

1988

Final Report of the Commission on Presidential Disability and the Twenty-Fifth Amendment

Miller Center Commission No. 4

Herbert Brownell

Birch E. Bayh Jr.

Kenneth W. Thompson

Chalmers M. Roberts

Follow this and additional works at: http://ir.lawnet.fordham.edu/twentyfifth_amendment_reports

Recommended Citation

Miller Center Commission No. 4; Brownell, Herbert; Bayh, Birch E. Jr.; Thompson, Kenneth W.; and Roberts, Chalmers M., "Final Report of the Commission on Presidential Disability and the Twenty-Fifth Amendment" (1988). *Reports*. 1.
http://ir.lawnet.fordham.edu/twentyfifth_amendment_reports/1

This Article is brought to you for free and open access by the Twenty-Fifth Amendment Archive at FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Reports by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

**REPORT OF THE COMMISSION
ON
PRESIDENTIAL DISABILITY AND
THE TWENTY-FIFTH AMENDMENT
1988**

Miller Center Commission No. 4

Preface

The Miller Center Commission on Presidential Disability and the 25th Amendment is the fourth National Commission established by the Center. The first of the Commissions dealt with the conduct of presidential press conferences. Press Secretary James Brady, in introducing President Reagan's first press conference, held up the Commission's report and announced that the President intended to follow its recommendations. Governor Linwood Holton and former NBC White House correspondent Ray Scherer chaired that Commission.

The second Commission reviewed the state of the presidential nominating process and was chaired by former Secretary of Defense Melvin Laird and former U.S. senator from Illinois, Adlai Stevenson III. Among its approximately 50 members were the then chairmen of the two major political parties and their immediate predecessors. The report's recommendations overlapped at certain points with the recommendations of the Hunt Commission; the two Commissions had some modest influence on national party decisions, especially by the Democratic National Committee. (For example, the DNC decided to increase the number of elected officials at national conventions and urged a narrowing of the time frame for primaries and party caucuses.) One member predicted that the Commission would have "a long afterlife" because it focused on perennial problems in the nominating process.

The third Miller Center Commission, co-chaired by former Secretaries of State William P. Rogers and Cyrus R. Vance analyzed presidential transitions and foreign policy. Its members included three past secretaries of state and three former secretaries of defense as well as key participants on both sides of each postwar presidential transition beginning with the transition from Truman to Eisenhower. The Commission's mandate foreshadowed some of the issues with which the fourth Commission on presidential disability has grappled.

The history of the fourth Commission reflects a convergence of factors that made its creation possible. First, the two principal authors of the 25th Amendment, former Eisenhower Attorney General Herbert Brownell and former U.S. Senator from Indiana Birch Bayh, accepted invitations to serve as co-chairmen. Second, the leaders of important national organizations such as the League of Women Voters, the American Bar Association, and the American Medical Association were available to participate and to assist in the dissemination of the report to concerned bodies of the citizenry. Third, respected former congressmen, senators, a former presidential counsel, and the recently retired chief justice joined the group. Fourth, staff at the University of Virginia, most notably Dr. Kenneth Crispell, former vice president for Health Affairs at the University of Virginia, had done significant research on presidential illness. Fifth, the W. Alton Jones Foundation provided generous funding to enable the Miller Center to proceed with the project. This support was crucial to our undertaking the project. Taken together these five factors made it possible to launch the Commission and conduct successful meetings in Washington, D.C.

Since 1985, the Commission has held approximately six working sessions. Staff work has been carried on at the Miller Center. Professor Paul Stephan of the University of Virginia Law School played a leading role in the Commission's necessary legal research, and his colleague Professor Daniel Meador offered helpful suggestions. Six excellent presentations at the Miller Center by Dr. Crispell, Dr. Knight Aldrich, Dr. Norman Knorr, Professor James Childress, Dr. Leonard Emmerglick, and Professor Paul Stephan supplement the work of the Commission and will be published in a forthcoming volume of working papers.

The main draftsman of the report is Chalmers M. Roberts, former political and diplomatic reporter for *The Washington Post*. His mastery of the subject matter and of clear and concise literary expression have resulted, in his words, in "turning legalese into journalese." The Commission is most grateful for his dedicated and informed research and writing through the summer of 1987, and respectfully dedicates the report to him. I should acknowledge the appreciation expressed by the Commission to the Miller Center and myself for organizing and coordinating this effort. I would in turn thank them for their dedication, informed judgment, and unquestioned intelligence on complex medical and political issues.

Five staff members deserve special mention. Anne Hobbs typed the original transcripts of all Commission meetings. Pat Dunn edited and made corrections in all Commission meeting transcripts and papers for the volume of special presentations. Shirley Kohut prepared the papers for the volume of special presentations and typed and made corrections in various versions of the final report. She has been tireless in assisting in the work of four National Commissions. Reed Davis attended every working session but one and was responsible for the efficient conduct of Commission meetings. Peter Tester attended the final session and joined in the editing of the report. Finally, Nancy Lawson helped with supplementary typing and editing where most needed.

Kenneth W. Thompson, Director
White Burkett Miller Center of Public Affairs

Twenty-Fifth Amendment

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 principle 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.

Note: Ratification completed February 10, 1967.

REPORT OF THE COMMISSION ON PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT

Introduction

Not until the ratification of the 25th Amendment to the Constitution on February 10, 1967, was the president, when he believed he was unable to discharge the duties of his office, authorized to make a temporary transfer of his powers and duties to the vice president. Set forth for the first time was the mechanism for the vice president and a majority of the Cabinet, on their own initiative, to make this determination, with the vice president immediately thereafter assuming the powers and duties as acting president. If the president challenges this unilateral action, however, he will prevail unless two-thirds of both houses of Congress confirm his inability to govern. This Commission believes that, under most circumstances, the 25th Amendment is clear, simple, and easily implemented. Some of the Amendment's provisions, however, are designed to respond to extremely complicated circumstances and could prove more difficult to implement. Hence the Commission strongly urges providing a guide for future applications of the 25th Amendment, whether conditions be of a crisis nature or of a lesser nature—a guide intended to assure prompt application in a manner faithful both to the spirit of the Constitution and to the intent of the framers of this Amendment.

