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# The Twenty-Fifth Amendment: Law, History, and Recommendations for Reform

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**The Twenty-Fifth Amendment: Law, History, and Recommendations for Reform**

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**Table of Contents**

I. Constitutional and Statutory Succession Provisions.....1  
II. Presidential Succession Timeline: 1787-2018.....3  
III. Presidential Succession By the Numbers.....12  
IV. Reform Recommendations.....13

**I. Constitutional and Statutory Succession Provisions**

**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.

**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.

### **Presidential Succession Act of 1947, codified at 3 U.S.C. § 19**

- (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.
  - (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.
- (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.

## **II. Presidential Succession Timeline: 1787-2018**

### **1787: Constitution's Succession Clause Drafted**

The Succession Clause is drafted at the Constitutional Convention. It designates the vice president as successor when the president dies, resigns, is removed, or suffers an "inability." Significantly, the clause does not define inability or provide a way to declare its existence. The clause gives Congress authority to appoint presidential successors in the event of a dual vacancy or inability of the president and vice president.

### **1790: Washington's Bout with Pneumonia**

President George Washington is nearly killed by a case of pneumonia so severe that it impairs his hearing and vision.

### **1792: The First Succession Law**

Under the authority granted to it in the Succession Clause, Congress passes the Presidential Succession Act of 1792, which designates two successors to the presidency: the president pro tempore of the Senate and the Speaker of the House of Representatives, in that order. But some members of Congress, including James Madison, are concerned that legislators are not "Officers" within the meaning of the Succession Clause. The Act of 1792 provides for a special election if a dual vacancy occurs with more than one year remaining in the presidential term.

### **1812: Vice President George Clinton Dies**

### **1813: Madison's Incapacity & Jackson's Possible Lead Poisoning**

In the summer of 1813, President James Madison suffers an illness that leaves him unable to conduct the affairs of state. Because Vice President Elbridge Gerry is weak and of an advanced age, the Senate acts to fill a vacancy in the president pro tempore position, fearing the president pro tempore would need to succeed to the presidency if Madison and Gerry died.

Andrew Jackson, who would become president in 1829, is shot during a brawl on the streets of Nashville, Tennessee in September 1813. The bullet lodges in his shoulder, potentially resulting in lead poisoning that could have caused Jackson's irritability, mood swings, and paranoia. The bullet would be removed in 1832, three years after Jackson reached the White House.

### **1814: Vice President Elbridge Gerry Dies**

### **1832: Vice President John Calhoun Resigns**

### **1835: Jackson Assassination Attempt**

In what may have been the first assassination attempt on a president, an assailant attempts to fire two guns at President Andrew Jackson, but both weapons misfire. The man is arrested after Jackson beats him with his cane.

### **1841: Harrison's Death and the Tyler Precedent**

President William Henry Harrison dies of pneumonia only a month after his inauguration, becoming the first president to die in office. Vice President John Tyler resolves ambiguity about his status by asserting that he became president, as opposed to merely acting as president. The practice of the vice president becoming president upon succession is subsequently called "the Tyler precedent."

### **1844: Tyler's Close Call**

While sailing on the Potomac River on the USS Princeton, President Tyler narrowly avoids death when the ship's cannon explodes, killing the secretary of state, secretary of the Navy, and five others. Tyler is below deck at the time of the explosion. There is no vice president due to Tyler's succession three years earlier.

### **1850: Taylor's Death**

President Zachary Taylor dies of illness. Vice President Millard Fillmore becomes president.

### **1853: Pierce's Psychological Ailments and his Vice President's Death**

President Franklin Pierce becomes severely depressed after his son is killed in a train crash shortly after his inauguration. There is no vice president for most of Pierce's term, as Vice President William King died less than two months after taking office.

### **1864: Lincoln Assassination Attempt**

President Abraham Lincoln narrowly avoids assassination when a sniper's bullet passes through his hat.

### **1865: Lincoln Assassination**

President Lincoln is shot while attending a play at Ford's Theater in Washington, DC, and dies the following morning. He is the first president to be assassinated and the third to die in office. Vice President Andrew Johnson and Secretary of State William Seward are also targeted as part of the assassination plot. Johnson succeeds to the presidency upon Lincoln's death.

