state’s (Nevada’s) ratification, the Twenty-Fifth Amendment became part of the U.S. Constitution on February 10, 1967, three years, two months, and nineteen days after Bayh drafted the legislation. Nuclear anxiety was ingrained in the Constitution itself, even as the Constitution continued to take shape based on the needs of the era. Although the amendment in its final form did not contain specific procedures to follow in the event of nuclear attack, congressmen attempted to strike a balance between including enough detail to provide a solid and reassuring answer to the succession and inability problem and, at the same time, allowing flexibility should unforeseen events happen, especially as a result of a nuclear attack. As references to the sudden transition from Kennedy to Johnson faded into the background, nuclear anxiety remained at the forefront of political discourse at the federal and state levels. Examining the legislative process through the lens of nuclear anxiety reveals new facets of the amendment’s path to ratification unavailable through more traditional accounts that omit the cultural and political mood or attribute the anxiety that helped propel the amendment forward solely to the presidential assassination. For a richer understanding of the reasons behind the Twenty-Fifth Amendment’s ratification, nuclear anxiety must be taken into account.

We still live, as President John F. Kennedy said, “under the nuclear sword of Damocles… capable of being cut at any moment by accident, or miscalculation, or by madness.”85 The historical patterns revealed by this study of the intersection of nuclear anxiety and presidential continuity indicate that as nuclear tensions rise, government activity around the search for solutions to succession and inability problems will intensify (though we are less likely to see the inability provisions – Sections 3 and 4 of the Twenty-Fifth Amendment – invoked in

---

cases of “madness”\(^{86}\). The continuity of the institution of the presidency is of greater importance than any one man, and as Feerick urges, the remaining “gaps that persist… must be addressed because mass [nuclear] catastrophe, illness, or some other happenstance can occur at any time.”\(^{87}\) The Bulletin of Atomic Scientists reminds us: “the Clock ticks.”

\(^{86}\) My doctoral dissertation also shows that while nuclear anxiety worked to produce the amendment, it worked to suppress the amendment in practice.

WHAT TO DO IF
SIMULTANEOUS PRESIDENTIAL AND VICE PRESIDENTIAL INABILITY
STRUCK TODAY

Roy E. Brownell II

The legal architecture governing presidential succession leaves unaddressed a number of potential hazards that threaten the continuity of American governance. This presentation will focus on dual inability: when the President and Vice President are simultaneously incapacitated.

Groundbreaking work has analyzed what policymakers should do prospectively to fix the problem of dual incapacity. However, the literature has not examined what should be done if dual incapacity were to occur right now, before a fix is publicly put into place.

The legal problems surrounding dual incapacity derive from shortcomings in the 1947 presidential succession statute. The 1947 law addresses dual incapacity but it omits two essential considerations. The measure provides that the Speaker of the House of Representatives becomes Acting President if the President and Vice President both become incapacitated, however, the statute says nothing about: 1) how a decision as to dual incapacity is to be made; and 2) who is to make it. Thus, in a situation involving dual incapacity, there is no clear indication of who would do what to resolve the quandary. As a result, a dual incapacity scenario would threaten to paralyze the executive branch at its highest levels.

The task at hand is further complicated by the fact that very little is publicly known about what policymakers have already formulated on the subject since such steps have been confidential. Given the failure of the executive branch and Congress to formulate a legislative solution, policymakers are confronted with no good options. The goal of this presentation is to identify the least bad option under the circumstances.

Any attempt to provide policymakers with an “off-the-shelf” solution to an immediate case of dual incapacity must try as closely as possible to satisfy three desiderata: 1) the proposal must be lawful; 2) it must be politically legitimate; and 3) it must be practical. Consistent with these three requirements, a solution is offered that policymakers should consider if this difficult issue should arise (assuming there is no public solution already in place at the time).

The approach is that, upon learning of an apparent dual incapacity, the Speaker (or officeholder who is next in the line of succession) should consult with the Senate President pro tempore (PPT) and the principal officers of the executive departments (i.e., the President’s Cabinet). The Speaker, PPT and a majority of the Cabinet should then decide whether the President and Vice President are in fact incapacitated. If they decide that dual incapacity has indeed occurred, they should instruct executive branch lawyers to craft a brief legal opinion articulating the legal basis upon which they have acted (i.e., the contingent grant of power theory

1 This document and the related presentation reflect the author’s views alone.
and 25th Amendment parallelism). Following the opinion’s completion, the Speaker, PPT and Cabinet should make public the dual incapacity determination and legal opinion and announce that the Speaker will be assuming the role of Acting President until the incapacity of the President or Vice President has been lifted.

In this joint public statement, the Speaker-turned-Acting President, PPT and Cabinet would announce that what was done was consistent with the Presidential Succession Act of 1947. But, out of an abundance of caution, the Speaker, PPT and Cabinet should state further that they are requesting that Congress retroactively ratify the process followed by the group and their ultimate decision. The Acting President would soon thereafter submit recommended legislative language that would also propose a statutory process for how the President and Vice President could demonstrate that they have regained their capacity and that would include a clear dual incapacity determination procedure going forward. This recommended bill language would closely follow Section 4 of the Twenty-Fifth Amendment.

At the same ceremony, the Speaker would announce his resignation from Congress and also that, if the President or Vice President at any point believe they have regained their capacity prior to the recommended bill’s enactment, either officeholder could make a public declaration to that effect. If the Acting President, PPT and Cabinet do not contest the matter, the formerly incapacitated officeholder (or officeholders) would then regain their position(s). If the Speaker, PPT and a majority of the Cabinet disagree with the declaration, Congress would decide the matter with legislative inaction resulting in the return of the President and Vice President.

While imperfect, this proposed solution does a better job of satisfying the three criteria—legality, legitimacy and practicality—than do competing approaches and should be given consideration by policymakers if they find themselves “in a pinch.”
The Twenty-Fifth Amendment and the Establishment of Medical Impairment Panels: Are the Two Safely Compatible?

By

Robert E. Gilbert
Northeastern University

Abstract: Presidents of the United States have often been seriously ill, whether with physiological or psychological afflictions. The Twenty-Fifth Amendment was added to the U.S. Constitution in 1967 in an effort to provide constitutional remedies for problems associated with such illnesses and to vacancies in the office resulting from these and other problems. More recently, it was proposed that some sort of Standing Medical Impairment Panel should be established by law in order to examine the President periodically and be authorized to publicly declare that he/she is medically unfit to serve, and should, therefore, cede the exercise of presidential powers to the Vice President, either temporarily or permanently. Two of these proposals are examined here from several different perspectives.