Above all, the Commission believes this is a time to "seize the moment." In 1988, Americans will choose a new president who will be inaugurated barely ten weeks later. During that critical and often frenetic transition period, many policy and personnel problems must be resolved. Along with them, the potential problems of presidential disability and the use of this Amendment must be discussed and, as far as is humanly possible, agreed upon through contingency planning by the new president, vice president, presidential physician, and White House chief of staff. In all of this, there surely will be a role for the president's spouse. Most emphatically, this must be done not after inauguration but before.

Why the urgency? One example should suffice. Consider the testimony of Dr. Daniel Ruge who was President Reagan's physician on March 31, 1981, less than three months after his inauguration when a would-be assassin seriously wounded the chief executive. Dr. Ruge was in the entourage that rushed Reagan to the hospital. When the Commission asked about the possible use of the 25th Amendment, he responded:

It was discussed. There is a big difference between Dan Ruge on March 30, 1981, after a shooting when he'd only been on the job two months for one thing, and what Dan Ruge would have been like four years later [at the time of Reagan's colon cancer operation] when he would have actually had time from April 1981 to July 1985 to think about it. I think very honestly in 1981, because of the speed of everything and the fact that we had a very sick president, that the 25th Amendment would never have entered my mind even though I probably had it in my little black bag. I carried it with me. The 25th Amendment never occurred to me.

Q: You think it would have occurred to you if the shooting had happened four years later?

Dr. Ruge: Yes.

Later, Dr. Ruge was asked if he thought the president could have signed a letter [making the vice president the acting president] after he got to the hospital and was in the operating room. Dr. Ruge replied, “Yes, he could have signed anything up until the time he went under anesthesia.”

Clearly, there must be much greater public recognition that presidents, like the rest of us, are subject to periodic illnesses and disabilities and that the 25th Amendment, among other things, offers excellent standard operating procedures for times of temporary presidential disability, a simple method to get through such contingencies without government disruption or public alarm.

The Commission has been impressed by what it has learned of the advances and complexities of modern medicine, in part from our discussions with two former presidential physicians who cared for five presidents. It is now obvious that the presidential physician can, and must, play an increased role. We view it as a dual role: first, the physician must uphold his role in the traditional, confidential doctor-patient relationship; second, and equally important in the uniquely presidential case, the physician must act as a representative, in strictly non-political terms, of the interests of the nation which elected the president. (This is discussed in greater detail in Appendix A.)

This report addresses and gives recommendations about this dual role, as well as other aspects that are part of the history and potential of the 25th Amendment. It particularly focuses on the often shadowy area of judgments about disability, including potentially long-term and chronic disability, and offers specific recommendations.

Eight of the 35 men who have occupied the White House have died in office, four of them victims of assassins. Several have had serious illnesses, some of which at the time were hidden from those who should have been told, as well as from the public. We must be better prepared to cope with the frailties of man in this nuclear age. The national interest demands it; the 25th Amendment can help. We hope this report contributes to knowledge for decision making.

The 25th Amendment now has been embedded in the Constitution for more than 20 years. The Commission does not recommend any further constitutional changes at this time, but it does point to some legislation it feels Congress and the president should consider in order to bring current law into better harmony with the 25th Amendment and its intentions. Some sections of the 25th (1 and 2) have already come into play with no resulting problem, though a potential problem is commented upon later in this report. The other sections (3 and 4), on which the bulk of this report centers, are designed to apply to complicated factual situations and are dependent to a great extent upon the circumstances which exist at the time of implementation. Thus, scenarios for endless mischief have been constructed and widely printed as both fact and fiction—horror stories of what the 25th Amendment might produce.

In describing the 25th Amendment, Congress considered a number of grave scenarios. It concluded that the final language of the Amendment allowed the fewest misinterpretations. Further, it concluded that each effort to shore up potential weaknesses only made matters worse.

Because the 25th Amendment deals with unpredictable human frailties, it is not perfect. In fact, there are no perfect solutions under such circumstances.

However, it is the Commission's opinion that, rather than amend the Constitution in an attempt to deal with such scenarios of presidential disability, political reality requires that the people of this nation make the most of what the 25th Amendment encompasses. Given that fact, the Commission offers analyses and suggestions, especially for the incoming chief executive, his vice president, his aides and assistants, as well as for the Congress and the public.

Throughout, the Commission has assumed that stability in time of crisis, or during any departure from the norm, depends on the good judgment and the good sense of both our leaders and

our citizens, regardless of their political associations. As the late Senate Republican Leader Everett M. Dirksen put it during the deliberations about the 25th Amendment, "We must assume that, when confronted with monumental national crisis, when subjected to the white heat of political scrutiny, those charged with responsibility will do what is in the public interest."

The subject matter of this Commission overlaps at important points with that of the Miller Center Commission on Presidential Transitions and Foreign Policy, co-chaired by former Secretaries of State William P. Rogers and Cyrus R. Vance. The present Commission recommends closely reading the two reports as they interrelate with one another.

The 25th Amendment

Section 1

Section 1 simply provides that in case of "the removal of the President from office or of his death or resignation, the Vice President shall become President." The basic language of this section is derived from Article II, Section 1, Clause 5 of the Constitution. Suffice it to say of Section 1 that "death" and "resignation" are such finite acts that Section 1 has presented no problems historically, since John Tyler, the first vice president to succeed a president, simply took the prescribed oath and proclaimed himself to be president, not acting president, after William Henry Harrison's death. This precedent has since been followed in seven cases and has effectively answered the early constitutional question of whether the new occupant should be acting president or president.

Section 2

Section 2, like Section 1, relates to Article II, Section 1, Clause 5 of the Constitution, but fills a major void—that is, what should be done when there is no sitting vice president. In the case of a vacancy, Section 2 provides for presidential nomination of a vice president, subject to congressional confirmation. This procedure now has been used twice. Following the resignation of Spiro T. Agnew, President Nixon nominated Representative Gerald Ford on October 12, 1973. On August 20, 1974, only 10 months after becoming president, Ford nominated former New York Governor Nelson A. Rockefeller to be vice president.

These developments—and they were not unanticipated—gave the United States its first unelected president. However, these transfers of power were not executed as immediately and clearly as were the cases which fell under the jurisdiction of Section 1 of the Amendment. This is because Section 2 provides no time limits for presidential nomination or congressional debate and approval (by majority vote of both House and Senate) of a vice president. In the first case, Ford was confirmed as vice president 54 days after Nixon nominated him. In the second case, it took Congress 121 days to confirm Rockefeller as vice president. There were also time lapses between the actual vacancies and the initial nominations. Nixon didn't even nominate Ford until three days after Agnew resigned, and it took Ford 11 days after the vice presidency became vacant to nominate Rockefeller.

