

2017

Past Reform Recommendations on Presidential Succession

John Rogan

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



Part of the [Law Commons](#)

Recommended Citation

Rogan, John, "Past Reform Recommendations on Presidential Succession" (2017). *Reports*. 6.
https://ir.lawnet.fordham.edu/twentyfifth_amendment_reports/6

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.

Past Reform Recommendations on Presidential Succession

Miller Center 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 available at <http://millercenter.org/policy/commissions/priorcommissions/disability>. The recommendations below appeared as summarized on pages 223-24 of "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 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 available at <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 Clinic on Presidential Succession (2012)

The Clinic’s nine law students worked under the guidance of Professor Feerick. 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 available at

<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. 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 to 2017 academic year, and published its Report in the Fordham Law Review in December 2017. The report is available at <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 (the "heads of the executive departments") 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 situations like the confusion over who is in control.
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 sound policy or constitutional.
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.