The history of the American Presidency has been replete with instances of serious physiological illnesses in presidents. The list of Presidents who suffered such illnesses includes Washington, Adams, Madison, Monroe, Jackson, W. H. Harrison, Taylor, Lincoln, Garfield, Arthur, Cleveland, McKinley, Wilson, Harding, F. D. Roosevelt, Eisenhower, Kennedy, Johnson, Reagan, George H. W. Bush and Clinton. Collectively, these Presidents suffered such medical problems as heart attacks, strokes, cancer, hemorrhages, pneumonia, convulsions, bullet wounds, gangrene, Addison’s Disease, Bright’s Disease, malaria, atrial fibrillation, alcoholism, scarlet fever, smallpox, infections, excruciating headaches, hypertension, ileitis, tremors, gallbladder disease, prostate disease, hyperthyroidism, torn ligaments and delirium. ¹

In addition to such physiological ailments, presidents have likely suffered from psychological illness as well. Calvin Coolidge is quite likely an example of such affliction.

After his 16 year old favorite son died of blood poisoning in July, 1924 after raising a blister on his toe while playing tennis, Coolidge blamed himself for the death, saying to visitors, “If I had not been president, my son would not have been playing tennis on the White House courts.” In the period after young Calvin’s death, the President seems clearly to have suffered from an unrelenting clinical depression. His White House Physician described him as being “temperamentally deranged” and his personal secretary described him as being “actually insane” but no one in or outside the White House realized that Coolidge was psychologically ill and would never truly recover. For the country, the President’s condition was disastrous since economic storm clouds were gathering that would soon develop into the Great Depression.

Coolidge’s presidency and his life had simply been destroyed by unrelenting grief. In his 1929 autobiography, Coolidge wrote all too truly, “In his suffering, he was asking me to make him well. I could not. When he went, the power and the glory of the Presidency went with him.”

It was especially to resolve instances of debilitating illnesses of all kinds for which the Twenty-Fifth Amendment was added to the Constitution in 1967 after years of effort. The Amendment’s four sections deal with vice presidential succession to the presidency, replacement of the Vice President when that office becomes vacant, voluntary withdrawal of the President from office and his/her replacement by the Vice President who becomes Acting President and involuntary replacement of the President by the Vice President who becomes Acting President.

**Twenty-Fifth Amendment**

The Twenty-Fifth Amendment has four sections, each of substantial importance.

**Section 1:** In case of the removal of the President from office or his death or resignation, the Vice President shall become President. **Section 2:** Whenever there is a vacancy in the office of

---


the Vice President, the President shall nominate a Vice President who shall take the oath upon confirmation by a majority vote of both houses of Congress. **Section 3:** Whenever the President transmits to the President Pro Tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President. **Section 4:** Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law decide, transmit to the President Pro Tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of his office as Acting President. Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no disability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of any such body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within 48 hours for that purpose if not in session. If the Congress, within 21 days after receipt of the latter written declaration, or, if Congress is not in session, within 21 days after Congress is required to assemble, determines by two thirds vote of both houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

After the Amendment was added to the Constitution, it demonstrated very quickly its great usefulness. Section I was invoked for the first time on August 9, 1974, only seven years after enactment, when Richard Nixon resigned the office of the Presidency under threat of impeachment as a result of the Watergate scandal. He was replaced immediately by Vice President Gerald Ford who became, under terms of Section 1 of the 25th Amendment, President of the United States. No longer was there doubt that the vice president became, in fact, President rather than Acting President whenever the president permanently vacated the office. Although it would appear that the Constitution’s Framers preferred an “Acting President” designation in instances of presidential transition since they wrote in the Constitution that the Vice President inherits the “powers and duties” of the presidential office rather than the office itself, the 1967 Amendment decided otherwise.
Section 2 was invoked for the first time in October, 1973 when President Nixon nominated Michigan Congressman Gerald R. Ford, the Republican House Minority leader, to be the nation’s new Vice President after incumbent Vice President Spiro Agnew was compelled to resign his office. Agnew’s resignation came about as part of a plea bargain that resulted from the embarrassing – and illegal - financial dealings in which he had become involved while serving as Baltimore County Executive and afterwards, as Governor of Maryland. After initially denying any wrongdoing, Agnew finally pled *nolo contendere* (no contest) to the felony of tax evasion for the year 1967 and resigned the vice presidency. In other words, Agnew had failed to pay taxes on the illegal payments he had received as a political leader in Maryland. His plea was accepted, he was fined $10,000, and placed on probation for three years. Had Agnew not resigned the Vice Presidency, he would likely have been indicted and quite possibly sent to prison since strong evidence existed that “he was guilty of bribery and extortion as well as simple tax evasion.”

After the House (by a 387-35 vote) and Senate (by a 92-3 vote) approved Ford’s nomination 54 days later, the former Congressman took the oath as the nation’s new Vice President. After Ford succeeded Nixon as President in August, 1974, he nominated former New York Governor Nelson Rockefeller to be his successor in the vice presidency. Given Rockefeller’s liberalism, his nomination upset many conservative Republicans. One factor that angered *both* liberals and conservatives was that Rockefeller had given financial “gifts” totaling almost two million dollars to a number of public officials so that they would remain in public office rather than returning to a more lucrative career in the private sector. To some, these gifts

---


smacked of influence peddling. After an acrimonious debate, Rockefeller’s nomination was finally approved by Congress (287-128 in the House; 90-7 in the Senate) following a lengthy delay of 121 days. If the Twenty-Fifth Amendment had not then been part of the Constitution, the Vice Presidency would have been vacant from the moment of Nixon’s resignation on August 9, 1974 until January 20, 1977 when former Minnesota Senator Walter Mondale took the oath of office as Jimmy Carter’s Vice President.

Section 3, the first of the disability provisions, has been invoked three times. The first occurred in 1985 when President Ronald Reagan, in the hospital and about to undergo cancer surgery, signed a letter designating Vice President George Bush as Acting President of the United States. Some nine hours later, Reagan signed a second letter, this time reclaiming his powers and duties as President. Ironically, if Reagan had delayed his resumption of presidential powers and duties until his recovery was further advanced, he might have escaped his embarrassing involvement in the devastating Iran-Contra scandal that apparently became “finalized” shortly after his surgery took place.7

Section 3 was also invoked in 2002 and 2007 by President George W. Bush just prior to undergoing colonoscopies while under anesthesia. In each instance, Vice President Dick Cheney served as Acting President for very brief periods of time. Section 3 should have been, but was not, invoked in 1981 by President Reagan after he was shot and seriously injured by attempted assassin John Hinckley. This was most unfortunate because Reagan was severely incapacitated as a result of having been shot and would likely have been quite unable to respond to any crises that confronted him soon after that event.8

Section 4 of the Twenty-Fifth Amendment is the one section that has not yet been utilized.

---

It conjures up the unpleasant specter of involuntary separation of the President from the powers and duties of office by co-operative action of the Vice President and a majority of the cabinet. Apparently section 4 was briefly considered for invocation by Ronald Reagan’s Chief of Staff late in Reagan’s second term when the president appeared to be rather disengaged from the work of his Administration. But, as will be discussed later in this paper, the decision was made not to invoke it.

