

2010

## Taking From the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity

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### Recommended Citation

Joel K. Goldstein, *Taking From the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 Fordham L. Rev. 959 (2011).

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# TAKING FROM THE TWENTY-FIFTH AMENDMENT: LESSONS IN ENSURING PRESIDENTIAL CONTINUITY

*Joel K. Goldstein\**

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\* Vincent C. Immel Professor of Law, Saint Louis University School of Law. I am grateful to John D. Feerick and James Fleming for their helpful comments; to Colin Luoma and Margaret McDermott, Esq. for research assistance; to Stephanie Haley for administrative help; and to a number of my colleagues at Saint Louis University School of Law who made suggestions during a workshop I presented as part of its faculty workshop series. Conversations with Akhil Reed Amar, Birch Bayh, John Feerick, Jim Fleming, Ned Foley, John Fortier, Bob Gilbert, Rose McDermott, Norman Ornstein, and Bill Treanor at the Fordham Law School Symposium, and in some cases over a period of years, have given me a better understanding of these issues. I am particularly grateful to John Feerick for such discussions (and friendship) over a period now spanning thirty-five years.

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#### INTRODUCTION

When the United States has a vigorous and apparently healthy President, as it generally does, its arrangements for ensuring presidential continuity receive little scrutiny. The absence of a current or recent succession crisis focuses attention on more immediate concerns. The ordinary indifference to presidential continuity issues finds further justification in the common belief that the system has always proven adequate to deal with whatever circumstances history has presented, a perception which encourages confidence that it will also handle those contingencies the future imposes.

For a variety of reasons, some academics and activists who study presidential continuity reject this popular consensus.<sup>1</sup> They point to gaps in the system and the number of times the nation has narrowly avoided some continuity crises and discount as naïve and optimistic the conclusion that these past escapes predict future deliverance. They imagine that disaster, if not just around the corner, lurks somewhere in the future and, absent corrective action, will someday leave the nation without a functioning President.

Discussions of America's arrangements for ensuring presidential continuity tend to proceed in one of two general directions. Some criticize various aspects of the Twenty-Fifth Amendment as inadequate to deal with the topics they address. More recent complaints have targeted the provisions for declaring a President disabled,<sup>2</sup> although the method for filling a vice presidential vacancy has not entirely escaped criticism.<sup>3</sup> Alternatively, another body of work views the Twenty-Fifth Amendment as a step forward but identifies troubling gaps in areas it does not regulate, such as the lack of procedures to declare a President disabled in the absence of a Vice President, the lack of a method to declare a Vice President disabled, the problematic line of succession after the Vice President, and a host of contingencies which could prevent the electoral system from producing an appropriate and functioning President by inauguration day.<sup>4</sup>

In fact, the Twenty-Fifth Amendment constituted a major advance that remedied some of the most glaring problems regarding presidential continuity. It operates in an area made complex by a number of factors including the variety of continuity crises which may arise, the difficult context in which they typically occur, the demands they impose for quick human decision, and the impediments to adequate preparation for that response. At its most basic level, the Amendment added several new

1. See, e.g., Akhil Reed Amar, Address, *Applications and Implications of the Twenty-Fifth Amendment*, 47 HOUS. L. REV. 1, 2, 7–9 (2010); see also John C. Fortier & Norman J. Ornstein, *Presidential Succession and Congressional Leaders*, 53 CATH. U. L. REV. 993, 993–94 (2004); Joel K. Goldstein, Commentary, *Akhil Reed Amar and Presidential Continuity*, 47 HOUS. L. REV. 67, 69–70 (2010).

2. See, e.g., Herbert L. Abrams, *Can the Twenty-Fifth Amendment Deal with a Disabled President? Preventing Future White House Cover-Ups*, 29 PRESIDENTIAL STUD. Q. 115, 129 (1999).

3. See, e.g., *Examination of the First Implementation of Section Two of the Twenty-Fifth Amendment: Hearing on S.J. Res. 26 Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 94th Cong. 67–70 (1975) [hereinafter *1975 Senate Hearings*] (statement of Arthur M. Schlesinger, Jr., presidential historian and scholar); Arthur Schlesinger, Jr., *What to Do About a Nonjob*, N.Y. TIMES, Nov. 29, 1974, at 39 (calling for repeal of Section 2 and ultimately abolition of Vice Presidency); Editorial, *Vice President Ford*, N.Y. TIMES, Dec. 7, 1973, at 40 (criticizing implementation of Section 2); Warren Weaver, Jr., *Law Experts Critical of 25th Amendment*, N.Y. TIMES, Dec. 20, 1974, at 16 (quoting scholars and legislators criticizing aspects of Section 2); Tom Wicker, *Why Rush to Change the 25th?*, N.Y. TIMES, Nov. 19, 1974, at 43 (calling for special presidential election if Section 2 Vice President becomes President).

4. See, e.g., CONTINUITY OF GOV'T COMM'N, PRESERVING OUR INSTITUTIONS: THE CONTINUITY OF THE PRESIDENCY 39–43 (2009), available at <http://www.continuityofgovernment.org/SecondReport.pdf>; Goldstein, *supra* note 1, at 71–83.

provisions to the Constitution to govern presidential succession and inability and vice presidential vacancy. It constructively addressed the two most pressing problems regarding presidential continuity in a manner that made prudent accommodations between different principles. Although its initial applications during its first forty-three years have been limited, it has worked quite well in diverse contexts, and there is no reason it should not do so in the future.

Yet the alarmists are also right. Reason for concern remains. Existing arrangements to ensure presidential continuity are inadequate to address a number of foreseeable contingencies. The remaining shortcomings do not represent failings of the Twenty-Fifth Amendment. Even if its ambition had been to solve every continuity problem, such an outcome was well beyond the reach of any single measure. That it did not eliminate every gap does not diminish the substantial contributions it made.