### **1868: Johnson Impeachment**

During President Johnson's impeachment, the vacancy in the vice presidency created by his succession three years earlier places Senate president pro tempore Benjamin Wade next in line to the presidency, creating a conflict of interest when Wade takes part in Johnson's impeachment trial. Wade settles on his Cabinet nominees before voting to remove Johnson from office.

### **1875: Vice President Henry Wilson Dies**

### **1881: Garfield Assassination**

President James Garfield is shot, and then lingers between life and death for over two months before dying. The ambiguities and gaps in the Constitution's Succession Clause are impediments to Garfield stepping aside or being removed from his power and duties while he is disabled. Vice President Chester Arthur is sworn in after Garfield's death.

### **1885: Vice President Thomas Hendricks Dies**

### **1886: The Second Succession Law**

The Presidential Succession Act of 1886 revises the line of succession, removing legislators and placing the Cabinet secretaries, in order of the creation of their respective departments, in the line of succession. The reform is prompted by the vacancies in the line of succession after the deaths of President Garfield and Vice President Hendricks. In both cases, the nation was left without any successors to the presidency, as there was no vice president, Senate president pro tempore, or Speaker of the House.

### **1893: Cover-up of Cleveland Surgery**

President Grover Cleveland undergoes surgery aboard a yacht on the Long Island Sound to remove a malignant tumor on the top of his mouth. He and his staff conceal the procedure and Cleveland's condition from the press, Vice President Adlai Stevenson, and all but one Cabinet secretary.

### **1899: Vice President Garrett Hobart Dies**

### **1901: McKinley Assassination**

President William McKinley is shot and dies eight days later. Vice President Theodore Roosevelt becomes president.

### **1902: Roosevelt Carriage Accident**

President Theodore Roosevelt is thrown from his horse-drawn carriage when an electric trolley car hits it. Roosevelt's face is severely bruised, he bleeds from his mouth, and he must undergo emergency surgery three weeks later to drain an abscess. There is no vice president because Roosevelt had succeeded to the presidency upon McKinley's assassination a year earlier.

### **1912: Vice President James Sherman Dies**

### **1919-1921: Wilson Inability**

President Woodrow Wilson suffers a stroke in September 1919, and is hardly seen in public or by anyone other than his wife, secretary and doctor for almost the rest of his term. Wilson fires his secretary of state for convening Cabinet meetings without his approval and for raising the possibility of Vice President Thomas Marshall acting as president.

### **1923: Harding Dies in Office**

President Warren Harding dies in office after suffering a cerebral hemorrhage. Vice President Calvin Coolidge becomes president.

### **1924: Coolidge's Depression**

President Calvin Coolidge's son dies, and the once effective president descends into a nearly paralyzing depression.

### **1933: The Twentieth Amendment and FDR Assassination Attempt**

The Twentieth Amendment is ratified. Its provisions include: (1) changes in the terms of office for the president and members of Congress; (2) the requirement that Congress assemble once a year on January 3; and (3) procedures for scenarios where the president-elect and/or vice president-elect die or "fail to qualify."

Seventeen days before Franklin D. Roosevelt's inauguration, an assailant fires on him in Miami's Bayfront Park. Roosevelt is not injured, but five bystanders are struck, including the visiting mayor of Chicago, who later died from his wounds.

### **1945: FDR Dies in Office**

President Franklin D. Roosevelt dies less than three months into his fourth term. Vice President Harry Truman becomes president. Truman is concerned by the fact that there will be no vice president for the entire term.

### **1947: The Third Succession Law**

At President Truman's urging, Congress restores legislators to the line of succession. The Presidential Succession Act of 1947 places the Speaker of the House and president pro tempore of the Senate at the top of the line of succession. The Cabinet secretaries follow in the order of the creation of their departments.

### **1950: Truman Assassination Attempt**

Two men launch an attack on Blair House, the residence near the White House where President Harry Truman is staying. They kill one Secret Service agent, but are not able to reach Truman.