Proposals for A Medical Advisory Committee

At least two proposals have been offered by prominent members of the medical community for establishment of Standing Impairment Panels to monitor the health of presidents of the United States and to facilitate implementation of relevant sections of the Twenty-Fifth Amendment. The first to be discussed here was made by Dr. Herbert Abrams, a now deceased Professor of Radiology at Stanford University; the second by Dr. Bert Park, a prominent Missouri neurosurgeon. Dr. Abrams and Dr. Park spoke and wrote about their plans frequently over the years. The objective of each proposal is to ensure that the Vice President, the Cabinet and Congress are informed as to situations when a President might be seriously impaired in terms of carrying out his/her official responsibilities as President of the United States. Each proposal will be assessed here in turn.

The Abrams Plan

Dr. Abrams proposed in 1995 that a committee system should be established “either by statute or concurrent resolution that ensures the vice president, the Cabinet and the public of objective, independent and accurate assessments of the president’s health.” Further, Abrams suggests that this committee “will consist of two internists, two neurologists, a psychiatrist and a surgeon.” These doctors would participate in an “annual review of pertinent history, systems,
physical examination and laboratory data on the President, together with the President’s physician.” The Committee would include “a reasonable mix of Democrats and Republicans to avoid the taint of partisanship, and the final composition of the group would be subject to approval of the Secretary of Health and Human Services.” Abrams does not attempt to specify what he means by the words “reasonable mix.” A 5-1 division between Democrats and Republicans seems quite unreasonable for such a sensitive and powerful body; would a 4-2 division represent a reasonable partisan “mix”?

Dr. Abrams does not describe what the process of approval by the Secretary of Health and Human Services might entail. Certain, of course, is that his proposal – if ultimately put into effect – all but guarantees that the Secretary of Health and Human Services will always be appointed primarily for reasons of staunch partisan loyalty to the President rather than for professional competence in his/her field of expertise. Whether this is appropriate or wise is quite unclear.

According to Abrams, a second – and very important - role played by this group of physicians would involve “the medical evaluation of the president whenever the question of disability arose.” The committee on which they serve would convene immediately after being informed by the President’s Physician or the Vice President that the President’s physical or mental condition needed to be reviewed. After completing its assessment, the Medical Committee would “convey to the president and vice president the presence or absence of a state of impairment requiring consideration of invocation of the Twenty-Fifth Amendment” and would make disclosure to the public of “significant findings.”

---


Despite the benign intent of this recommendation, it presents highly complex problems. First, Abrams points out that because the role of an independent body of experts will be to examine the president but not to deliver medical care, “they would not have the same professional obligations with regard to confidentiality as would his personal physician.”\footnote{Abrams, “Can the Twenty-fifth Amendment Deal with a Disabled President? Preventing Future White House Cover-ups,” 1999, p. 122.} Even assuming this view is correct, the violation of the principle of medical confidentiality in the case of the President of the United States would likely have devastating effects both at home and abroad by injecting into the public domain medical information that should be kept private. Abrams’ proposal would be damaging to Presidents in terms of their ability to inspire confidence and provide leadership.

In this important respect, the writings of Political Scientist Richard Neustadt are useful to consider. In his seminal book – which is still in print today, almost sixty years after its initial publication in 1960, Neustadt focused his attention not on the topic of presidential powers but rather on the “concept” of presidential power. The two are quite different from each other and it is important to understand the difference. Presidential powers are the constitutional powers specifically exercised by the President. Thus, the President is Commander in Chief of U.S. military forces, can veto legislation, can appoint individuals to various offices and so on. Presidential power, however, is of another nature and perhaps more difficult to understand. Neustadt writes of the enormous importance of the president’s “Professional Reputation.” He explains that:

A President’s persuasiveness with others in the government depends on something more than his advantages for bargaining. (Those) he must persuade must be convinced in their own minds that he has the skill and will enough to use his advantages. Their judgment of him is a factor in his influence with them.

… those who share in governing the country are inveterate observers of a President. They have
the doing of whatever he wants done. They are the objects of his personal persuasion. They also are the most attentive members of his audience. These doers comprise what in spirit, not geography, might well be termed “the Washington community.” This community cuts across the President’s constituencies. Members of Congress and of his Administration, governors of states, military commanders in the field, leading politicians in both parties, representatives of private organizations, newsmen of assorted types and sizes, foreign diplomats and principals abroad - all these are Washingtonians, no matter what their physical locations…. By definition, all its members are compelled to watch the President for reasons not of pleasure but vocation. They need him in their business just as he needs them.

…A President’s effect on them is heightened or diminished by their thoughts about his probable reaction to their doing. They base their expectations on what they can see of him. And they are watching all the time….

A President who values power …has every reason for concern with the residual impressions of tenacity and skill accumulating in the minds of Washingtonians-at-large. His bargaining advantages in seeking what he wants are heightened or diminished by what others think of him. Their thoughts are shaped by what they see. They do not see alone. They see together. What they think of him is likely to be much affected by the things they see alike. His look in everybody’s eyes becomes strategically important for his influence. Reputation, of itself, does not persuade, but it can make persuasion easier, or harder, or impossible.”

Neustadt argues, then, that the President’s “professional reputation” (what other political leaders at home and abroad think of his political skillfulness) is important to his persuasive abilities and that he must do all he can to protect that reputation. He must understand - truly understand - that his leadership must be both steady and disciplined and that he must be seen as being “in control” of himself and his Administration. In his official duties, words are important and he must always say what he means and must always mean what he says. His words and his policies must always be in sync and must reinforce each other. He must certainly strive to avoid errors in describing his policies and must be clear and steady in stating his Administration’s intentions. Presidential power depends, in part, on the ability of presidents to protect their “professional reputations” since those reputations are essential to the art of governance.

In this respect, then, any public announcement of the President’s alleged ailments by members of an Impairment Panel would surely undermine his overall “professional reputation”

and make it much more difficult for him to lead or, in other words, to exert influence. This is hardly an objective that should be sought after – except, of course, by enemies and competitors of the United States on the world stage and by the President’s political enemies at home. What benefits, for example, would a public airing of Franklin Roosevelt’s ailments have brought to him and to the United States during World War II, a time when the country needed a strong president as well as popular reassurance and determination? Would it have enhanced or diminished Roosevelt’s “professional reputation” and the nation’s war efforts? Would it have enhanced or diminished his popular standing? At what price to the President and to the country?

Also, by the same logic, what benefits would a public scrutiny of Dwight Eisenhower’s ileitis surgery in 1956 have brought to him, personally, and to the war in the Middle East that he was struggling – successfully - at the time to bring to an end? A competent surgeon suggested privately to the President’s intimates that the “chances are six or eight to one against a man of Eisenhower’s age recovering from an ileitis operation.” However, as we now know, Eisenhower did indeed recover. If the content of the surgeon’s opinion had been publicized at home and abroad, would Eisenhower’s “power” have held steady - or would it have sharply declined? Would full disclosure in either of these instances have produced desirable results for the president in office at the time or for the nation? Or would it more likely have produced confusion, upset, and political turmoil? To most observers, the answer is clear.