Nonetheless, gaps remain, some of which create an unacceptable risk that the United States will find itself without a functioning Chief Executive whose exercise of presidential powers and duties is seen as legitimate. These defects include those relating to the line of succession after the Vice President. They require attention. Soon.

Yet reform in this area comes slowly (or not at all) and with great difficulty. Invariably, interest in the topic peaks when a crisis occurs “but subsides once the emergency has passed.”<sup>5</sup> Decision makers tend to be preoccupied by more immediate concerns, an understandable orientation which relegates continuity problems, contingent by nature, to future agendas. When decision makers do consider these issues, familiar obstacles often stymie reform. Some problems seem intractable. Some preferred remedies offend interested parties. The range of proposals makes consensus elusive. The political payoff is small,<sup>6</sup> and accordingly, public officials lack the requisite incentive to invest the necessary resources to convert ideas into law.

Recent events confirm this sorry pattern. The attacks of 9/11 could have presented the greatest threat to governmental continuity in American history. Surely that assault should have prompted policy makers to act to reinforce vulnerable parts of our system. Although the Continuity of Government Commission produced insightful studies<sup>7</sup> and a few disparate hearings were held, more than nine years have passed yet public officials

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5. *Presidential Inability: Hearings on H.R. 836 et al. Before the H. Comm. on the Judiciary*, 89th Cong. 1 (1965) [hereinafter *1965 House Hearings*] (statement of Rep. Emanuel Celler).

6. *Presidential Inability and Vacancies in the Office of Vice President: Hearings on S.J. Res. 13 et al. Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 88th Cong. 149–50 (1964) [hereinafter *1964 Senate Hearings*] (statement of John D. Feerick, scholar on presidential succession) (“Inability and succession are not election issues. Few votes will turn on whether or not this committee or the Congress does anything about these issues.”).

7. See CONTINUITY OF GOV'T COMM'N, PRESERVING OUR INSTITUTIONS: THE CONTINUITY OF CONGRESS (2003), available at <http://www.continuityofgovernment.org/report/FirstReport.pdf>; CONTINUITY OF GOV'T COMM'N, *supra* note 4.

have taken no action to close easily observable gaps in our system for assuring presidential continuity.

This combination, of known persistent continuity gaps without a corresponding impulse to reform, makes this an auspicious occasion to reexamine the Twenty-Fifth Amendment. It remains the most successful effort to address those continuity problems inherent in the original Constitution or which subsequently developed. Lessons from that experience may help reformers act to resolve at least some of the remaining shortcomings. In addition to its provisions, the Twenty-Fifth Amendment represents certain implicit constitutional values that should guide responses to remaining problems. Moreover, it was the product of successful legislative strategies in an area that generally resists such measures. Although all of these principles and lessons do not point in the same direction and some have limited application to the remaining issues, others should inform efforts to close existing gaps in the system to ensure presidential continuity.

Part I of this Article briefly outlines the context in which the Twenty-Fifth Amendment was proposed and ratified, describes the contributions it has made, and argues that it has worked well. Part II identifies constitutional and legislative principles associated with it. Part III sketches the modern context. Part IV assesses the current line of successors after the Vice President, identifies problems with it, and suggests how some of the principles relating to the Twenty-Fifth Amendment might help remedy some of the remaining problems.

#### I. TO THE TWENTY-FIFTH AMENDMENT AND WHAT IT BROUGHT

In 1965 Congress proposed, and in 1967 the states ratified, the Twenty-Fifth Amendment, thereby addressing the two most conspicuous and significant dilemmas relating to presidential continuity as they existed in the mid-1960s. These problems were the absence of constitutional clarity regarding, or procedures to handle, presidential inability, and the possibility that someone other than a Vice President might become President.

##### A. *The Context of the Twenty-Fifth Amendment*

The constitutional gaps just mentioned had existed since the earliest days of the Republic.<sup>8</sup> Five developments during the middle of the twentieth century created the political context that contributed to the Twenty-Fifth Amendment.

First, in 1947, Congress changed the line of succession following the Vice President to begin with the Speaker of the House of Representatives and then the President pro tempore of the Senate before continuing through the Cabinet.<sup>9</sup> When Harry S. Truman succeeded to the Presidency in April

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8. See generally JOHN D. FEERICK, *FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION* (1965).

9. See Presidential Succession Act of 1947, Pub. L. No. 80-199, 61 Stat. 380 (codified as amended at 3 U.S.C. § 19 (2006)).

1945, upon the death of Franklin D. Roosevelt, Secretary of State Edward R. Stettinius, Jr. stood a heartbeat away from the Presidency. Inasmuch as Stettinius was a businessman, federal bureaucrat, and diplomat but lacked any political experience, Truman named former U.S. Supreme Court Justice James F. Byrnes, who was thought to be a presidential figure, to replace him,<sup>10</sup> and Congress, at Truman's suggestion, placed the Speaker atop the line of succession. Truman did not believe he should have power to appoint his successor and argued that the Speaker had an electoral pedigree surpassed only by those of the President and Vice President.<sup>11</sup>

Second, the advent of the nuclear age and of the Cold War added importance to the Presidency and accordingly lent urgency to the subject of presidential succession and inability. Those threatening conditions made more perilous the prospect of a hiatus in executive power or the presence of a Chief Executive not equipped to exercise it. In an earlier age of "carrier pigeons" when the Army depended on "horse-drawn caissons," presidential continuity had lacked such urgency, Senator Birch Bayh, the principal author of the Amendment, suggested.<sup>12</sup> But by 1965, "with the awesome power at our disposal," when armies could be moved "half way around the world in a matter of hours" and civilization could be destroyed in a matter of minutes, it was "high time" to heed history to "make absolutely certain" that there would always be a functioning President.<sup>13</sup>