### **1955-61: Eisenhower's Inabilities and the First Letter Agreement**

President Dwight D. Eisenhower suffers three health episodes: (1) a heart attack in 1955; (2) an attack of ileitis (inflammation of the intestine) in 1956; and (3) a stroke in 1957. In 1958, Eisenhower creates a "letter agreement" with Vice President Richard Nixon stating that Eisenhower can transfer the powers and duties of the presidency to Nixon if he is disabled. The agreement also provides that Nixon can declare Eisenhower disabled after appropriate consultation, if Eisenhower cannot make the declaration himself. In both scenarios, Eisenhower can declare the end of his inability and resume his powers and duties.

### **1960: Assassination Plot Targeting President-elect Kennedy**

A month after John F. Kennedy's election, a man loads his car with dynamite and drives to the house in Palm Beach, Florida where Kennedy is staying. He decides against driving his vehicle into Kennedy's car at the last minute after seeing Kennedy's wife and daughter bid him goodbye.

### **1963: Kennedy Assassination**

President John F. Kennedy is assassinated in Dallas, Texas. Vice President Lyndon Johnson, who had been in the same motorcade as Kennedy, becomes president. President Johnson creates a letter agreement with Speaker of the House John McCormack, who is 72-years-old. The Senate president pro tempore, who is second in the line of succession, is 86-years-old.



### **1965: Johnson's Surgery Under General Anesthesia**

President Lyndon Johnson has surgery under general anesthesia to remove his gallbladder. The procedure lasts for over two hours. Although a formal transfer of power to Vice President Hubert Humphrey does not occur, Johnson tells his Cabinet that Humphrey has authority to make any necessary decisions during the surgery.

### **1967: The Twenty-Fifth Amendment**

The Twenty-Fifth Amendment is ratified. The Amendment (1) codifies the Tyler precedent by stating that the vice president becomes president upon the president's death, resignation or removal; (2) allows the president to fill a vacancy in the vice presidency with approval from Congress; (3) allows the president to temporarily step aside when he or she is disabled; and (4) allows the vice president acting with a majority of the Cabinet, "or such other body" created by Congress, to declare the president disabled and gives Congress 21-days to "decide the issue" if the president disputes such a declaration.

### **1973: Agnew's Resignation, the First Use of the Twenty-Fifth Amendment, and Concerns About Nixon's Psychological State**

Vice President Spiro Agnew resigns, and President Richard Nixon nominates and Congress confirms Gerald Ford to be vice president under the Twenty-Fifth Amendment's Section 2.

During the Watergate scandal, President Nixon is despondent and drinking heavily, leading top advisers to make some important decisions without him.

### **1974: Worries Over Nixon's Emotional State Persist, Ford Succeeds to the Presidency, and Rockefeller Becomes Vice President**

As Nixon's emotional instability grows in the final days of Watergate, his defense secretary instructs the military to check any military orders from Nixon, especially those involving nuclear weapons, with him or the secretary of state.

President Nixon resigns after revelations about his role in covering-up details of the Watergate scandal. Vice President Ford succeeds to the presidency under Section 1 of the Twenty-Fifth Amendment. Ford then nominates and Congress confirms Nelson Rockefeller to be vice president under the Twenty-Fifth Amendment's Section 2.

### **1975: Ford Assassination Attempts**

In the span of less than three weeks, two assailants attempt to shoot President Ford. In the first attempt, the assailant's gun misfires. Seventeen days later, a woman successfully fires a gun at President Ford, but a bystander grabs her arm, causing the shot to miss the president.

### **1978: Carter Considers Invoking Section 3**

When it becomes possible that President Jimmy Carter might undergo a surgical procedure under general anesthesia, the White House Counsel drafts letters for him to temporarily transfer power to Vice President Walter Mondale using Section 3 of the Twenty-Fifth Amendment. But President Carter does not undergo the procedure.

### **1981: Reagan Assassination Attempt**

President Ronald Reagan is shot, and has life-saving surgery under general anesthesia. Cabinet members and White House staff discuss the Twenty-Fifth Amendment, but do not invoke it. Meanwhile, Secretary of State Alexander Haig appears to inaccurately tell the nation that he is acting as president.