Of course, there were good and, at the time, sufficient political if not public policy reasons for all these time periods. Still, one can conjure up possibilities of a presidential and vice presidential vacancy that the 25th Amendment does not address. For example, both the president and vice president could die in a common tragedy. In this event the Presidential Succession Act of 1947 would come into play because both the presidency and vice presidency would be vacant (Appendix B). Some of this act's provisions are now in conflict with the superseding 25th Amendment and should be altered by Congress.

Section 3

Section 3 was a great leap forward into the unknown. It was an effort to instill a method of continuity in the presidency. In the Commission's view, it has been used only once: during Reagan's hospitalization for colon cancer surgery. On July 13, 1985 Reagan signed a letter in which he specifically stated that he was "mindful of the provisions of Section 3." However, he did "not believe that the drafters of this Amendment intended its application to situations such as the instant one." He went on to say, "Nevertheless, consistent with my long-standing arrangement with Vice President George Bush, and not intending to set a precedent binding anyone privileged to hold this Office in the future," he was passing to the vice president his "powers and duties . . . commencing with the administration of anesthesia to me in this instance." The president concluded by saying he would advise the Senate's president pro tempore and the Speaker of the House (to whom the letter was addressed, under the terms of Section 3) "when I determine that I am able to resume the discharge of the constitutional powers and duties of this Office."

Fred F. Fielding, then counsel to President Reagan, in his testimony to the Commission said,

Let's go back to the week before the operation. We knew—some of us knew—and I forget when it became public, that the President was going to have his physical. We knew at the time that he was going to have a form of anesthesia, to have the procedure that occurred on Friday, if I recall my dates correctly. He was operated on on Saturday, got a procedure on Friday. What was going to happen was that there was a possibility that if something was found that they would have to instantly put the President under. I used that as an opportunity the preceding week to schedule a meeting with the President and the Vice President and Don Regan (then chief of staff). We sat in the Oval Office and we discussed the whole situation: the National Command Authority plus the President's desires on passage of power temporarily if he were suddenly temporarily incapacitated....

The decision was obvious that unless something unexpected occurred on Friday there would be no need for the 25th Amendment in any way, shape or form. But Don Regan called me down late afternoon on that Friday and said, "We've got some problems with the health exam." And we went through the whole drill—if you will—of what is to be done and where is the Vice President, and what is the press to be advised of and what is not to be told, and the normal procedures that you go through. One of the subjects obviously was the 25th Amendment. I can tell you, and I think it is important for the sake of history, that when we left, no decision of a recommendation to the President had been made although we knew the procedures. I drafted basically two letters: one was a little flushing out of the letter that was already in the book¹, and the other was basically the letter the President actually signed.

The Commission believes that any president receiving anesthesia should use Section 3 of the 25th Amendment. The Commission believes that this mechanism should be made part of a routine course of action so that its invocation carries no implications of instability or crisis. Each president will have to make the decision and circumstances will be different. However, the Commission believes that use rather than non-use will create the sense of routine.

Section 3 creates a simple and relatively straightforward way for the president to provide for situations in which he suffers from a temporary inability to carry out the duties of office. The key aspects of this procedure are the president determining that he will be temporarily unable to perform his duties, communicating this decision to the Speaker of the House and the president pro tempore

of the Senate, and subsequently communicating that his inability has ended. In cases where the president knows in advance that he will enter into a period of inability, this mechanism permits a smooth transition of power under the president's ultimate control.

It should be possible to identify in advance a fairly wide range of circumstances where the president should almost automatically invoke Section 3. One situation involves elective surgery where general anesthesia, narcotics, or other drugs that alter cerebral function will be used. A similar case involves a debilitating disease or physical malfunction. Because anyone under anesthesia is unable to function both during the period of unconsciousness and afterwards while disoriented, presidents should accept the inevitability of temporarily transferring power to the vice president beyond the immediate hours in the operating room, or even in the hospital—perhaps 24 or 48 hours. It would be wise for a president to state this publicly so that the nation and the world are reassured, and to settle White House officials' fears of losing power.

In short, let the president wave from his window to show he is up and around but convalescing while the vice president, as acting president under Section 3, takes care of the day-to-day business. As Herbert Brownell has noted, there is a substantial difference between the president being able to wave to the crowd from a hospital window and being able to govern.

The president is the only person with the power and prerogative to invoke or not invoke Section 3. Thus far the question of using Section 3 has been raised two times due to presidential illness. The Commission was told that the "non-use" of Section 3 was determined by the White House staff after the attempted assassination of Reagan, and by Reagan and the White House staff prior to his cancer surgery. The White House physician was not consulted by the White House staff before the emergency surgery following the attempted assassination, although he was inside the hospital. Prior to the cancer surgery, the White House staff received inadequate medical information or chose to ignore the information it did receive.

The Commission re-emphasizes that during the transition period between electing and inaugurating a new president, the vice president, presidential physician, and chief of staff should consider what to do in medical contingencies. The Commission recommends written guidelines if possible, agreed upon in advance,² under which Section 3 could or would be invoked for three levels of medical conditions: an emergency, planned procedure, or treatment for a chronic ailment. Most certainly, it should be invoked for any surgical procedure involving anesthesia, narcotics, or other drugs which alter cerebral function. In judging the president's ability to resume the powers and duties of office, anything that impairs mental capacities must be considered.

The presidential physician's advice is especially important because the president may otherwise not appreciate the extent to which particular medical situations may compromise his ability to function. As part of the periodic review of the president's health, he and his physician should consider whether any new situations should be added to the list of contingencies that may involve disability.

In cases of elective surgery and similar circumstances, the president will have no difficulty invoking Section 3. Situations may arise, however, where an unanticipated medical crisis places the president in a position where he, his vice president, chief of staff, and physician had previously agreed to rely on Section 3. President Reagan's surgery following the assassination attempt is just such a case. The president-elect, his vice president, chief of staff, and physician should, at the earliest possible date, try to design special rules to cover such a crisis.