Third, President Dwight D. Eisenhower's three illnesses, especially his heart attack in 1955 and his stroke in 1957, focused the attention of policy makers and the public on the problem of presidential inability.<sup>14</sup> Defects in the existing legal regime were readily apparent. It provided no procedures for determining the existence or duration of a presidential disability nor did it make clear whether the President could subsequently resume the exercise of presidential powers and duties. Committees in each house began looking at the topic in the mid-1950s,<sup>15</sup> as did the executive branch.<sup>16</sup> Attorneys General Herbert Brownell and William P. Rogers presented administration proposals for constitutional amendments in 1957 and 1958, respectively.<sup>17</sup> Eisenhower and Vice President Richard M. Nixon entered into a letter agreement that provided for Eisenhower or Nixon to initiate a transfer to Nixon of presidential powers on a temporary basis with Eisenhower retaining the right to resume those powers on his simple declaration that he

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10. DAVID McCULLOUGH, *TRUMAN* 368 (1992).

11. Special Message to the Congress on the Succession to the Presidency, PUB. PAPERS 128, 129 (June 19, 1945).

12. 111 CONG. REC. 15,595 (1965) (statement of Sen. Birch Bayh).

13. *Id.*

14. See FEERICK, *supra* note 8, at 211–29; see also HERBERT BROWNELL WITH JOHN P. BURKE, *ADVISING IKE: THE MEMOIRS OF ATTORNEY GENERAL HERBERT BROWNELL* 273–78 (1993); RICHARD M. NIXON, *SIX CRISES* 131–81 (1962).

15. FEERICK, *supra* note 8, at 238–42.

16. BROWNELL, *supra* note 14, at 277–78; FEERICK, *supra* note 8, at 227–29.

17. FEERICK, *supra* note 8, at 239–41; John D. Feerick, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, 32 FORDHAM L. REV. 73, 113–15 (1963).

was ready to do so.<sup>18</sup> John F. Kennedy and Lyndon B. Johnson, Johnson and Speaker of the House of Representatives John McCormack, and Johnson and Vice President Hubert H. Humphrey later entered into the same agreement.<sup>19</sup>

Fourth, the Nixon and Johnson Vice Presidencies contributed to a perception that the Vice Presidency had assumed new importance. The office was attracting more able public figures who were being given roles within the executive branch and were becoming more visible.<sup>20</sup>

Finally, the Kennedy assassination generated new interest in the topic. It suggested that even the presence of a young and ostensibly healthy President<sup>21</sup> did not immunize America from continuity issues. Johnson's history of a serious heart attack made his health seem precarious. The vision of McCormack and Senate President pro tempore Carl Hayden behind him when he addressed Congress did not inspire confidence. Neither had ever been considered presidential timber nor did they project any sense of vigor as they slumped in their chairs.<sup>22</sup>

The time was ripe for reform. Inadequacies in existing arrangements stood revealed. The risks of inaction were apparent, based in part on a recognition that the world had changed and that America could not assume that it would inevitably escape continuity problems as it had in the past. As President Johnson put it,

Our escape has been more the result of Providence than of any prudence on our part. For it is not necessary to conjure the nightmare of nuclear holocaust or other national catastrophe to identify these omissions as

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18. Agreement Between the President and the Vice President as to Procedures in the Event of Presidential Disability, PUB. PAPERS 196 (Mar. 3, 1958).

19. Statement of Procedures for Use in the Event of Presidential Inability, 2 PUB. PAPERS 1044 (Oct. 5, 1965); The President's News Conference of December 18, 1963, 1 PUB. PAPERS 65–66 (Dec. 18, 1963) (reporting that Johnson and McCormack had made the same disability agreement as Kennedy and Johnson); White House Statement and Text of Agreement Between the President and the Vice President on Procedures in the Event of Presidential Inability, PUB. PAPERS 561 (Aug. 10, 1961) (describing the agreement between Kennedy and Johnson); Charles Mohr, *Johnson Reaches Disability Accord*, N.Y. TIMES, Jan. 28, 1965, at 13 (reporting that Johnson and Humphrey had adopted the Eisenhower-Nixon agreement).

20. See JOEL K. GOLDSTEIN, *THE MODERN AMERICAN VICE PRESIDENCY: THE TRANSFORMATION OF A POLITICAL INSTITUTION* 151–54, 190–93 (1982).

21. See generally ROBERT DALLEK, *AN UNFINISHED LIFE: JOHN F. KENNEDY 1917–1963*, at 397–99, 471–73 (2003) (discussing Kennedy's health problems as President); ROSE MCDERMOTT, *PRESIDENTIAL LEADERSHIP, ILLNESS, AND DECISIONMAKING* 118–56 (2008) (documenting Kennedy's precarious health).

22. Cf.; Arthur Krock, *In the Nation: The Cart Is Getting Ahead of the Horse*, N.Y. TIMES, Dec. 12, 1963, at 38 (noting preoccupation with succession, rather than inability, owing to the "advanced ages" of McCormack and Hayden); Arthur Krock, *Succession Problem*, N.Y. TIMES, Dec. 8, 1963, at E9 (noting Johnson's precarious health and the age of McCormack and Hayden); James Reston, *Washington: The Problem of Succession to the Presidency*, N.Y. TIMES, Dec. 6, 1963, at 34 (stating McCormack unqualified to be President); Editorial, *The Succession*, CHI. TRIB., Dec. 10, 1963, at 20 (noting questions regarding McCormack and Hayden); *Two Old Timers Next in Line for Presidency of U.S.*, CHI. TRIB., Dec. 1, 1963, at 30 (discussing the fact that McCormack and Hayden were well beyond the age of Presidents).

chasms of chaos into which normal human frailties might plunge us at any time.<sup>23</sup>