### **1985: Reagan Cancer Surgery**

The Twenty-Fifth Amendment is used for a fourth time when President Reagan implicitly invokes Section 3 to transfer his powers and duties to Vice President George H.W. Bush before undergoing cancer surgery. Seven hours and 54 minutes after transferring his powers and duties, Reagan resumes them by submitting a second letter to the Speaker of the House and president pro tempore of the Senate.

### **1987: Contemplated Use of Section 3 and Concerns About Reagan's Mental Acuity**

The White House Counsel's Office prepares for an invocation of the Section 3 of the Twenty-Fifth Amendment before President Reagan undergoes skin cancer surgery, but the procedure does not end up requiring general anesthesia.

Several White House officials believe Reagan's mental faculties are deteriorating, describing him as inattentive and disengaged. A memo to the chief of staff summarizes those concerns raises the possibility of invoking Section 4 of the Twenty-Fifth Amendment, but the chief of staff and other top aides reject the idea after scrutinizing Reagan's behavior.

### **1988: Recommendations from Miller Center Commission on Presidential Disability and the Twenty-Fifth Amendment**

The Commission on Presidential Disability and the Twenty-Fifth Amendment is co-chaired by former Senator Birch Bayh and former Eisenhower Attorney General Herbert Brownell, two of the authors of the Twenty-Fifth Amendment. The commission holds six working sessions between 1985 and 1988. It is assisted in its work by former White House officials, former members of Congress, and attorneys, among others. The commission recommends that the White House plan extensively for uses of the Twenty-Fifth Amendment.

### **1989: President George H.W. Bush's Meeting on the Twenty-Fifth Amendment**

In the first months of President George H.W. Bush's term, he calls a meeting with his wife, Vice President Dan Quayle, the White House physician, the chief of staff, the White House counsel, and several others to discuss how and when the Twenty-Fifth Amendment should be invoked. An aspect of the plan involves "secret letters of understanding" between the president and vice president "indicating their intentions for transfer of power in case of illness."

### **1991: George H.W. Bush's Irregular Heartbeat**

President George H.W. Bush experiences shortness of breath and fatigue while jogging. Doctors identify the cause as atrial fibrillation, an irregular heartbeat. Doctors consider an electrical shock procedure under anesthesia to correct Bush's heartbeat. White House lawyers update a previously prepared letter for invoking the Twenty-Fifth Amendment, but it is never used because Bush does not undergo the procedure.

### **1995: Recommendations from the Working Group on Presidential Disability**

The Working Group includes medical doctors, politicians, scholars, and former White House officials. Former Presidents Jimmy Carter and Gerald Ford address the Group, and it holds three major meetings between 1994 and 1995.

### **1996: Clinton Assassination Attempt**

While in the Philippines, President Bill Clinton's motorcade is rerouted at the last minute after the Secret Service intercepts communications suggesting that there are bombs planted on the route. An investigation reveals a bridge on the original route is rigged with explosives.

### **1997: Clinton Knee Surgery**

President Clinton undergoes surgery after injuring his knee by stumbling down steps. To avoid using general anesthesia, which would have required invoking the Twenty-Fifth Amendment, doctors administer an epidural that only affects part of Clinton's body. The chief of staff stays in close contact with Vice President Al Gore's staff during the incident.

### **2001: Cheney's Resignation Letter**

In response to the lack of procedures for declaring the vice president disabled, Vice President Richard Cheney drafts a resignation letter to be used if he became disabled. He gives the letter to his counsel with instructions to let President George W. Bush decide whether to invoke it.

### **2002: Bush Transfers Power**

Prior to undergoing a colonoscopy, President George W. Bush invokes Section 3 of the Twenty-Fifth Amendment to transfer the powers and duties of the presidency to Vice President Cheney. Two hours and 15 minutes after the transfer, Bush submits a second letter to the Speaker of the

House and president pro tempore of the Senate stating that he was reassuming his powers and duties.