Dr. Abrams further accentuates this problem when he suggests that “the committee would have nothing to gain by withholding information from the public.” In the case of the President of the United States, this is, once again, hardly a sensible notion. Does the public in

15 Abrams, “Can the Twenty-Fifth Amendment Deal with A Disabled President?”, 1999, p. 122.
the United States and abroad deserve to know *everything* about the President’s state of health? Does not the President, as do all other Americans, have privacy rights? Might not – indeed should not - some information be properly withheld from the public domain? Should, for example, the discovery of an aneurism in Eisenhower’s heart by his cardiologist, Dr. Thomas Mattingly, in 1955 have been announced immediately or soon after to the world? Such an announcement may not have been correctly understood by either the public or by world leaders and almost certainly would have diminished Eisenhower’s ability to lead at home and abroad. It also may well have prevented him from running for re-election in 1956 and, rather unfairly, from winning that election if he did run.

Eisenhower’s autopsy, conducted almost nine years after he left office, revealed that the aneurysm *did indeed exist* for at least 13 years and likely much longer but that it had *not* ruptured during the remainder of his lifetime. In fact, after surmounting his 1955 cardiac problems, Eisenhower had gone on to live until March 1969, thereby surviving to the age of 78. In a height of irony, in reaching this age, the former President had outlived his 1956 Democratic Party opponent, Adlai Stevenson, *and* the Democratic Party’s Vice Presidential nominee, Estes Kefauver, by several years.16 This was doubly ironic in light of the fact that Stevenson had given a rather tasteless televised address during the 1956 campaign in which he warned that:

I must say bluntly that every piece of scientific evidence we have, every lesson of history and experience, indicates that a Republican victory tomorrow would mean that Richard Nixon would probably be President of this country within the next four years. I say frankly as a citizen more than a candidate that I recoil at the prospect of Mr. Nixon as a custodian of the nation’s future, as guardian of the hydrogen bomb, as representative of America in the world, as Commander in Chief of the United States armed forces. Your choice tomorrow will not be of a president for tomorrow. It will be of the man – or men – who will serve as President for the next four years.17

---


In supporting his proposal, Abrams complains that “White House Physicians have shown a strong propensity for masking presidential illness.” In this regard, he cites Cary Grayson, Woodrow Wilson’s White House Physician, who in 1918 “helped orchestrate the cover-up of Wilson’s massive stroke under the direction of Wilson’s wife.” 18 While this assertion about Grayson might well be accurate, 19 other – and far more recent - White House Physicians have behaved quite differently and would seem wholly undeserving of such criticism. For example, in 1981, Senior White House Physician Dr. Daniel Ruge was convinced that Ronald Reagan should surely invoke the Twenty-Fifth Amendment after being shot and severely wounded by John Hinckley but Reagan’s “political” aides decided otherwise. 20 Also, Dr. John Hutton, Senior White House Physician to Ronald Reagan during Reagan’s second term, believed that it was absurd for Reagan to resume his powers and duties in 1985 only nine hours after undergoing extensive cancer surgery, 21 but Reagan did resume them – with very unfortunate results to himself and the country. More specifically, it now appears that Reagan, while recuperating in the hospital, gave “final approval” to a controversial policy of arms sales to Iran that backfired badly and produced humiliation for the president and his entire Administration. 22

Also, during the Clinton administration, invocation of section 3 of the Twenty-Fifth Amendment arose once as a “live” possibility. This was when the President fell while in Florida in March, 1997 and badly injured his quadriceps tendon. Dr. Connie Mariano, senior White House Physician during Clinton’s presidency, explains that Clinton received a spinal anesthetic

21 Dr. John Hutton, Oral History Project, Miller Center, University of Virginia, Charlottesville Va., April 15-16, 2004, p. 32.
prior to surgery that did not affect his consciousness or his cognitive abilities.” She adds, however, that “if the president had undergone general anesthesia for surgery, … I was fully prepared to recommend invoking Section 3 of the Twenty-Fifth Amendment, which would have allowed the powers and duties of the presidency to pass into the hands of Vice President Gore.” She also indicated that she “had informed Bruce Lindsay, a key presidential adviser, that, if the President required general anesthesia, section 3 should certainly be invoked. As general anesthesia was unnecessary, I did not recommend its invocation.”

The viewpoints expressed by White House Physicians associated with the Reagan and Clinton Administrations seem to suggest that blanket condemnations of White House Physicians for gross insensitivity and/or for cowardice on the issue of presidential disability are unwarranted and unfair. After enactment of the Twenty-Fifth Amendment in 1967, members of this group seem to have become much more sensitive to the constitutional avenues now available to presidents in confronting instances of disability and much more alert to the opportunities provided by the Twenty-Fifth Amendment in dealing with them. A hundred years ago, Woodrow Wilson and Dr. Grayson did not have these constitutional advantages since the Twenty-Fifth Amendment simply did not exist then and the Constitution was rather vague on issues of disability and inability.

That very vagueness may have made presidential advisers/associates of all kinds very hesitant to recommend that a President “step aside” to make way for a temporary Acting President since the new Acting President may not have agreed that his role was only temporary and that he must be willing to relinquish his powers with grace and calm whenever the President

---

chose to reclaim them. More specifically, what would have convinced Woodrow Wilson that Vice President Thomas Marshall would have voluntarily relinquished his presidential powers when Wilson wanted them to be released rather than holding on to them until Wilson’s term had finally run out? Since 1967, the answer to this compelling question is, quite simply, the Twenty-Fifth Amendment.

In an effort to further enhance the status of the White House Physician in the power structure of the White House, a group of former White House Physicians, working as part of the Working Group on Presidential Disability, a body formed in 1994 by the Bowman Gray School of Medicine and the Jimmy Carter Presidential Center, recommended that “the President appoint a senior Physician to a position as his or her personal physician in the Executive Office of the President,” that this ‘Senior Physician’ have the responsibility “for facilitating the application of the Twenty-Fifth Amendment,” and that “the Senior White House Physician be accorded a title such as Assistant to the President or Deputy Assistant to the President or equivalent military rank.” These Physicians - who have had experience as White House functionaries of a very special sort - have made these suggestions as a way of increasing the status and personal clout of future White House Physicians so that in any subsequent instances involving possible invocations of the Twenty-Fifth Amendment, their advice will be taken very seriously, rather than being essentially ignored, by others in the chain of White House command. All of this should suggest that Abrams’ sharp criticisms of White House Physicians as being secretive and untrustworthy cheerleaders for presidential continuance in office regardless of health status

24 Earlier, Dr. Abrams seemed to agree that White House Physicians tended to cover up presidential illnesses before enactment of the 25th Amendment. See Abrams,”The Vulnerable President and The Twenty-Fifth Amendment,” Wake Forest Law Review, Fall, 1995, p. 470.
seem badly outdated. Proposals based on such outdated assumptions should be approached with great caution.