### B. Presidential Inability

The Constitution, as originally ratified was ambiguous regarding presidential inability, and subsequent developments compounded that uncertainty. The Constitution simply provided that “[i]n 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.”<sup>24</sup> The text did not make clear whether “the same” referred to the presidential powers and duties or the office itself. After William Henry Harrison became the first President to die in office in 1841, Vice President John Tyler claimed that he was President, not simply the Vice President acting as President.<sup>25</sup> Although Tyler’s claim probably contradicted the Framers’ intent, later Vice Presidents who found themselves in that situation embraced his position and ultimately the Tyler Precedent became accepted as constitutional reality. Whether the successor became President or acting President made no formal difference if the vacancy was permanent (i.e. death, resignation, or removal) but that distinction had significant impact in the case of presidential inability, the one event in which the President’s departure could be temporary. If the presidential office devolved on the Vice President in case of the President’s “[i]nability to discharge the Powers and Duties of [his] Office,”<sup>26</sup> that transfer would displace the President. The Constitution provided for one President at a time and offered no way for an ousted President to return to office other than through the electoral system. If, however, only the presidential powers and duties devolved on the Vice President, the office remained with the President, and he could presumably reclaim its powers and duties.

The constitutional ambiguity, compounded by the Tyler Precedent, complicated matters when presidential disabilities arose, primarily during the Garfield,<sup>27</sup> Wilson,<sup>28</sup> and Eisenhower<sup>29</sup> administrations. Presidents and those around them were often not anxious to consider transferring power to the Vice President in part for fear that so doing might permanently displace

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23. Special Message to the Congress on Presidential Disability and Related Matters, 1 PUB. PAPERS 100, 101 (Jan. 28, 1965); *see also* 111 CONG. REC. 7937 (1965) (statement of Rep. Emanuel Celler) (“Fate has been most kind to Americans, but we should not continue to tempt it.”); *id.* at 7945 (statement of Rep. Robert Stafford) (“We have trifled with fate too long.”); *id.* at 7952 (statement of Rep. Harold Donohue) (“It may well be considered among our greatest blessings that, as yet, no confounding catastrophe has erupted out of vacancies in the vice-presidency or presidential incapacity.”).

24. U.S. CONST. art. II, § 1, cl. 6.

25. FEERICK, *supra* note 8, at 92–94.

26. U.S. CONST. art. II, § 1, cl. 6.

27. *See* FEERICK, *supra* note 8, at 118–39.

28. *See id.* at 162–80.

29. *See id.* at 211–29.

the Chief Executive. Vice Presidents were reluctant to act.<sup>30</sup> Vice President Chester A. Arthur took no action during the eighty days during which President James A. Garfield lay in a coma between the assassination attempt and his death in 1881.<sup>31</sup> Garfield and Arthur were from rival factions of the Republican party, and their political enmity further complicated the situation.<sup>32</sup> Vice President Thomas Marshall did not discharge presidential powers during the seven months when a stroke largely incapacitated Woodrow Wilson.<sup>33</sup> Wilson and Marshall were both progressive Democrats, but Marshall, like virtually all other Vice Presidents of his era, had relatively little involvement in the executive branch. Vice President Richard M. Nixon participated more fully in the Eisenhower Administration but presidential power remained with Eisenhower during his 1955 heart attack, his 1956 surgery under anesthesia following an ileitis attack, and his 1957 stroke and period of convalescence.<sup>34</sup>

The Twenty-Fifth Amendment addressed presidential inability indirectly in Section 1 and directly in Sections 3 and 4. Section 1<sup>35</sup> simply performed constitutional housekeeping. It imported into the text of the Constitution the Tyler Precedent with respect to the three situations in which an event ended the president's claim to the office—death, resignation, and removal—thereby separating those events from that of inability. Section 3<sup>36</sup> provided a means whereby the President could voluntarily transfer powers and duties to the Vice President, subject to the right to reclaim them. Section 4<sup>37</sup> provided a mechanism whereby the Vice President and

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30. The structure of political institutions gave further reason for inaction. For much of American history, Vice Presidents often came from rival wings of the President's political party. Until 1940, the presidential nominee had little input in the choice of his running mate. Finally, Vice Presidents functioned primarily in the legislative branch as President of the Senate and had relatively little involvement in the business of the executive branch.

31. See FEERICK, *supra* note 8, at 125.

32. See *id.* at 120–21.

33. See *id.* at 166–79 (summarizing the period between Wilson's stroke on September 25, 1919 and the first Cabinet meeting on April 13, 1920).

34. See *id.* at 217–20; NIXON, *supra* note 14, at 144–49, 167–68, 174–75.

35. Section 1 provides: "In case of the removal of the President from office or of his death or resignation, the Vice President shall become President." U.S. CONST. amend. XXV, § 1.

36. Section 3 provides:

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.

*id.* amend. XXV, § 3.

37. Section 4 provides:

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

the principal officers of the executive branch or such replacement body as Congress might create could remove presidential powers and duties from the Chief Executive. The President could reclaim those powers and duties but, if the moving parties contested his or her fitness, Congress would decide the issue.

### C. Vice Presidential Vacancy

The Twenty-Fifth Amendment also addressed the problem of vice presidential vacancy, a contingency which had occurred sixteen times before 1967, eight times following presidential deaths (and vice presidential successions),<sup>38</sup> seven times following vice presidential deaths,<sup>39</sup> and once following a vice presidential resignation.<sup>40</sup> The Constitution provided no means to fill a vice presidential vacancy prior to the next quadrennial election. Instead, it covered the Vice President's constitutionally prescribed functions by empowering the Senate to choose a President pro tempore in his absence<sup>41</sup> and authorizing Congress to identify an officer to act as President in case of a double vacancy.<sup>42</sup> The absence of a procedure to fill a vice presidential vacancy had two related consequences—the Vice

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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.