### **2005: Bush Assassination Attempt**

During a speech abroad in Georgia, an assailant throws a live grenade at President Bush. The grenade lands approximately 30 yards from Bush, but does not explode.

### **2007: Bush Transfers Power Again**

The Twenty-Fifth Amendment is invoked for a sixth time, as President Bush again transfers power to Vice President Cheney before a colonoscopy. Two hours and 5 minutes after transferring his powers and duties, Bush resumes them by submitting a second letter to the Speaker of the House and president pro tempore of the Senate.

### **2009: Report Issued by the Continuity of Government Commission**

The Continuity of Government Commission, a joint effort by the American Enterprise Institute and Brookings Institute, is led by Honorary Co-Chairmen former Presidents Jimmy Carter and Gerald R. Ford and Co-Chairmen former Senators Alan K. Simpson and David Pryor. The Commission's 2009 report advances recommendations for improving the presidential line of succession.

### **2010: Obama White House Considers Using Section 3**

Before President Barack Obama undergoes a colonoscopy, White House officials consider recommending use of the Twenty-Fifth Amendment. But Obama's doctors use a version of the exam that does not require sedation, partially to avoid transfer of power issues.

### **2012: Report of the First Fordham Law Presidential Succession Clinic Published**

The *Fordham Law Review* publishes the First Presidential Succession Clinic's Report, *Ensuring the Stability of Presidential Succession in the Modern Era*, 81 *Fordham L. Rev.* 1 (2012).

### **2017: Trump Officials Consider the Twenty-Fifth Amendment & Report of the Second Fordham Law Presidential Succession Clinic Published**

President Donald Trump fires FBI Director James Comey, who is replaced by Acting Director Andrew McCabe. McCabe subsequently recalls Deputy Attorney General Rod Rosenstein discussing the possibility of invoking the 25<sup>th</sup> Amendment to remove Trump from his powers and duties in the wake of Comey's firing. The FBI's general counsel at the time later testifies to Congress that McCabe told him Rosenstein was aware of two cabinet secretaries who were prepared to invoke the amendment. A contemporaneous FBI memo reviewed by the *New York Times* identifies the two cabinet members as the attorney general and homeland security secretary. Rosenstein disputes reports about McCabe's recollections, though does not deny them.

The *Fordham Law Review* publishes the Second President Succession Clinic's Report, *Fifty Years After the Twenty-Fifth Amendment: Recommendations for Improving the Presidential Succession System*, 86 *Fordham L. Rev.* 917 (2017).

### **2018: Senior Administration Official Raises 25<sup>th</sup> Amendment in Anonymous Op-Ed**

An anonymous senior official in President Donald Trump's administration writes a *New York Times* op-ed stating that there had been "whispers" in the White House about invoking Section 4 of the Twenty-Fifth Amendment in response to Trump's "instability."

### **III. Presidential Succession By the Numbers**

#### **Presidents Who Did Not Finish Their Terms: 9**

- Deaths: **8**
  - Deaths from Illness: **4** (Harrison, Taylor, Harding, Roosevelt)
  - Assassinations: **4** (Lincoln, Garfield, McKinley, Kennedy)
- Resignations: **1** (Nixon)

#### **Vice Presidents Who Did Not Finish Their Terms: 18**

- Deaths: **7**
- Resignations: **2**
- Succession: **9**

**Total Time With No Vice President: 37 years, 9 months, and 1 day**

**Total Time With a Vice President Who Succeeded to Presidency: 26 years, 3 months, and 28 days**

**Total Time With An Acting President: 13 hours and 10 minutes**

#### **Uses of the Twenty-Fifth Amendment: 6**

- Section 1: **1** (Ford)
- Section 2: **2** (Ford, Rockefeller)
- Section 3: **3** (Reagan, W. Bush (2))
- Section 4: **0**

## **IV. Reform Recommendations**

### **Miller Commission on Presidential Disability and the Twenty-Fifth Amendment (1988)**

*The commission, created by the Miller Center at the University of Virginia, was co-chaired by former Senator Birch Bayh and former Eisenhower Attorney General Herbert Brownell, two of the authors of the Twenty-Fifth Amendment. The Commission held six working sessions between 1985 and 1988. It was assisted in its work by former White House officials, former members of Congress, and attorneys, among others. The Commission's Report is here: <http://millercenter.org/policy/commissions/priorcommissions/disability>. The recommendations below appear as summarized in "The Twenty-Fifth Amendment: Its Complete History and Applications" by John D. Feerick.*