Additional points raised by Dr. Abrams are quite important and deserve discussion here. The first is his provocative remark that a closely divided impairment panel would not be problematic in resolving issues of presidential disability. Abrams writes that “five to four decisions of the Supreme Court are legion … but have hardly shaken the foundations of the republic.”26 He then goes on to claim that “an independent body of experts will be objective, will have no conflict of interest, and … can be counted on not to violate the public trust.”27 These rather grandiose pronouncements are highly questionable.

First, contrary to Abrams’ assertion, closely divided Supreme Court decisions often generate intense conflict and occasional outrage among the general population, the political “influentials,” and/or the states. For example, the Supreme Court decision in Citizens United v. Federal Election Commission in 2010, which saw the court vote 5 to 4 to strike down limitations on spending by corporations in political campaigns, provoked a “firestorm of criticism.”28 As Mark Alexander writes, “…there is a serious democratic tension when one constitutional value (speech) gets promoted over another (equality).” He continues: “In our modern fund-raising machinery, as candidates and elected officials raise money from a small set of elite donors, they are disproportionately responsive to the few, not to the many and not to their constituents. When this occurs, the few have concentrated power, the many have diluted power and political equality is trampled.”29 So angry were so many at this 5-4 decision that President Barack Obama publicly rebuked the Court during his 2010 State of the Union Address on national television

26 Abrams, “Can the Twenty-Fifth Amendment Deal with a Disabled President?,” 1999, p. 124.
27 Abrams, “Can the Twenty-Fifth Amendment Deal with a Disabled President?,” 1999, p. 122.
and deliberately denounced its Citizens United ruling in the presence of the court’s justices, several of whom had voted on the majority side in this case.

Three years later, the same Supreme Court, again in a 5 to 4 decision, determined in Windsor v. United States that the Defense of Marriage Act – enacted by Congress in 1996 to thwart gay marriage - was unconstitutional. While this decision was seen as a great victory for gays and lesbians, it provoked a sharp counterattack in several states. The Indiana legislature, for example, enacted a law in 2015 aimed at insulating citizens of that state from the “encroachment” of gay rights but the outcry was so great - not only by gay rights activists but also by corporations, the media, and even sports heroes - that the Republican Governor (Mike Pence) and Republican legislature very quickly altered the offensive legislation.\(^{30}\) This, of course, infuriated further the state’s anti-gay forces.

What these experiences signify is rather clear. Contrary to what Dr. Abrams has asserted, closely divided Supreme Court decisions frequently enrage major segments of the public, particularly when they relate to emotional national issues. It should be easy to imagine, then, the furies that almost certainly would be unleashed if a Presidential Impairment Panel should issue a closely divided “report” recommending that a President of the United States should essentially be removed from the exercise of the powers and duties to which he or she had been duly elected.

Second, it is unrealistic to expect that Impairment Panel members would always be able to present their views about the President in an unambiguous, unbiased, nonpartisan, easily understood, and widely accepted manner. In fact, it is not even guaranteed that they will all abide by professional standards of personal behavior. Specifically, in their performance as panel members in relation to psychological/psychiatric diagnoses, it would appear that psychiatrists

can be found on every side of psychiatric issues and that the testimony of psychiatric personnel can be inaccurate, and, at times, even badly tainted and thoroughly untrustworthy.

As an example, after John Hinckley – in order to show his love for movie actress Jodie Foster – shot President Reagan, Press Secretary Brady, a secret service agent and a Washington, D.C. policeman in March, 1981 outside the Washington Hilton Hotel, he was subsequently found to be psychologically unsound and was, therefore, confined to St. Elizabeth’s Psychiatric Hospital in Washington, D.C. Just a few years after his initial confinement, however, Hinckley sought permission to leave the hospital, without any supervision whatsoever, for visits with his family. When his intention was challenged in court, psychiatrists differed greatly in their testimony. One, in particular, stood out as having a rather unique viewpoint. Dr. Glenn Miller, a well-established psychiatrist, strongly supported unsupervised family visits. He testified at the time that, in his opinion, the 1981 would-be assassin posed no danger to President Reagan, Press Secretary Brady or anyone else. Miller also testified that Hinckley no longer saw himself as a hero for attempting to kill Reagan, showed remorse for what he had done, and was no longer obsessed with actress Jodie Foster.31

Although Hinckley’s lawyer had introduced Dr. Miller in the courtroom as “a witness who was hired by the hospital as a consultant,” it soon became clear to the court – and to the public - that Dr. Miller was on the payroll of Hinckley’s wealthy father. In other words, his testimony was quickly and widely debunked as having been “bought and paid for.” Other psychiatrists who gave testimony during the Hinckley proceedings – these unpaid by the wealthy Hinckley family – differed sharply from Miller in their views. They were convinced that Hinckley suffered from a severe, chronic mental illness and remained dangerous to himself and to others, including Jodie Foster. They also revealed that President Reagan’s would-be assassin, while hospitalized at St.

31 Fred Fielding, Files, Box 23F, Ronald Reagan Presidential Library.
Elizabeth’s, had written several letters to serial killer Ted Bundy, then on Florida’s death row. Bundy was a kidnapper, rapist and serial killer who confessed to killing at least 30 women and girls in seven states between 1974 and 1978. He decapitated at least 12 of his victims and kept some of their heads in his apartment as mementoes. In 1989, Bundy was executed for his crimes. Rather strangely, Hinckley had written to Bundy, not to question or condemn him for his horrific killing spree but rather to express his sorrow about the “awkward position Bundy must be in.”

These “independent” psychiatrists also revealed that Hinckley had corresponded recently with Squeaky Fromm, who had tried to assassinate President Ford in 1975, had made clear his intention to communicate with convicted serial killer Charles Manson and had some twenty photographs of Jodie Foster in his hospital room – a fact that, in itself, might well suggest his continued obsession with the actress. Despite this obsession, Hinckley had recently become engaged, the “independent” psychiatrists informed the court, to a 43 year old woman found not guilty by reason of insanity for killing her sleeping 10 year old daughter. In light of these startling disclosures, the “bought and paid for” testimony of Dr. Miller was publicly and decisively repudiated and Hinckley’s request for unsupervised departures from his psychiatric hospital was rejected by the court then and for many years thereafter.