*Id.* amend. XXV, § 4.

38. The Presidents who died in office, the Vice Presidents who succeeded them, and the dates of the Presidents' deaths are as follows: William Henry Harrison (John Tyler, April 4, 1841), Zachary Taylor (Millard Fillmore, July 9, 1850), Abraham Lincoln (Andrew Johnson, April 15, 1865), James A. Garfield (Chester A. Arthur, September 19, 1881), William McKinley (Theodore Roosevelt, September 14, 1901), Warren G. Harding (Calvin Coolidge, August 2, 1923), Franklin D. Roosevelt (Harry S. Truman, April 12, 1945), and John F. Kennedy (Lyndon B. Johnson, November 22, 1963). *See* FEERICK, *supra* note 8, at 315.

39. Vice Presidents George Clinton (April 20, 1812), Elbridge Gerry (November 23, 1814), William Rufus King (April 18, 1853), Henry Wilson (November 22, 1875), Thomas A. Hendricks (November 25, 1885), Garret A. Hobart (November 21, 1899), and James S. Sherman (October 30, 1912) died in office. *See* FEERICK, *supra* note 8, at 316.

40. John C. Calhoun resigned in the last few months of his term (December 28, 1832) to accept election as senator from South Carolina. *See* JOHN NIVEN, JOHN C. CALHOUN AND THE PRICE OF UNION: A BIOGRAPHY 192–93 (1988).

41. U.S. CONST. art. I, § 3, cl. 5 (“The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.”).

42. *Id.* art. II, § 1, cl. 6 (“[T]he 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.”).

Presidency would remain unoccupied until the end of the term, and during that time some other government figure would be next in line to the Presidency. Congress had passed three succession laws adopting different strategies—in 1792, placing the President pro tempore and Speaker of the House of Representatives in line with provision for a special election of a President;<sup>43</sup> in 1886, placing the Cabinet members beginning with the Secretary of State in line;<sup>44</sup> and in 1947, placing the Speaker, then the President pro tempore, then the Cabinet.<sup>45</sup> Following the Kennedy assassination, the enhanced significance of the Vice Presidency, coupled with the concerns regarding alternative lines of succession, created interest for the first time in providing a means to fill vice presidential vacancies.

Section 2<sup>46</sup> provided a procedure to fill a vice presidential vacancy whereby the President would nominate a Vice President subject to confirmation by both houses of Congress. As is suggested below, the provision reflected a new vision of the Vice Presidency which saw that office as an important advisor and assistant to the President. It also flowed from an appreciation of the virtues of the Vice Presidency as the first successor and the relative disadvantages of alternative successors.

#### *D. First Implementations*

Developments since 1967 have tested the provisions of the Twenty-Fifth Amendment. Events to date do not cover the landscape of possibilities, and the response, in some instances, was not optimal. Nonetheless, the first implementations of several provisions of the Amendment provide evidence that it works well and encourage confidence in its further application.

##### 1. Presidential Succession

Not too much should be made of the successful application of Section 1, which governed the succession of Gerald R. Ford to the Presidency upon Nixon's resignation on August 9, 1974. Section 1, after all, simply confirmed that the Tyler Precedent applied to death, resignation, and removal of the President. Ford succeeded to the Presidency as had eight Vice Presidents before him, although this time following resignation, not death, of his predecessor, and at the end, not near the beginning, of a national trauma.

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43. See Act of Mar. 1, 1792, ch. 8, §§ 9, 10, 1 Stat. 239, 240–41 (repealed 1886) (relating to “the Election of a President and Vice President of the United States, and declaring the Officer who shall act as President in case of Vacancies in the offices both of President and Vice President”).

44. See Act of Jan. 19, 1886, ch. 4, 24 Stat. 1 (repealed 1947).

45. See Presidential Succession Act of 1947, Pub. L. No. 80-199, 61 Stat. 380 (codified as amended at 3 U.S.C. § 19 (2006)).

46. Section 2 provides: “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.” U.S. CONST. amend. XXV, § 2.

## 2. Filling Vice Presidential Vacancy

Section 2, however, did work quite well in 1973 and 1974 when Ford, and then Nelson A. Rockefeller, were nominated and confirmed as Vice President. The first implementation of the Amendment was occasioned by unforeseen circumstances; a President under cloud of criminal behavior nominated a potential Vice President to fill a vacancy created by the resignation of a Vice President charged with criminal behavior. The vacancy was created by the resignation of Vice President Spiro T. Agnew as part of a plea agreement to avoid prosecution for bribery,<sup>47</sup> only the second time a Vice President had resigned and the first in circumstances that suggested unfitness to hold office. Nixon, who was subject to impeachment proceedings for obstruction of justice in connection with the Watergate offenses, nominated Agnew's successor. In the heightened ethical environment following Watergate and Agnew's resignation due to alleged criminal improprieties, an intense investigation of Ford was to be expected. Some 350 FBI agents spent three weeks investigating Ford and produced 1700 pages of new data; some fifty agents from the Internal Revenue Service, General Accounting Office, and the Senate Rules Committee staff also participated.<sup>48</sup>

Although the bizarre scenario that led to the vacancy was not anticipated, those who wrote the Twenty-Fifth Amendment had foreseen the possibility of a second complicating factor—a Congress controlled by the President's opposing party.<sup>49</sup> When Nixon nominated Ford in October 1973 and when Ford nominated Nelson A. Rockefeller ten months later, the Democratic party held majorities in both the House of Representatives and Senate.<sup>50</sup> Divided control had two implications for the proceedings. The Democratic Speaker of the House stood next in line so that Nixon's removal would change party control of the White House. Moreover, the Democrats would run the confirmation process in both houses and could defeat the nomination.