1. The general public should be better informed about the Twenty-Fifth Amendment. Discussions by presidential candidates are important for increasing awareness.
2. The president should make use of the Twenty-Fifth Amendment a regular process of government and should not be reluctant to use it. The likelihood of instability and crises is reduced the more routine the use of the amendment becomes.
3. The president should not attempt to reclaim his powers under the amendment until his full mental capacity has returned.
4. Between Election Day and Inauguration Day, the president-elect, the chief of staff, the president's counsel, the White House physician, the vice president-elect, and the president's spouse should discuss the amendment and devise plans of action for all medical contingencies.
5. Written guidelines should be developed by each administration for three different medical contingencies: an emergency, a planned procedure, and treatment of chronic ailments.
6. The role of the White House physician should be increased. The physician should be consulted constantly during a president's term for his or her input and knowledge of the president's health.
7. The White House staff must be apprised of its critical position when disability issues arise. It should not try to govern by itself and it must deal with the public in an open and honest manner.

### **Working Group on Presidential Disability (1995)**

*The Working Group included medical doctors, politicians, academics, and former White House officials. Former Presidents Jimmy Carter and Gerald Ford addressed the Group. It held three major meetings between 1994 and 1995. The Group's proceedings are documented in "Presidential Disability: Papers, Discussions, and Recommendations on the Twenty-Fifth Amendment and Issues of Inability and Disability in Presidents of the United States," which was edited by James F. Toole and Robert J. Joynt and published in 2001 by the University of Rochester Press.*

1. The Twenty-Fifth Amendment is a powerful instrument which delineates the circumstances and methods for succession and transfer of the power of the presidency. It does not require revision or augmentation by another constitutional amendment. However, guidelines are needed to ensure its effective implementation.

2. The Twenty-Fifth Amendment has not been invoked in some circumstances envisioned by its founders. When substantial concern about the ability of the president to discharge the powers and duties of the office arises, transfer of power under provisions of the Twenty-Fifth Amendment should be considered.
3. A formal contingency plan for the implementation of the amendment should be in place before the inauguration of every president.
4. Determination of presidential impairment is a medical judgment based upon evaluation and tests. Close associates, family, and consultants can provide valuable information which contributes to this medical judgment.
5. The determination of presidential inability is a political judgment to be made by constitutional officials.
6. The president should appoint a physician, civil or military, to be senior physician in the White House and to assume responsibility for his or her medical care, direct the military medical unit, and be the source of medical disclosure when considering imminent or existing impairment according to the provisions of the Twenty-Fifth Amendment.
7. In evaluating the medical condition of the president, the senior physician in the White House should make use of the best consultants in relevant fields.
8. Balancing the right of the public to be informed regarding presidential illness with the president's right to confidentiality presents dilemmas. While the senior physician to the president is the best source of information about the medical condition of the president, it is the responsibility of the president or designees to make accurate disclosure to the public.
9. The Twenty-Fifth Amendment provides a remarkably flexible framework for the determination of presidential inability and the implementation of the transfer of powers. Its provisions should be more widely publicized and its use destigmatized.

### **Continuity of Government Commission (2009)**

*The Commission was a joint effort by the American Enterprise Institute and Brookings Institute. Its Honorary Co-Chairmen were former Presidents Jimmy Carter and Gerald R. Ford and its Co-Chairmen were former Senators Alan K. Simpson and David Pryor. The Commission was founded in the fall of 2002 to make recommendations for ensuring the continuity of each of the nation's branches of government. It released separate reports on each branch. The recommendations in its report on the executive branch are below. The full report is here:*

<https://www.brookings.edu/research/the-continuity-of-the-presidency-the-second-report-of-the-continuity-of-government-commission/>.