One possibility would be for the president-elect to prepare an appropriate letter for invoking Section 3. He could leave the letter unsigned and undated, but under agreed-upon conditions, such

as an imminent general anesthesia or an injury resulting in impending shock or loss of consciousness, Secret Service personnel or others accompanying the president (as could well have been the case with Dr. Ruge, already discussed) could produce the letter for his signature. This plan of action could be used, of course, only in cases where the president remained conscious and competent at the time he signed the letter. Although this prospect of shifting presidential power under emergency conditions might strike some as unsettling, the Commission believes that such a formula is preferable to putting the vice president and the Cabinet to the choice of invoking Section 4 or leaving the office of the president effectively unoccupied.

The Commission recognizes that a president facing a "grey area" medical situation—a case where his inability is likely to be transitory—may prefer to do nothing on the assumption that any transfer of power can erode the appearance of his authority even where it does not affect its actual exercise. In many cases, however, a wait-and-see attitude carries unacceptable risks. Even the most straightforward medical procedure, if conducted under general anesthesia, can lead to complications. The patient can suddenly stop breathing or experience cardiac arrest, either in response to the surgery or to the anesthesia. The patient may simply remain unconscious much longer than anticipated, or remain confused after regaining consciousness. The Commission is concerned that instances have occurred where officials in an administration have overestimated the president's ability to perform his duties without the proper interval following anesthesia.

Rather than run the risk of leaving a power vacuum, the Commission recommends that in borderline cases the president take the precaution of using Section 3 and designate the vice president as acting president. Once the public comes to accept this course as a normal way of doing business, the perception problem will disappear. By showing strong leadership regarding Section 3, a president could increase his stature in history as well as aid his successors in office. We believe that the president can count on the good sense and good judgment of the American people, the Congress, and his immediate colleagues in such situations.

The Commission has heard four reasons for not invoking Section 3. The first is that a president who invokes its provisions would set a precedent for future presidents. (This was the case in Reagan's letter of July 13, 1985.) The second is that invoking it would contribute to a crisis atmosphere that might alarm friends and allies abroad, mislead our adversaries, and cause serious reactions in the financial community, even a stock market crash. The third is that the casual use of Section 3 might tempt the vice president or others to undertake a coup by employing Section 4 to seize presidential powers. The fourth reason is skepticism in political circles over whether medical information is or can be precise enough to determine with any degree of certainty the disability of the president.

The Commission examined and rejected every argument. First, Section 3 allows each president to determine whether or not to invoke it. Its use is strictly voluntary. Second, the risk of a crisis atmosphere is proportionate to the degree to which a natural and orderly routine for the transfer of power is institutionalized, that is, widely understood and generally accepted by the public. Thus, the more the provision is used by succeeding presidents, the more routine it becomes and the less sense of crisis there will be at home and abroad. Third, the vice president's fear of a coup is based on a false analogy with other political systems. Historically, the defects of the American vice presidency have not included the temptation to seize power, but the refusal to accept the power inherent in the office. Examples are Vice President Chester Arthur during President James Garfield's long illness after an assassin shot him, and Vice President Thomas Marshall during President Woodrow Wilson's grave illness. After President Eisenhower's 1955 heart attack, Vice President

Nixon scrupulously avoided any act not clearly authorized by the president. In Nixon's case, and ever since, the tempo of modern communications has assured wide and swift public disclosure of the least sign of a "power grab." Fourth, modern communications technology and the media habits that have grown with it make it far less likely that a president's physicians could successfully hide illnesses, as was true in varying degrees during the presidencies of Grover Cleveland, Woodrow Wilson, Franklin D. Roosevelt and John F. Kennedy. For example, Eisenhower and Reagan, two presidents who suffered a number of illnesses while in office, kept the public pretty well-informed, either voluntarily or due to media pressure. This is not to say that the public no longer suspects medical cover-ups, but it surely lessens their suspicion. Furthermore, the Commission has been repeatedly told that, as the public better understands the uses and reach of modern medicine, including anesthesia, a cover-up carries political as well as physical risks to those who would opt for it.

One issue the Commission considered is the advisability of the president's and vice president's written agreements by which the president would in effect delegate his Section 3 authority under certain specified circumstances. Through such an agreement the president would declare his intent that if a particular situation arose, resulting in him being incapable of determining his ability to function, the vice president would have the authority to inform the Speaker of the House and the president pro tempore of the Senate that an inability existed and that he would serve as acting president until the president recovered. Before the adoption of the 25th Amendment, similar agreements existed between Presidents Eisenhower, Kennedy, and Johnson and their respective vice presidents, although no occasion arose to test their efficacy or validity.

Whatever the constitutional status of those agreements that antedate the 25th Amendment, the Commission believes that such delegations no longer are appropriate. The Commission regards the constitutionality of such agreements as an open question since there is no definitive authority on the point. However, it seems likely that such an agreement would be inconsistent with the 25th Amendment. One could assert that the expressed authority of Section 3 carries with it implicit power to anticipate in advance when that power will be exercised. More persuasive to the Commission is the argument that Section 4 provides the exclusive means for determining a presidential inability once the president loses the capacity to make that determination for himself. When the Constitution so clearly and directly addresses an issue—here, the mechanism for temporary transfers of power from the president to the vice president—efforts to find alternative, implicit resolutions seem forced.

Because the principal purpose of the 25th Amendment is to resolve all doubts over the status of the chief executive during periods of crisis or uncertainty, the Commission considers it unwise and contrary to the Amendment's spirit to rely on a method not clearly contemplated by the Amendment. In coming to this conclusion, the Commission of course offers no judgment on the binding effects of such agreements during the period before adoption of the 25th Amendment. The history of the Amendment indicates that its framers intended to create a mechanism that would supersede those prior strategies, and that they did not intend either to repudiate or merely to supplement the earlier arrangements.

In short, Section 3 creates a constitutional mechanism within the 25th Amendment for a president to say, in effect, that "I am unable to serve temporarily. Rather than resign the office, I will temporarily remove myself and have the vice president serve as acting president. When I am able again to serve I will reclaim the presidency." This is the pattern Reagan followed in July 1985 during his surgery, despite the disclaimer in his letter. He and his associates clearly intended to invoke Section 3, as his then counsel Fred Fielding testified to this Commission. The disclaimer was simply a device to get Reagan to consider Section 3; and it worked.

Section 4

Section 4 is the most tantalizing and, so far, the only unused provision of the 25th Amendment. It deals with a crisis which our nation has never directly confronted. In retrospect, it probably could have applied to the final periods of Woodrow Wilson's or Franklin D. Roosevelt's presidencies.