The first implementations of Section 2 ran remarkably well and made a historic contribution to the American constitutional system. Circumstances did not allow Nixon to select his first choice, former Texas Governor and Secretary of the Treasury John B. Connally. Members of both parties opposed his selection. Other high risk potential nominees—Governors Ronald Reagan and Nelson Rockefeller—also provoked opposition in both

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47. See generally RICHARD M. COHEN & JULES WITCOVER, *A HEARTBEAT AWAY: THE INVESTIGATION AND RESIGNATION OF VICE PRESIDENT SPIRO T. AGNEW* 341–53 (1974).

48. JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND EARLIEST APPLICATIONS* 135–36 (2d ed. 1992); Marjorie Hunter, *Senate Committee to Begin Hearings Today on Ford Nomination as Vice President*, N.Y. TIMES, Nov. 1, 1973, at 32.

49. See, e.g., *1965 House Hearings*, supra note 5, at 48 (statement of Sen. Birch Bayh).

50. See *Party Division in the Senate, 1789–Present*, U.S. SENATE, [http://www.senate.gov/pagelayout/history/one\\_item\\_and\\_teasers/partydiv.htm](http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm) (last visited Nov. 11, 2010); *Party Divisions of the House of Representatives (1789 to Present)*, OFFICE OF THE CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, [http://clerk.house.gov/art\\_history/house\\_history/partyDiv.html](http://clerk.house.gov/art_history/house_history/partyDiv.html) (last visited Nov. 11, 2010).

parties.<sup>51</sup> But the idea that the Democrats could impose a mere caretaker, although suggested by some,<sup>52</sup> was quickly rejected by Senator Birch Bayh, the principal author of the Twenty-Fifth Amendment, as inconsistent with its intent.<sup>53</sup> Ultimately, Nixon nominated House Minority Leader Gerald R. Ford, who commanded broad support on both sides of the aisle.<sup>54</sup> Ford had never been a presidential prospect but he had been considered as a possible vice presidential candidate and had served as the House leader for eight years.

Ford's confirmation in less than two months was impressive especially when the surrounding circumstances are considered. Since it constituted the first application of Section 2, government officials involved had no precedents from which to draw. Neither the Senate Rules Committee nor the House Judiciary Committee had ever before held hearings on a nominee. The opposition party had large majorities in both the House and Senate. Nixon, the President who nominated Ford, was facing a likely impeachment inquiry. That proceeding became inevitable after Nixon ordered the firing of Archibald Cox, the independent counsel investigating high officials in the Nixon Administration, only eight days after Ford's nomination, in the "Saturday Night Massacre."<sup>55</sup> That dramatic and shocking episode worsened the temper of American politics, further undermined Nixon's legitimacy, and presented another obstacle for Ford's confirmation.<sup>56</sup> The "national turmoil" that ensued pushed Nixon's approval rating below thirty percent,<sup>57</sup> a precipitous decline for a President re-elected in a forty-nine state landslide less than one year earlier.

Moreover, circumstances mandated a full inquiry. Ironically, Ford's popularity in Congress, especially in the House, provided reason to proceed deliberately. Speaker Carl Albert worried that too speedy a confirmation might appear to reflect cronyism that would undermine Ford's legitimacy and that of the Section 2 process.<sup>58</sup> The Agnew debacle made even more

51. FEERICK, *supra* note 48, at 131; *Congress to Vote*, N.Y. TIMES, Oct. 11, 1973, at 1 (quoting Democratic leaders predicting opposition to certain high profile choices).

52. See John Herbers, *All Rumors, and None of Them Are Very Good*, N.Y. TIMES, Sept. 23, 1973, at E1 (reporting Democratic sentiment against nomination of presidential possibility).

53. FEERICK, *supra* note 48, at 131 (quoting Sen. Bayh).

54. See generally JAMES CANNON, *TIME AND CHANCE: GERALD R. FORD'S APPOINTMENT WITH HISTORY* (1994); RICHARD NIXON, *RN: THE MEMOIRS OF RICHARD NIXON 925-27* (1978) (stating that Ford was the first choice of Congressmen); BARRY WERTH, *31 DAYS: THE CRISIS THAT GAVE US THE GOVERNMENT WE HAVE TODAY 37* (2006) (stating that Nixon felt precluded from selecting his preference, Connally, due to Watergate and bipartisan political opposition).

55. See FEERICK, *supra* note 48, at 136.

56. Douglas E. Kneeland, *Bork Takes Over*, N.Y. TIMES, Oct. 21, 1973, at 1; Warren Weaver, Jr., *Court Rebuffed*, N.Y. TIMES, Oct. 20, 1973, at 1, 16 (reporting possible problems for Ford's confirmation from Nixon's conduct).

57. *Nixon Plan on Prosecutor is Opposed by Mansfield*, N.Y. TIMES, Oct. 28, 1973, at 1.

58. Marjorie Hunter, *A Congress Delay on Ford Expected*, N.Y. TIMES, Oct. 18, 1973, at 27 (stating Congressmen from both parties believe a quick confirmation would be a mistake); Marjorie Hunter, *Ford and Albert Deal with Deep Problems*, N.Y. TIMES, Nov. 3, 1973, at 12.

necessary a careful examination of Ford's record insofar as it reflected on his character.<sup>59</sup> Ford was widely perceived not simply as a Vice President but as a likely President given Nixon's increasingly perilous political situation.<sup>60</sup> Bayh recognized that the Ford confirmation process would establish a precedent and accordingly urged against a perfunctory consideration.<sup>61</sup> Nixon's nomination of Ford was viewed positively by 47% and negatively by 34%; by contrast, in late October 1973, Nixon's handling of the Presidency was viewed negatively 64% to 32%.<sup>62</sup> Ultimately, Ford was approved, 92 to 3, in the Senate and 387 to 35 in the House.<sup>63</sup> Although all who voted against the nomination were Democrats, the overwhelming number of Democrats supported Ford's confirmation.<sup>64</sup>

The existence of Section 2 played a critical role in extricating America from the unique circumstance created by the concurrent criminal and constitutional proceedings against Agnew and Nixon. The presence of a procedure to install a new Republican Vice President, and accordingly a Republican successor to Nixon, minimized the role of partisan considerations. The Nixon Justice Department could work to remove Agnew without fear of placing, for a prolonged period of time, the Democratic Speaker of the House, Carl Albert, next in line behind a President who was facing an increasingly serious impeachment proceeding. Those proceedings against Nixon could go forward without fear that his removal would shift party control. Republican leaders could ultimately encourage Nixon to resign, a move that did not jeopardize their party's control of the White House for the remainder of the term but strengthened its chances to retain it.