1. The presidential line of succession should extend outside of Washington, D.C.
2. Remove congressional leaders from the line of succession.
3. Congress should pass a law for a special election for president if a simultaneous vacancy of the presidency and vice presidency occurs in the first two years of a presidential term.
4. The line of succession should be reordered to have the secretary of state followed by the secretary of defense, attorney general, and secretary of treasury. Lower profile Cabinet members should be replaced by the offices created for figures outside of Washington.
5. Congress should remove acting secretaries from the line of succession.
6. Clarify procedures for incapacitation, especially for lower profile officials in the line of succession.

- a. Further, Congress should clarify what would happen if a majority of the Cabinet were unavailable for the vice president to consult with when the president is incapacitated. Congress could use the “other body” provision in Section 4 of the Twenty-Fifth Amendment to create an alternative body to act in this situation.
- 7. Fix inaugural and pre-inaugural scenarios.
  - a. The outgoing president could submit the names of several of the incoming president’s Cabinet nominees on the day before the inauguration or the morning of January 20. Additionally, several members of the line might be sent out of town for the ceremony.
  - b. Shorten as much as possible the period between the casting of electoral votes and their counting by Congress.
  - c. Political parties should plan for the possibility of the death of their president-elect and vice president-elect.

**Fordham University School of Law’s First Clinic on Presidential Succession (2012)**

*The Clinic’s nine law students worked under the guidance of Professor Feerick and Adjunct Professors Dora Galacatos and Nicole Gordon. The Clinic interviewed former Senator Birch Bayh, Reagan and Bush White House Counsel Fred Fielding, and other scholars and experts. The Clinic met in fall 2010, and published its Report in the Fordham Law Review in 2012. The report is here: <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4818&context=flr>.*

- 1. Presidential and Acting Presidential Inability Recommendations
  - a. Statutory Action
    - i. Acknowledge that the president or acting president, upon declaration of his own inability, can transfer his powers voluntarily to the next in the line of succession in instances of vice presidential inability or vacancy.
    - ii. Authorize the person next in the line of succession after the vice president, together with a majority of the Cabinet, to declare the inability of the president or acting president in instances of vice presidential inability or vacancy.
  - b. Executive Contingency Planning
    - i. The president or acting president should prepare a prospective executive declaration of inability at the beginning of his service, in which he would define the situations that in his view would render him unable to discharge the powers and duties of the presidency in the future and would provide that the declaration of his inability goes into effect based upon a review process set out by the president or acting president.
- 2. Vice Presidential Inability Recommendation
  - a. The vice president should prepare a prospective executive declaration of inability at the beginning of his service, in which he would define the situations that, in his view, would render him unable to discharge the powers and duties of the vice presidency in the future and would provide that the declaration of his inability goes into effect based upon a review process set out by the vice president.
- 3. Line of Succession Recommendations
  - a. Statutory Action



- i. Establish an executive line of succession that runs exclusively through the Cabinet after the president and vice president. In the case of removal, death, or resignation of the president, the Cabinet member assuming the powers duties of the presidency should be required to resign from the Cabinet. In a case of inability, the Cabinet member assuming the powers and duties of the presidency should not be required to resign.
    - ii. In the event an executive line of succession is not adopted, establish a binary line of succession that first runs through Congress, and then the Cabinet, in instances of death, resignation, and removal. Successors would be required to resign in these circumstances. The line of succession would run solely through the Cabinet in instances of presidential and vice presidential inability or failure to qualify. Under this proposal, when a Cabinet member assumes the powers and duties of the presidency, that Cabinet member would not be required to resign.
    - iii. Confirm whether acting secretaries are included in the line of succession and, if so, either remove them from the line, or alternatively, amend the 1947 Act so that acting secretaries can assume the powers and duties of the presidency, in the order of the departments' creation, only after succession has passed through all of the Cabinet secretaries.
- 4. Pre-inaugural Period Recommendations
  - a. Political Party Rules
    - i. In the event of the death or resignation of a presidential candidate before the political party conventions, require the parties to hold an open meeting to decide which replacement candidate(s) will receive the delegates' votes.
    - ii. In the event of the death or resignation of a presidential nominee between the political party conventions and the general election, require the parties to either hold an open meeting to select a replacement candidate or recall the convention delegates.
    - iii. During the period between the general election and the meeting of the Electoral College, provide that the vice presidential candidate replaces a deceased or resigned candidate of the same ticket and that the candidate's party issue recommendations to the presidential electors as to a new candidate for the office of vice president.
  - b. Congressional Rules
    - i. In the event of the death or resignation of a presidential or vice presidential candidate between the meeting of the Electoral College and the counting and declaration of the electoral votes by Congress, require Congress to count votes cast for a candidate if he was alive at the time of the Electoral College vote.
  - c. Executive Contingency Planning
    - i. During the period between the counting and declaration of the electoral votes by Congress and Inauguration Day, the outgoing president should consider promptly nominating any Cabinet nominees that the president-elect submits to him, and Congress should confirm as many nominees as possible prior to Inauguration Day, consistent with the proper discharge of Congress's advice and consent responsibility. One or more newly