This provision involves a sick president who either refuses or is unable to confront his disability. Put another way, this section basically applies to a president who is disabled but unwilling to step aside. He or she may be stubborn, or be in the hands of a powerful staff or of a strong-willed spouse, the latter being Wilson's case. In that case, the presidential physician was Mrs. Wilson's witting accomplice.

Before the 25th Amendment, there was no mechanism other than impeachment for dealing with an unfit president who would not resign, or who was not mentally capable of resigning his office. Impeachment, however, was designed to deal with high crimes and misdemeanors, not health problems. Section 4 has inspired much criticism because it opens a window for new and troubling scenarios. The effect of modern medicine on human life certainly has increased the imaginable scenarios. For these reasons, before approving Section 4, Congress deliberated at great length in order to erect a large enough constitutional tent (with plenty of room inside) to accommodate all possible cases, whether foreseen, completely unforeseen, or imagined.

It is essential, too, in assessing this section's potential use, to remember that no mechanical or procedural solution would be fail-safe unless the public possesses, at such a time of crisis, a certain sense of "constitutional morality." Or, as another observer has put it, "the Amendment is only technically self-executing. Nonetheless, it contains all that a constitutional device should: a set of presumptions about the process of exercising power and an implicit expectation that it will be applied in a mood of restraint."³

Section 4 has two paragraphs. The first paragraph allows the vice president and a majority of either the Cabinet or of "such other body as Congress may by law provide," to declare the president "unable to discharge the powers and duties of his office," and transfer his powers to the vice president, who thus would serve as acting president.

The second paragraph of Section 4 responds to a possible scenario in which the president, whether having voluntarily transferred his powers to the vice president or having had his powers transferred from him by the vice president and a majority of either the Cabinet or of "such other body as Congress may by law provide," seeks to resume "the powers and duties of his office" against the aforementioned party's determination. If this scenario should occur, the second paragraph of Section 4 allows the vice president and a majority of either the Cabinet or of "such other body as Congress may by law provide," to prevent the president from resuming office. To do so, they must "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" by a two-thirds vote.

As the language infers, Section 4 gives Congress the authority to create some other "body" to substitute for the Cabinet. This authority is given because, while Cabinet members are apt to be loyal to the administration and have firsthand awareness of the president's condition, they are also likely to be overly reluctant to acknowledge publicly that the president has any deficiencies. In other words, the Cabinet's lack of detached objectivity and its unwillingness to act on this question are plausible. Therefore, the argument goes, the public interest requires that the question of the president's ability to perform the duties of his office be evaluated by a group able to view the question in a less interested manner.

The realities of American politics and public opinion, and that sense of “constitutional morality,” which is essential in a time of national crisis, are the only limitations on who would serve in such a Congressionally appointed “body.” However, if “such other body” were established, a majority of its members would need to take the initiative or concur with the vice president to temporarily transfer the president’s powers and duties to the vice president. The Cabinet would play no role in this process if Congress were to enact a statute creating “such other body.” Thus Congress has the power to decide whether the Cabinet is the best decision-making group to determine presidential inability.

Various groups, other than the Cabinet, were suggested during the hearings leading up to the formulation of the 25th Amendment, and they continue to be suggested. Suggestions for the “other body” include, for example, a group composed of the chief justice, the Speaker of the House, the president pro tempore of the Senate, and the minority leaders of both houses of Congress. Another suggestion is that this “other body” be composed of medical doctors, either appointed for terms or designated by office, such as the surgeon general.

The Commission has considered whether to propose that Congress exercise its power under Section 4 to create a body other than the Cabinet to determine presidential inability. The Commission has reviewed the various arguments and proposals made in the hearings leading up to the framing of the Amendment, as well as current proposals, and has concluded not to recommend creating some other statutory body. The Commission recognizes that, although the Cabinet suffers from the defects mentioned above and may not be an ideal group, it is unlikely that any other body would be free of difficulties or receive as much political acceptance. Whatever group is employed, they should consult with the White House physician, who should solicit help and assistance from outside medical specialists.

Even if Congress does not create a permanent body of this sort, this provision in Section 4 is salutary in that it gives Congress power to act if, in a particular situation, the Cabinet fails to act when it is clear that the president is unable to carry out his duties. Congress could create another body to take action in that special situation. Such congressional action would be subject to presidential veto as any other legislation, and a veto could be overridden by a two-thirds vote of both houses. Such a body would be temporary and created to deal specifically with one assignment, leaving the Cabinet in place to address situations thereafter.

The Commission strongly believes that the chief justice and other members of the Supreme Court should have no role in any such body or in any other fashion under the terms of the 25th Amendment. The late Chief Justice Earl Warren advised strongly against any such role during deliberations in Congress on the Amendment, and former Chief Justice Warren Burger took the same position in speaking to the Commission. The Commission considers it essential to keep the judicial role separate lest, in a situation perhaps now unimaginable, the Supreme Court might be called to rule on some application of the 25th Amendment. Historically, it is worth recalling the presidential election crisis of 1876, in which only two days before inauguration day Rutherford B. Hayes prevailed over Samuel J. Tilden, and then only by the vote of a congressionally-appointed electoral commission of seven Republicans, seven Democrats, and one “independent”—five of whom were senators, five representatives, and five justices of the Supreme Court. Congress selected four of the justices who, in turn, selected the fifth. This fifth justice, Joseph P. Bradley, cast the deciding vote in the 8-to-7 ruling. It is true that concurrent political bargaining over the underlying post-Civil War issues provided the essential resolution of the crisis, but the Court was misused in the role it played.

The Cabinet or “other body” notwithstanding, the essential person in any application of the

25th Amendment's fourth Section is the vice president. However, if the president objects, the vice president cannot become acting president unless he affirmatively joins the Cabinet or "other body" in declaring a transfer of power. If the president, despite the vice president's action taken jointly with a majority of the Cabinet or "other body," declares that "no inability" exists and therefore reclaims the presidency, Congress becomes the referee. A two-thirds vote of both the Senate and the House would be required to uphold the vice presidential claim in the face of an objecting president.