What if a Standing Impairment Panel was established in the United States, as Dr. Abrams suggests, and was investigating the subject of possible psychiatric dysfunction on the part of an incumbent President of the United States? A dueling band of psychiatrists would then be called upon to offer “objective” and “trustworthy” testimony to the Impairment Panel, certainly not testimony that was distorted, biased, or shaped by “compensation.” Then, members of Congress would be charged with carefully weighing the “objective” and “trustworthy” testimony and

---

32 Fielding, Files, Box 23F, Ronald Reagan Presidential Library.
taking appropriate action with regard a possible invocation of the Twenty-Fifth Amendment. Could this process be carried out with certainty of fairness? Could not future Dr. Millers emerge from time to time with their bought-and-paid-for testimony? Would the objectivity, reliability and professionalism of the process be transparent to all? Or would large segments of the population be convinced that a partisan coup was in progress and respond with rage?

More specifically, let us suppose that the Republican psychiatrists on the Impairment Panel determined that the President of the United States, a Democrat, was indeed psychologically ill and should step aside in favor of the Vice President? Suppose, too, that the Democrats among the panel psychiatrists decided that the President was wholly well, or at least well enough, to remain in power? Since members of Congress would then be offered at least two competing, divergent and eminently “respectable” psychiatric opinions upon which to “hang” their vote, they would be able to subscribe rather easily to whatever opinion supported their normal partisan proclivities, while insisting that their votes were based on the proffered medical advice and nothing else. But, in fact, the medical “theories” thrust onto the public domain in this instance may well have been put forward for thoroughly partisan purposes. Would, then, the process have been objective, fair and aimed at the common good? Or would it have represented nothing more than abject partisanship dressed cleverly in psychiatric disguise? Finally, would the American people accept the validity of such an obviously partisan process or rather take to the streets in protest? In light of the deepening partisan divide in this country and the lessened inclination to compromise, the answer to each of these questions seems clear.

One final criticism of the Abrams’ proposal is quite important and deserves attention. Although physicians are generally well-trained and often well-intentioned, they are also fallible

---

human beings with significant limitations. They are not all-knowing gods who should speak to the nation *ex cathedra* on all medical matters. Despite their impressive knowledge base, physicians can and do make serious mistakes on occasion in their diagnoses and prognoses and should not be put in the position of publicly and independently recommending that a President of the United States should step down from the exercise of his powers/duties, whether permanently or temporarily. Even the best and most extensive training in medicine does not lead to medical infallibility, a fact that should prevent physicians from publicly “playing god” in terms of presidential health and mortality. A discrete, behind-the-scenes role for medical professionals in caring for the President makes eminent good sense; a *public* role in announcing to the world diagnoses, prognoses and whether the Twenty-Fifth Amendment should be invoked – as envisioned by the Abrams proposal - does not.

**The Park Proposal**

Dr. Bert Park, M.D. has proposed a rather different plan to achieve regular, objective medical assessments of the President’s health status. He writes that “a Presidential Disability Commission, staffed by physicians skilled in disability determination, could be chosen or appointed before the inception of the next Administration.... Equally divided by political persuasion, such a commission would be charged with monitoring the President’s health on a yearly basis and reporting its findings to the vice president.” Park adds here that this group “would have no power to initiate proceedings against the president; much less to depose him; its duties would be restricted to gathering medical facts to assist the vice president in making an informed decision should the question of inability arise.”

---

Park, then, would take steps to ensure that there would be an “equal” division—by party—of Medical Commission members. In my view, this is clearly superior to the approach taken by Dr. Abrams as previously described. Nevertheless, in our present badly overheated political environment, with contending political forces clearly at war with each other, the Park proposal would likely result in frequent “presidential health confrontations” in which one side would try to achieve partisan advantage by disabling (e.g., removing from office) a troublesome leader of the opposite party. Overturning the nation’s election returns because of partisan animosity would be harmful to the country’s morale and destructive to whomever happened to be serving as the country’s legitimately elected leader. It would also irreparably damage our reputation as a nation resting firmly on the bedrock foundations of democracy.

The thought that a President of the United States could be required by law to submit to annual medical examinations by physicians who are not known to him and who were nominated, at least in part, by a confrontational opposition party in Congress to participate in his annual medical examination is troubling. It violates the president’s privacy rights and his freedom to consult his own physicians— as opposed to those who are forced on him by his political enemies.

In any event, the function of Dr. Park’s commission would be to “gather medical facts to assist the vice president in making an informed decision should the question of inability arise.” Dr. Park explains here that “as the amendment expressly states, only the vice president or cabinet can initiate any deliberations relevant to a determination of presidential inability.” He writes:

the disability commission would undertake a physical examination, supported by appropriate diagnostic tests. Second, these findings are analyzed to determine the nature and extent of the patient’s impaired bodily functions. The third step entails a comparison of the results of that analysis with the criteria specified in the *Guides to the Evaluation of Permanent Impairment* (1971). That need not be performed by the same physician (or physicians) responsible for the

---

initial examination. The final step in rating medical impairment takes into account all relevant considerations in order to reach a “whole person” impairment rating on a percentage basis.\textsuperscript{37}

In a presentation made in support of his proposal in 1995 to members of the Working Group on Presidential Disability, a collection of some 50 physicians, lawyers, government personnel and university professors formed to study a broad range of disability issues, Dr. Park commented that:

“perhaps some relevant examples from recent history might very quickly assist you in understanding what I mean by the term “percentage impairment of the whole person.” What does that really entail? With regard to the all-importance of brain dysfunction, several factors are included in the evaluation of such impairment in the Guides, among them disturbances in language, or complex and integrated function as abstraction and emotions, as well as the presence of episodic or permanent neurologic deficits. Now, applying these and other Guides’ criteria to Franklin Delano Roosevelt during his last term in office allows one not only to substantiate, but also to quantitate, his impairment retrospectively.\textsuperscript{38}

Park then goes on to state that “Roosevelt would have been rated as 15 percent impaired as early as March, 1944….” Even if accurate, is it certain that this alleged impairment level posed any real problems with regard the president’s effectiveness? Is Park arguing that it did? If so, what is the evidence supporting his judgment? Park also estimates that “by 1945, Roosevelt would have been objectively rated from 20-45 percent impaired …. By this time, he suffered from congestive heart failure, chronic obstructive pulmonary disease, and periods of anemia, all of which may adversely affect brain function, and each with its own percentage of impairment as figured in the final equation.”\textsuperscript{39} However, Park’s inclusion of the word “may” in this instance suggests rather clearly that such illnesses need not adversely affect brain function. How, then, can the matter of inability –and its extent – be determined?

\textsuperscript{37}Park, Ailing, Aged and Addicted, 1993, p. 207.


\textsuperscript{39}Park, Ailing, Aged and Addicted, 1993, p. 206.
Park also asks “whether anyone would choose to be led by a president certifiably impaired from the standpoint of brain dysfunction approaching 50 percent of his former self” and answers that “I think not, and certainly not if this point were made public at the time.”

These statements, however, are rather confusing. The data presented above by Dr. Park of Roosevelt’s impairment level in 1945 fell into a rather broad range of 20 to 45 percent. What, then, was the actual level of Roosevelt’s impairment? Was it 20%? Was it closer to 45%?