The Rockefeller confirmation took four months from nomination to confirmation, more than twice the length of Ford's. Ford consulted widely and vetted a number of candidates for more than ten days before determining that Rockefeller was his first choice.<sup>65</sup> A desire of some congressional Democrats to sideline Rockefeller from participating in the 1974 midterm elections may have played some part in the delay,<sup>66</sup> but other, legitimate and nonpartisan factors also contributed and were the

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59. Editorial, *Action on Mr. Ford*, N.Y. TIMES, Nov. 12, 1973, at 32.

60. *Approval on Floor is Expected*, N.Y. TIMES, Nov. 21, 1973, at 1; Editorial, *A Future President?*, N.Y. TIMES, Nov. 26, 1973, at 30; *Ford Tells Rumor of Oil Release*, CHI. TRIB., Nov. 17, 1973, at S4 (quoting Congressman that Ford would be President within a year); Michael J. Harrington, *Opposes Ford for V.P.*, CHI. TRIB., Nov. 17, 1973, at S12; Marjorie Hunter, *1 Man Being Interviewed for 2 Jobs*, N.Y. TIMES, Nov. 4, 1973, at E2; Marjorie Hunter, *Senate Unit Backs Ford, 9 to 0; McGovern Predicts Nixon Ouster in Year*, CHI. TRIB., Nov. 12, 1973, at 13; see FEERICK, *supra* note 48, at 142 (quoting predictions Ford would be President).

61. Richard L. Madden, *Choice is Praised by Both Parties*, N.Y. TIMES, Oct. 13, 1973, at 1.

62. Louis Harris, *Nixon's Rating Still at Bottom*, CHI. TRIB., Nov. 12, 1973, at 26.

63. FEERICK, *supra* note 48, at 141, 149-50.

64. *Id.* at 129-52.

65. WERTH, *supra* note 54, at 61-63, 93-95, 100-03, 107-09, 114-16, 119, 138-40.

66. See GERALD R. FORD, *A TIME TO HEAL* 224 (1979) (blaming the delay on partisan politics).

major reason the Rockefeller proceedings were so much more protracted. The enormous Rockefeller family wealth introduced new issues, raised questions regarding conflicts of interest, and required additional research.<sup>67</sup> During the course of hearings, a number of disclosures required further investigation and additional hearings. For instance, Rockefeller had made substantial cash gifts to various state and national officials including members of Congress.<sup>68</sup> He had also denied involvement with financing a book disparaging a serious opponent in the 1970 gubernatorial campaign; in fact, Rockefeller's brother had largely financed the effort and Rockefeller had been advised of the project.<sup>69</sup> An IRS audit found Rockefeller owed more than \$900,000 in additional taxes.<sup>70</sup> The complexity of Rockefeller's record juxtaposed with the heightened focus on public ethics in the Watergate era made it predictable that Congress would move deliberately. Rockefeller's nomination required seventeen days of public hearings. John D. Feerick later observed that "serious questions" imposed a need for further investigation and examination as a predicate for public confidence in the process.<sup>71</sup> Rockefeller's public support declined during the proceedings,<sup>72</sup> and some original supporters, like Senator Barry M. Goldwater, were publicly acknowledging second thoughts by late October.<sup>73</sup>

The normal congressional interlude incident to the midterm campaigns also delayed consideration. Congress was in recess for the elections from mid-October to mid-November. In mid-November, the Senate Rules Committee reconvened to question Rockefeller regarding some newly released information including his gifts and loans to public officials and his involvement with the Goldberg book; House hearings began in late November and concluded after the Thanksgiving recess.<sup>74</sup> Some suggested that Rockefeller's confirmation should be deferred until the new Congress met in January, 1975, but Albert rejected that request.<sup>75</sup> Ultimately, Rockefeller was confirmed 90 to 7 in the Senate,<sup>76</sup> and 287 to 128 in the

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67. James Cannon, *Gerald R. Ford and Nelson A. Rockefeller: A Vice Presidential Memoir*, in *AT THE PRESIDENT'S SIDE: THE VICE PRESIDENCY IN THE TWENTIETH CENTURY* 135, 139 (Timothy Walch ed., 1997).

68. See FEERICK, *supra* note 48, at 169–70.

69. See *id.* at 172–73.

70. See *id.* at 174–75.

71. *1975 Senate Hearings*, *supra* note 3, at 146 (statement of John D. Feerick, scholar on presidential succession); see also Editorial, *Rockefeller Inquiry*, N.Y. TIMES, Nov. 17, 1974, at 18E (arguing that "lengthy" proceedings were justified if they produced a "higher standard of ethical conduct" for public officials). See generally FEERICK, *supra* note 48, at 166–84 (describing the Rockefeller confirmation process).