Any Section 4 action would place a vice president on the hottest of political hot seats, especially if there were to be any public doubt about the president's condition. The history of the vice presidency, with its limited constitutionally prescribed role, has not been a happy one. In one of John Nance Garner's more polite descriptions of this post, which he occupied for eight years, he called the vice presidency "a spare tire on the automobile of government." Now the 25th Amendment's Section 4 places the major and most positive burden on the vice president if the president is ever removed from office. A vice president is likely to be apprehensive about the appearance of disloyalty or of self-aggrandizement. Thus, despite knowing the president's true condition, the vice president might appear ambivalent. The Commission believes that it makes good political and common sense to try to relieve the vice president the ambivalence that results from having to initiate the process leading to his or her own self-promotion to the highest office in the land. Although it is clear that Section 4 provides an equal role for the vice president and the Cabinet or such other body, it is also true that, to the extent the Cabinet or other body is willing to play an active and visible role in the Section 4 process, the vice president is placed in a less difficult position.

Given current medical knowledge about psychiatric and physical illnesses, the disabilities of older persons, and the progressive impairment of mental functions including the so-far irreversible disease known as Alzheimer's, the scenarios to which Section 4 might apply can only be imagined. The Commission discussed such problem areas with both the former presidential physicians and other medical authorities. Knowledge has only reinforced the Commission's doubts that any new law, or even constitutional amendment can adequately provide for the future. But some established regime might help, especially one involving the presidential physician.

It is obvious that the presidential physician would be a critical person should Section 4 ever have to be considered. A vice president and Cabinet, or "other body," would be highly dependent on medical advice in reaching what would be, nonetheless, a political decision. (Appendix A details the Commission's view of the role of the presidential physician and what can, and should, be done now to enhance his standing.)

Other persons should also be considered, notably the president's spouse and the White House chief of staff and entourage.

Thus far many presidential spouses have been apolitical, several politically influential, and some powerful in terms, as they have seen it, of protecting their husband's health and political fortunes. Sometimes this has led to hiding presidential illnesses, the most obvious 20th century case being that of Edith Bolling Wilson during her husband's final years of semi-invalidism in the White House after suffering successive strokes. The presidential physician colluded with Mrs. Wilson to hide the truth from almost everyone.

Of course, voters do not elect presidential spouses, but first ladies have historically had differing roles and, in recent years, their own staff and offices. The Commission cannot and does not suggest any set of rules or codes of conduct for future presidential spouses, but it does strongly recommend that each spouse be brought into the preparatory transition discussions, already noted, on the possible applications of the 25th Amendment. It is essential that spouses, like the other key

personnel around the president, be mentally prepared for what could occur, and unfortunately so often has occurred, and that they be familiar with the Amendment's provisions. The vice president's spouse should also know about the 25th Amendment and its potential applications.

The presidential chief of staff, a post that President Eisenhower established in the White House after his years of commanding allied forces in Europe during World War II, has become a critical cog in the executive branch. In recent years, it has proved more important in certain respects than even the more senior of the Cabinet departments, including State and Defense.

When Reagan was shot and rushed into surgery, the Commission has been told, White House staff members made the decision not to put the Section 3 option before him. Regarding his colon cancer surgery, Reagan decided not to officially invoke Section 3, but to use its form nonetheless. Key White House staff members delineated his options.

The White House staff plays an important role in assessing presidential disability. Key staff members and, in particular, the chief of staff and immediate associates are in continuous contact with the president. They consider themselves uniquely qualified to judge the president's capacity for exercising his powers and duties. They are conscious of their prerogatives, fearful of threats to the president's authority, and cognizant of the high stakes of political power. The White House staff has the most to lose if and when the president relinquishes his powers. Particularly in some presidencies, the staff carries major responsibilities for the details of administering and managing the presidency. Top staffers are likely to worry that the vice president, in the role of acting president, is less likely than they are to know and carry out the president's wishes. The worst fate of all, in the White House staff's view, would be for the acting president to bring in assistants from the vice presidential staff.

When a president cannot perform the duties of office, the nation and the government, if it lacks an acting president, may incur no serious difficulty for some time, especially if the president's incapacity escapes public attention. The staff can always appear to act for the president except to sign or veto bills passed by Congress, submit nominations for Senate consideration or fill interim vacancies, grant pardons, make treaties, or serve as commander in chief of the armed forces. However, a president in office should not encourage staff assistants ever to believe they can function without a president who, with full consciousness, bears responsibility for their actions. Otherwise, when a president's hidden incapacity is revealed, as inevitably happens, the decisions and policies which had been attributed to the ailing president become suspect and the president's standing is shaken. Whenever an administration practices deceit of any kind, the office of the president loses stature and respect.

The office's unremitting responsibilities accompany the president wherever he goes. In these times, a president is never away from means of instant communication with any department of the United States government and with almost any foreign government. Always within reach is the "football," containing secret codes that enable the president to signal this country's immediate response if ever it should face a nuclear attack. Even while asleep, a president is always on call, and his aides will rightfully be criticized if, upon learning of a major calamity or an alarming threat to the nation, they do not inform the president immediately.

The office's worldwide prestige has given rise to extraordinary public expectations about the American president's ability to cope with a sudden national emergency or world crisis. Preserving the American public's respect for the capacity and dependability of the American presidency is an important reason for not deliberately permitting an official hiatus. On the other hand, if the president becomes unconscious or otherwise disabled, and the vice president is not duly authorized to act, and no person with the president's authority and power is present and capable of acting, then the

importance and value of the presidency would be debased. Not having a leader during a national emergency or world crisis would exacerbate the problem. Such considerations ought to convince every responsible presidential aide that, whenever or however a situation arises for applying the 25th Amendment, he or she must not withhold information about the president's health or otherwise discourage using this constitutional remedy for a presidential illness. In addition, the American people must understand that their presidents, whoever they may be, are not superhuman. They are human beings subjected to enormous pressures and responsibilities and, like the average citizen, they may face disabling infirmities. The Commission believes that the 25th Amendment provides the nation the means of insuring that the powers and duties of the presidency are always in the hands of someone able to perform them. The Commission believes that this Amendment must be utilized whenever necessary as a normal ingredient in the governmental process.

Commission Co-Chairmen

The Honorable Herbert Brownell
The Honorable Birch E. Bayh, Jr.

Commission Vice Chairman

The Honorable Mortimer M. Caplin

Commission Members

The Honorable Philip W. Buchen
Chief Justice Warren E. Burger
The Honorable M. Caldwell Butler
Carolyn K. Davis
Nancy M. Neuman
Karen O'Neil
Chalmers M. Roberts
Dr. M. Roy Schwarz
W. Reece Smith, Jr.
The Honorable William B. Spong, Jr.