Unbiased referees might well argue that an 80% unimpaired Franklin Roosevelt – or even a 55% unimpaired one – was fully up to meeting his official responsibilities. In short, Dr. Park’s statistical analysis really has little meaning here because it is so broad, so indefinite, and tells us so little about Roosevelt’s actual performance in office. Even a 50 percent impaired leader might well be superior in leadership skills to his wholly unimpaired, but thoroughly inexperienced, replacement.

In this regard, it might be useful to note that many Americans – and many Americans in leadership positions – may well have preferred the charismatic Roosevelt to remain in the White House at that time of world conflagration rather than confront the prospect of a new, untried and untested Commander in Chief. Thus, Greenstein suggests that Roosevelt’s “temperament could scarcely have been better suited for inspiring public confidence….. Even if the sense of absolute assurance he radiated was only that of a masterful performer, it reveals his singular emotional fitness for the demands of his times.”

The power of Roosevelt’s leadership was often in evidence as late as 1944 and even early into 1945. Consider a memorandum that he sent to Secretary of State Hull in January, 1944, little more than a year before his death, in response to a question about Indochina that Hull

---

had raised. It suggests that Roosevelt, although ill, was quite clear-headed, rather perceptive and very much in command:

I saw Halifax last week and told him quite frankly that it was perfectly true that I had, for over a year, expressed the opinion that Indo-China should not go back to France but that it should be administered by an international trusteeship. France has had the country—thirty million inhabitants—for nearly one hundred years, and the people are worse off than they were at the beginning.

As a matter of interest, I am wholeheartedly supported in this view by Generalissimo Chiang Kai-Shek and by Marshall Stalin. I see no reason to play in with the British Foreign Office in this matter. The only reason they seem to oppose it is that they fear the effect it would have on their own possessions and those of the Dutch. They have never liked the idea of trusteeship because it is, in some instances, aimed at future independence. This is true in the case of Indochina.

Each case must, of course, stand on its own feet, but the case of Indo-China is perfectly clear. France has milked it for one hundred years. The people of Indo-China are entitled to something better than that.42

In her study of Roosevelt’s presidency, Rose McDermott concluded that “because his condition manifested intermittently, it did not impact all his decisions and actions. Most notably, it appears not to have affected Roosevelt’s performance at Yalta…(where) he managed to secure the two things he cared about most: Soviet agreement to the United Nations and its future cooperation in the war against Japan.”43 Crispell and Gomez offer agreement to McDermott’s view by adding this important point: “FDR’s condition varied sharply from day to day…. He always picked up and bounced back quickly… his inner vitality, even though weakened, was so radiant that, after a few moment’s talk, he could make almost any visitor completely forget that he seemed ill.”44

---

42 The Pentagon Papers, Part I, A 14, PDF, p. 22.
On April 2, 1945, Roosevelt again seemed very much in command when he sent a fiery message to Soviet leader Josef Stalin. It was a message that demonstrated his continued and quite powerful involvement in affairs of state:

It would be one of the great tragedies of history if at this very moment of victory now within our grasp, such distrust, such lack of faith should prejudice the entire undertaking after the colossal losses of life, materiel, and treasure involved. Frankly, I cannot avoid a feeling of bitter resentment toward your informants, whoever they are, for such vile misrepresentations of my actions or those of my trusted subordinates.45

From reading his angry words, few would imagine that ten days later, Roosevelt would be dead and Truman would be President. On learning of this transition, General Dwight Eisenhower, U.S. Commander in Europe, commented that on that night, he “went to bed depressed and sad.”46

While Park’s analysis of FDR is surely provocative, it is incomplete and raises more questions than it answers. First, is it certain that Roosevelt’s alleged 1944-1945 impairment levels posed any problems whatsoever with regard his effectiveness? What evidence supports this view? More specifically, assuming that Park is correct that Roosevelt was 45% “impaired” in 1944-1945, did the President’s impairment result in poor leadership? If so, examples should be provided to make Park’s points meaningful. Today, many believe that Roosevelt remained an alert, shrewd and articulate leader to the end, even though showing frequent mood swings and operating below the peak level of performance shown earlier in his term.47 The President tried to compensate for his waning strength by allowing some of his powers to shift to aides,48 but he typically remained “in charge.” Franklin Roosevelt is still widely seen as “the most influential

leader in the United States in the twentieth century.” 49 Apparently, even a 45 or 50 percent impaired leader, if Park is correct in his estimation, might well be superior to his wholly unimpaired, but thoroughly inexperienced, replacement.

In Dr. Park’s remarks before the Working Group on Presidential Disability in 1995, he made several comments about the Vice President that deserve discussion. He commented, for example, that “The experiences of Chester A. Arthur and Thomas Riley Marshall during the respective disabilities of their immediate superiors has shown that, though the cabinet may be willing to hear that a president is disabled, a squeamish vice president …might choose to abstain. As a result, a disabled president might remain in office. In fact, this is what occurred following the attempt to assassinate Reagan.” 50

Certainly, the assassination attempt against President Reagan suggests strongly the complexity of Twenty Fifth Amendment, section 4 invocations. Although Reagan was severely wounded by the shot fired at him by John Hinckley, section 3 of the 25th Amendment could not be invoked because the President was too severely incapacitated by his gunshot wound to invoke it, at least after losing consciousness following arrival in the hospital. Although section 4 of the Amendment provides an alternative route to a transfer of presidential power, it was also not used. Vice President Bush was not in Washington at the time and didn’t arrive there until early that evening. Ironically, Reagan’s Chief of Staff was then Jim Baker, a moderate Republican and very close friend of the Vice President who had coordinated Bush’s 1980 presidential campaign. Because of his well-known friendship with Bush, Baker surely felt uncomfortable in recommending invocation of the 25th Amendment to the Reagan loyalists.

Understandably, the chief of staff reasoned that Reagan’s other aides – and perhaps Reagan himself – might have seen any suggestion of invocation by Baker as a sign of disloyalty to the President and/or an act of excessive loyalty to Bush.\(^5\) Therefore, although he mentioned the *possibility* of invocation to Reagan’s other aides,\(^5\) Baker simply did not recommend invocation. It is worth noting, however, that Richard Allen, another Reagan aide, had convened a meeting of the cabinet in the White House Situation Room that day, both to keep cabinet members up to date on what was happening and to have them available if it did become necessary to invoke the Twenty-Fifth Amendment.\(^5\)

In the matter of invocations of sections 3 and 4 of the Amendment, all vice presidents are likely to tread very carefully. Appearing to be too eager to become Acting President might well end their careers. In 1981, Bush was wise to be measured and cautious in his behavior in response to the assassination attempt. Since Reagan’s doctors were highly optimistic that the President would recover from his wound, Bush was understandably reticent to become *too* prominent in events. This can be seen in the fact that he wisely refused to land in a helicopter on the White House lawn – as he had been urged to do – since such behavior is, quite properly, “reserved” for the President.\(^5\) Bush’s refusal to become too prominent in events after Reagan was shot was well-rewarded. Eight years later, he was nominated for the Presidency by the Republican Party and then elected to that office with Reagan’s active support. Perhaps he might never have attained these goals if he had appeared too ambitious, too assertive and/or too grandiose on the day that Reagan was shot.