confirmed Cabinet secretaries should remain at a secure location outside of Washington, D.C., on Inauguration Day. This recommendation is particularly important in the case of an exclusively executive line of succession, as the Clinic recommends.

### **Fordham University School of Law's Second Clinic on Presidential Succession (2017)**

*The Clinic's fourteen law students worked under the guidance of Professor Feerick and Adjunct Professor John Rogan. The Clinic interviewed over 25 scholars and experts, including then-CIA Director John Brennan, former Physician to the President Connie Mariano, three former White House Counsels, and other distinguished scholars and experts. The Clinic met during the 2016-2017 academic year, and published its Report in the Fordham Law Review in December 2017. The report is here: <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5454&context=flr>.*

1. Executive Branch Contingency Planning
  - a. 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 to engage in the Section 4 process.
  - b. The White House Medical Unit should add a mental health professional.
2. Line of Succession
  - a. 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."
  - b. Congress should clarify the status of acting Cabinet secretaries in the line of succession, ideally by removing them from the line.
  - c. 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.
  - d. All officials in the line of succession should prepare for succession contingencies, becoming fully aware of their roles, to avoid confusion over who is in control during emergencies
3. Dual and Vice Presidential Inability
  - a. 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."
  - b. 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.
4. Congressional Procedure in a Section 4 Scenario
  - a. 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.
- b. 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.
  - c. 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.
5. Campaign Health Issues
- a. Congress or a private organization should form a commission to create non-binding guidelines of what presidential candidates should disclose about their health.
  - b. Laws requiring the release of medical records or participation in medical examinations may not be constitutional or sound policy.
6. Political Party Rules for Replacing Presidential Candidates
- a. 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.
  - b. The parties should also create procedures for removing medically incapacitated presidential candidates.

### **More Information**

An interactive version of the timeline as well as articles and primary source documents relating to presidential succession are available on Fordham Law’s Twenty-Fifth Amendment Archive at [http://ir.lawnet.fordham.edu/twentyfifth\\_amendment\\_archive/](http://ir.lawnet.fordham.edu/twentyfifth_amendment_archive/).

### **Resources**

John D. Feerick, “The Twenty-Fifth Amendment: Its Complete History and Applications” (Third Edition) (2014) (Fordham University Press, Bronx, New York)

Birch E. Bayh, “One Heartbeat Away: Presidential Disability and Succession” (1968) (Bobbs-Merrill, Indianapolis, Indiana)

John D. Feerick, “From Failing Hands: The Story of Presidential Succession” (1965) (Fordham University Press, Bronx, New York)

Ruth C. Silva, “Presidential Succession” (1951) (Greenwood Press, New York, 1968)

Yale Law School Rule of Law Clinic, “The Twenty-Fifth Amendment to the United States Constitution: A Reader’s Guide” (2018)

Joel K. Goldstein, *Taking From the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 Fordham L. Rev. 959 (2010)

Jared Cohen, *Close Calls: When American Presidents Diced with Death*, The Guardian, (Apr. 6, 2019), <https://www.theguardian.com/books/2019/apr/06/american-presidents-died-in-office-close-calls>