Appendix A

The President's Physician

In the 1981 Congressional Directory, the first issued during the Reagan administration, the staff listing for the Executive Office of the President (that is, the White House office) contained 55 names. It began with the counselor to the president, the chief of staff, his deputy, a raft of varied assistants to the president, then deputy assistants and special assistants. The last name on the list was the chief usher; the name just before his—54th of 55—was that of the physician to the president, preceded by the curator of White House artifacts.

This Commission has been shocked at the low rank and, sometimes, the seemingly low esteem accorded to the physician—and not just in the current administration.

Dr. Ruge, Reagan's first White House physician, told this Commission that "despite its glamorous name, the office of the White House physician is somewhat blue collar."

But it is far easier to say the physician's job should be upgraded than to suggest how to do it. Among other eminent and knowledgeable figures in both medicine and the structure and workings of the White House office, this Commission has talked with Dr. William Lukash, who served Presidents Johnson, Nixon, Ford, and Carter. It is apparent that each president has his own habits in his relation with his physician and that these have varied almost as greatly as have presidential foreign and domestic policies.

This leads us to conclude, first of all, that the president's physician must remain a person of the president's own choice, that he or she should not be subject to Senate confirmation or to approval by any other body, medical or otherwise. The president and his personal physician must have total mutual confidence and confidentiality, as a symbiotic relationship. But each of them must also realize that the physician has a dual obligation. As Dr. Lukash agreed, such physicians are "accepting a dual loyalty to their own patients but also to the public."

Further, it should be noted, the post of physician to the president has grown from a one-doctor role to what Dr. Lukash called providing "health care for the fifteen hundred constituents in the White House," with a second medical office in the adjoining Executive Office Building and "two assistant physicians to help with the traveling" groups that go with a chief executive, including the Secret Service, the press, the military, and those involved in communications.

Still, the 25th Amendment centers directly on the president and, under certain circumstances, the vice president. This is the role being considered in this appendix. All other medical functions are strictly secondary.

We must, and do, assume that any future presidential physician will not only be a skilled professional, but be highly knowledgeable of both the medical and political aspects of the 25th Amendment as well. He or she must consider that he or she, and all those physicians who assist from time to time, are responsible not only for the care of the chief executive but also for the "care of the country."

To be an effective personal physician, the time-honored concept of patient-doctor confidentiality must be maintained in broad terms. The physician must become acquainted with the vice president and have unquestioned access to the president.

The Commission suggests that a possible "code of conduct" for the president's physician should include:

a. From the beginning of his appointment, the physician must know the history, medical and political implications, and use of the 25th Amendment.

b. He or she should abide by the views of the American Medical Association Council on Medical Ethics regarding patient-doctor confidentiality and those instances when it can be abridged in the national or community interest. The Commission considered recommending a statute stating that the presidential physician had a positive duty to communicate details concerning the president's condition if it jeopardized the national interest, but concluded that such a statute was not necessary and probably would be self-defeating.

c. He or she should meet during the transition period with the president-elect regarding the potential use of the 25th Amendment's disability provisions. With the president-elect, the vice president-elect, and those who will become the president's chief of staff and legal counsel, the physician should undertake during the transition to establish, if possible, a written protocol regarding the use of these provisions.

d. He or she should possess the knowledge, humility, and expertise to obtain consultation to insure the best medical care for the president. Any presidential physician, if only because of his office, has easy access to any consultant or group of consultants that he wishes to have see the president to aid in treatment or to make the difficult decision of evaluating disability (the latter being the key issue to invoke or not invoke Section 4).

In order to reinforce the presidential physician's influence whenever the 25th Amendment might come into play, numerous persons have suggested in various studies that an independent board of physicians be created to examine the president's physical and mental health from time to time. The Commission and the medical advisory group to the Commission discussed this concept. The general conclusion was that, while such a board would officially "protect" the president's physician, it would prevent or hinder a real doctor-patient relationship between the president and his or her physician.

The political and world situation, the power of the White House staff and, most of all, the president's wishes will always determine when and how Section 3 will be used. We urge that, because of his or her unique status, the president's physician, with consultants if he or she desires, play a major role. The physician should help the president make the decision to invoke Section 3 and to reassume office if the Amendment is used.

Appendix B

Statutory Succession Laws

Act of July 18, 1947

(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

(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, postmaster general, secretary of the interior, secretary of agriculture, secretary of commerce, secretary of labor.*

(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.

(3) The taking of the oath of office by an individual specified in the list in paragraph (1) of this subsection shall be held to constitute his resignation from the office by virtue of the holding of which he qualifies to act as president.

(3) 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

***The position of postmaster general was abolished in 1970, and the secretaries of health, education and welfare, of housing and urban development, and of transportation have been added to the line of succession.

officers appointed, by and with the advice and consent of the Senate, prior to the time of 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.

Act of January 19, 1886

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in case of removal, death, resignation, or inability of both the president and vice president of the United States, the secretary of state, or if there be none, or in case of his removal, death, resignation, or inability, then the secretary of the treasury, or if there be none, or in case of his removal, death, resignation, or inability, then the secretary of War, or if there be none, or in case of his removal, death, resignation, or inability, then the attorney-general, or if there be none, or in the case of his removal, death, resignation, or inability then the postmaster general, or if there be none, or in case of his removal, death, resignation, or inability, then the secretary of the navy, or if there be none, or in case of his removal, death, resignation, or inability, then the secretary of the interior, shall act as president until the disability of the president or vice president is removed or a president shall be elected: *Provide,* That whenever the powers and duties of the office of president of the United States shall devolve upon any of the persons named herein, if Congress be not then in session, or if it would not meet in accordance with law within twenty days thereafter, it shall be the duty of the person upon whom said powers and duties shall devolve to issue a proclamation convening Congress in extraordinary session, giving twenty days' notice of the time of meeting.

Sec. 2. That the preceding section shall only be held to describe and apply to such officers as shall have been appointed by the advice and consent of the Senate to the offices therein named, and such as are eligible to the office of president under the Constitution, and not under impeachment by the House of Representatives of the United States at the time the powers and duties of the office shall devolve upon them respectively.

Sec. 3. That sections one hundred and forty-six, one hundred and forty-seven, one hundred and forty-eight, one hundred and forty-nine, and one hundred and fifty of the Revised Statutes are hereby repealed.