Dr. Park raises three *final* points that deserve discussion. First, he writes that “As regards the three instances of presidential disability during Reagan’s tenure, it bears emphasizing that *one* individual was largely responsible in each case for withholding the application of the Twenty-Fifth Amendment.” He then named the three individuals to whom he referred: presidential aide Richard Darman in 1981, Reagan himself in 1985, and Chief of Staff Howard Baker in 1987. Park then points to what “that dubious legacy suggests – the need to secure a second opinion from other than official sources.”

Park is correct that Richard Darman played a key role in the decision not to invoke the disability provision of the Twenty-Fifth Amendment in 1981. However, Darman did not have the power to determine on his own authority that section 3 would not be invoked. As previously discussed, Chief of Staff Jim Baker was rather neutralized as a source of power on that particular occasion because of his closeness to Vice President Bush. This meant that a person who *should* have played a key role in considering invocation of section 3 had *not* done so, leaving a subordinate (Darman) to push hard and effectively for non-invocation. Nevertheless, the ultimate decision was *not* Darman’s alone but rather the consensus view of Reagan’s key aides.

With regard 1985, it is quite unclear what Dr. Park means when he refers to Reagan’s “withholding” invocation of the 25th Amendment. Reagan did *not* withhold invocation that year. He invoked section 3, in fact, just prior to undergoing surgery for colon cancer. Although Reagan’s comments at the time of invocation were somewhat unclear, invocation of the 25th Amendment was the only mechanism in existence –short of resignation - by which he could constitutionally pass on his powers and duties to Vice President Bush. Therefore, he *had to* have invoked section 3. In his 1990 autobiography, Reagan stated *explicitly* that he had, in fact, done so. He wrote, “Before they wheeled me into the operating room, I signed a letter invoking the

---

Twenty-Fifth Amendment, making George Bush acting president during the time I was incapacitated under anesthesia."\(^{56}\)

Concerning the decision not to invoke the amendment in 1987, the issue of inability arose again late in Reagan’s term after one of the president’s aides, James Cannon, complained to Howard Baker, the President’s newest Chief of Staff, that Reagan seemed “inattentive at Cabinet meetings” and that many staffers speculated he preferred to spend his time in the residence, rather than working."\(^{57}\) However, after meeting on several occasions with Reagan, Baker became convinced that the President was then emerging from a period of lethargy, likely related to the devastating Iran-Contra scandal in which he had approved the “arms for hostages” arrangement with Iran shortly after undergoing major surgery for colon cancer. The independent counsel’s investigation of Iran-Contra led to 11 convictions of top Administration aides.\(^{58}\) The scandal quite conceivably could have brought down the Reagan presidency.\(^{59}\) Reagan’s re-emergence, in Baker’s view, saw him much more “involved” and much more assertive, making invocation of the Amendment unnecessary.

Second, Dr. Park asks, “how has the present system of impairment determination fared today when applied to executives of major corporations and the like?” He responds to his own question by writing that “independent clinical studies substantiate that …permanent impairment can be rated with reasonable accuracy, uniformity and dispatch. In essence, the machinery for such determination has been in place since 1971 and has worked well. It would seem, then, no great leap of principle to extend the practice to the workings of the Twenty-Fifth Amendment.”\(^{60}\)

---


The problem with Park’s assessment, however, is that there are extraordinarily significant differences between executives of major corporations and presidents of the United States. The “removal for cause” of a corporate leader is generally seen as a “private” matter, one that is handled by a corporate board of directors. Board members choose and appoint the corporate leader themselves, typically without major input from shareholders or anyone else outside the corporate board. The President of the United States, however, is chosen for his position by an electoral college that is now “elected” by some 140 million voters in the fifty states as well as in Washington, D.C. The difference between these two processes is so great that no “leap of faith” could justify extension of the very private processes of the corporate world to the broadly transparent public domain.

Third, Dr. Park recommends that on questions of possible disability in presidents of the United States “a second opinion” should be sought apart from those of White House aides. This second opinion, of course, would come from members of his proposed Presidential Impairment Panel. However, I would like to suggest a modification of this suggestion, namely that this “second opinion” be that of the senior White House Physician and the Associate White House Physicians as well. In my view, the “second opinion” should not come from a board of “examiners” outside the White House who likely have never before met the President, have never before seen him except on their television screens, and are complete strangers to him as he is to them.

Over time, White House Physicians become close to the President. Their office is in the White House itself, close to his; they typically see the President regularly, perhaps even several times a day; they speak with him often; they, in other words, come to “know” the President and know him rather well. In return, he knows them and likely trusts them. This intimate relationship
between the president and his doctors is quite important and should be put to good advantage. Who better to give medical advice about (and to) the president than the doctors who know and treat him intimately and over time? Also, *their* evaluation would be much better accepted by the President and by much of the country.

Conclusions

At the final session of the Working Group on Presidential Disability on December 3, 1996, Dr. Park highlighted his remarks in favor of a “Standing Presidential Impairment Panel” by stating that:

> What I, therefore, would hope to represent as the finished product of our deliberations is some suggested wording for a concurrent resolution to be considered by Congress that designates the composition of this consultative body and specifies the method and prospective timing of its selection. Not only would such expertise strengthen the mandate of the White House Physician, it would provide for that necessary second opinion that the American people deserves.”

Not surprisingly, Dr. Abrams strongly supported Park’s “motion” but neither man saw his hopes realized. At this concluding session, the Park-Abrams motion supporting creation of a Standing Medical Commission to monitor the President’s health and report on it to relevant officials was overwhelmingly rejected by Group members. The vote was *17 percent in favor, 83 percent opposed*. In this “election,” I voted with the majority and have explained the reasons for my “no” vote in this paper and elsewhere. In the intervening years, I have never regretted my vote or changed my mind on the issues that shaped it.

A medical commission, as proposed by either Dr. Abrams or Dr. Park, however well-intentioned they both have been, would damage unacceptably the “professional reputation” of

---


presidents of the United States and, at the same time, weaken greatly their ability to lead. Because of the systems of separation of powers and checks and balances given to us by the Framers of the Constitution, Presidents are already checked and balanced by our political institutions (e.g. Congress and the courts) to a notable degree; they are checked and balanced by the media as well. The first several months of the Trump Administration have strongly illustrated this point and President Trump has certainly tweeted vociferously of his displeasure in response. But while these restraining mechanisms are useful in our political system, too many “checks and balances” on presidents, including those suggested by Drs. Abrams and Park, make for a dangerously weakened and continually threatened chief executive. In my view, we should say “no” to such suggestions.