Act of March 1, 1792

Sec. 9. *And be it further enacted,* That in case of removal, death, resignation or inability both of the president and vice president of the United States, the president of the Senate pro tempore, and in case there shall be no president of the Senate [pro tempore], then the speaker of the House of Representatives, for the time being shall act as president of the United States until the disability be removed or a president shall be elected.

Sec. 10. *And be it further enacted,* That whenever the offices of president and vice president

shall both become vacant, the secretary of state shall forthwith cause a notification thereof to be made to the executive of every state, and shall also cause the same to be published in at least one of the newspapers printed in each state, specifying that electors of the president of the United States shall be appointed or chosen in the several states within thirty-four days preceding the first Wednesday in December then next ensuing: *Provided*, There shall be the space of two months between the date of such notification and the said first Wednesday in December, but if there shall not be the space of two months between the date of such notification and the first Wednesday in December; and if the term for which the president and vice president last in office were elected shall not expire on the third day of March next ensuing, then the secretary of state shall specify in the notification that the electors shall be appointed or chosen within thirty-four days preceding the first Wednesday in December in the year next ensuing, within which time the electors shall accordingly be appointed or chosen, and the electors shall meet and give their votes on the first Wednesday in December, and the proceedings and duties of the said electors and others shall be pursuant to the directions prescribed in this act.

Appendix C

Endnotes

1. At another point Fielding said to the Commission:

One of the things that I had my staff working on was a book, basically an emergency book. What do you do about X, Y, Z, events concerning the President's health? I state in all candor that [the book] was not completed on March 30. Early afternoon, and suddenly the President was shot and we all realized (a) it was an incident, (b) the President was shot, (c) it was very serious. The stories were many; we ultimately ended up in the basement room.

Everybody now is aware of the 25th Amendment. To be very frank with you, that day, when I mentioned the 25th Amendment I could see eyes glazing over in some parts of the Cabinet. They didn't even know about the 25th Amendment. It wasn't a full Cabinet meeting, it was whomever in the Cabinet could be notified, started drifting in and taking seats around the table.

The book is now finished. Whenever I would travel with the President there were two copies. I would always carry a copy with me of the book. There was always one back in my office in the safe. The book basically is every situation you can imagine that has occurred to the president or the vice president: it is, for that matter, [a collection of] scenarios. I did that because I knew that there was reluctance on the part of the President to activate the 25th Amendment for a "minor" procedure of short-term duration. . . .

I thought the President should have two options: one was very clear, that of exercise of the 25th Amendment; and the other was a piece that would accomplish the activation of the 25th Amendment, but was more consistent with what I perceived to be the President's concerns. His concern mainly was that he didn't want to set a precedent for future Presidents. But I can tell you in all candor there was no political reason why he didn't want to, which theoretically there could be as with someone who is having a power fight or whatever you would with their vice president.

Next morning I sat down with the chief of staff at the hospital and we discussed this. I showed him the two drafts, the normal draft and the optional draft, and I don't think Don's mind was made up at that point, until that point, to be very honest. I think his mind was still open about it. We discussed it and then we went in and discussed it with the President in the hospital room. And he made his decision, he signed the optional paper. As it turned out, the doctor had predicted three hours for the operation. He wanted to get a little head start so he started the anaesthesia earlier than he had told us he was going to start it because he wanted to give himself a little more time. So there probably was a period of time in there, although it was academic, a technical period of time when the President was out, and we had not called Vice President Bush.

Later that afternoon we asked to see the doctor (the operating surgeon, not the presidential physician). We explained to him the 25th Amendment, the implications of it. We explored it with him. I was asking questions about how you could know, what was the legitimate way to determine whether the President was capable, understanding, lucid, and that sort of thing. We hit upon several tests, one of which was that I said "I'm going to ask him to sign a letter. How about asking him to read the letter and understand it? Wouldn't that be evidence that he was lucid?" And he said, "Yep." We went in a little after seven to see him.

He was joking with the nurses when we walked in. We had a conversation with him; we discussed the transfer of power. I handed him the letter and he picked it up and literally started to read it and his eyes were shutting and opening, and it was obviously going like this, like he was turning his eyes. And I thought, uh oh, and Don Regan and I looked at each other and decided that maybe we were a little premature. Then the President reminded us that he didn't have his glasses and he didn't have his contacts on and he couldn't read it. It had nothing to do with his consciousness at all. We read the letter to him; we discussed it with him. Don said something, in effect, "Now that you know what we are up to, Mr. President, maybe we'll come back in a couple of hours and ask you to sign it," when at that point the President said, (this is not a full quote, but something to the effect) "Oh, heck no, I don't want you to wake me up later. I'll sign it now." So we decided he was lucid enough, certainly, to take it back.

My mind was that it should not be shorter than necessary or longer than required since this was the first exercise of the Amendment. I would have had no problem with going overnight with everything we knew and all the briefings that we had and all the strategic information we had. But in my mind, again, my own personal view was if you were comfortable with the President's condition, the sooner the better for any number of reasons. And certainly it was a very practical, political reason that the public out there needed reassurance the President was in fact really O.K., this wasn't a death-threatening situation, that he . . . had come through the procedure and was lucid enough to take back the problems.

The worst thing in the world would have been to have him transfer—and this was the other thing we talked about—the power to the vice president, take it back, and then later have to transfer it back again. So that was a factor in our thinking as well. We had to be reassured by the doctors that the probabilities of that to occur was low.

Our question was not “was the man in discomfort?” The question was whether he was lucid or whether he had the ability to carry on, not whether it was comfortable in the short term. When somebody asked whether the White House physician was in on the discussion, the answer was no. But I know that Don Regan talked to the doctor at that time and we had discussed the scenario with him the night before. It wasn't that the White House physician was excluded; it was that once we got into the surgery phase that we were dealing with the surgical team. (From Fred F. Fielding's testimony to the Commission on September 30, 1986.)

2. Logically, this would be an expanded version of the "emergency book" created by Fred Fielding in the early Reagan years. (See endnote above.)

3. Richard P. Longaker, “Presidential Continuity: the Twenty-fifth Amendment,” 13 *UCLA Law Review* 1966, p. 560, cited in the forthcoming *Hidden Illness in the White House*, by Kenneth R. Crispell, M.D. and Carlos F. Gomez, B.Sc. with C. Brian Kelly, p. 313.