72. See *Rockefeller Support Fell in September, Poll Finds*, N.Y. TIMES, Oct. 25, 1974, at 21.

73. Linda Charlton, *Goldwater Now Undecided on Rockefeller Nomination*, N.Y. TIMES, Oct. 25, 1974, at 1.

74. FEERICK, *supra* note 48, at 176–82.

75. See Linda Charlton, *Rockefeller Vote Faces Delay Plea*, N.Y. TIMES, Dec. 14, 1974, at 27.

76. Three conservative Republicans—Senators Barry M. Goldwater (Arizona), Jesse Helms (North Carolina), and William Scott (Virginia)—and four liberal Democrats—James

House.<sup>77</sup> A coalition of conservative Republicans and liberal Democrats opposed Rockefeller.<sup>78</sup> House Democrats voted to confirm Rockefeller 134 to 99; House Republicans did so, 153 to 29.<sup>79</sup> Rockefeller praised Congress for its “thoroughness” in acting as a surrogate for the American people, which he said spoke to the Constitution’s “enduring strength and vitality.”<sup>80</sup> Republican Minority Leader Senator Hugh Scott commended the operation of the Amendment.<sup>81</sup>

The success of the Ford and Rockefeller experiences, of course, carries no guarantee that Section 2 will always work well. Shortcomings could occur in two opposite directions. Congress, particularly if controlled by the opposite party from the President, could use the Section 2 process to score political points rather than act expeditiously to fill the vacancy as intended. In the Senate, the filibuster would allow this sort of partisan abuse even by a substantial group from the minority party. And members of the president’s own party might act to prevent the promotion to Vice President of a rival within their own party. Although confirmation in a highly visible process would seem likely to encourage the nomination of highly credentialed and respected figures, it is possible to imagine these sorts of pressures inducing a President to bypass presidential figures.

Alternatively, Congress might be too deferential in reviewing a nominee. This danger would seem most likely to occur if the vacancy arose from some national trauma, such as the succession of a Vice President following a presidential assassination. Inasmuch as Section 2 was conceived following the assassination of President Kennedy, Congress had that contingency very much in mind. The aftermath of tragedy might also lead a new President to make an improvident selection, for instance by nominating the spouse or family member of the deceased President.

The possibility of unhappy outcomes does not, however, distinguish Section 2 from any other procedure that depends on human implementation. Yet the track record from the Ford and Rockefeller confirmations provides reason for optimism. In each case, a President nominated a well-respected person who was among the leading political figures of his generation. In each case, the nominee was confirmed with a minimum of partisan delay even though the opposition party controlled both houses of Congress. That one nominator was facing likely impeachment proceedings and the other had himself achieved office through Section 2 did not preclude them from having their nominees considered and confirmed. These successful implementations should help establish norms to govern subsequent uses.

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Abourezk (South Dakota), Birch Bayh (Indiana), Howard Metzenbaum (Ohio), and Gaylord Nelson (Wisconsin)—voted against Rockefeller. Linda Charlton, *Ford is Pleased*, N.Y. TIMES, Dec. 11, 1974, at 1.

77. Linda Charlton, *Rockefeller Sworn in as Vice President After Confirmation by House*, 287 to 128, N.Y. TIMES, Dec. 20, 1974, at 1.

78. *Id.*

79. *Id.*

80. *Transcript of Senate Inaugural Ceremony*, N.Y. TIMES, Dec. 20, 1974, at 16.

81. *Id.*

In addition to functioning well, Section 2 greatly strengthened arrangements to assure presidential continuity. By providing a mechanism to fill a vice presidential vacancy, Section 2 diminished the significance of the line of successors after the Vice President. During the 178 years before the Twenty-Fifth Amendment was ratified, the Vice Presidency was vacant, and accordingly, a legislative leader or Cabinet officer stood first in line of succession for thirty-seven of those years or twenty-one percent of the time.<sup>82</sup> During the forty-three years since it has been in effect, someone other than the Vice President has been the first successor for only about one percent of the time.<sup>83</sup>

Of course, all of that reduction cannot be traced to Section 2. Perhaps a more accurate measure of the impact of Section 2 comes from looking simply at the presidential term from January 20, 1973 to January 20, 1977 during which both implementations of Section 2 occurred. Without Section 2, the Vice Presidency would have been vacant for thirty-nine months instead of six months, nearly an eighty-five percent reduction. That presidential term was, of course, an anomaly since it was the only time when two vacancies occurred in one term. Had Nixon completed his term, the period of vice presidential vacancy would have shrunk from thirty-nine months to two months, a ninety-five percent reduction.

Finally, a third measure of the anticipated impact of Section 2 might involve applying an average expected vacancy period under Section 2 retrospectively across American history. If one assumes that filling a vice presidential vacancy will normally require three months, the average of the Ford and Rockefeller experiences, Section 2, had it been in place since 1789 would have allowed filling the Vice Presidency all but four years, instead of nearly thirty-eight, a reduction of nearly ninety percent. Under any measure, Section 2 greatly minimizes the defects of alternative lines of succession by making much more remote the chance they will be used.

### 3. Presidential Inability

The history under the inability provisions, though not without some controversy, also reflects successful resort to Section 3 and some positive developments regarding it and Section 4. Presidential power has been transferred on three occasions under Section 3 when Presidents underwent medical procedures under anesthesia. President Reagan transferred power to Vice President Bush for about eight hours on July 13, 1985 when he underwent surgery to remove a cancerous polyp from his intestine.<sup>84</sup> Reagan, Bush, and other top officials had discussed the possibility of a

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82. See FEERICK, *supra* note 8, at 316.

83. During this forty-three year period, the Vice Presidency has been vacant for only six months: almost two months during Ford's confirmation as Vice President and just over four months relating to Rockefeller's nomination and confirmation. See FEERICK, *supra* note 48, at 215, 255, app. D.II.

84. FEERICK, *supra* note 48, at xv-xvi.

transfer during the week leading up to Reagan's surgery.<sup>85</sup> Reagan did not wish to set a precedent that would bind his successors when they underwent surgery under anesthesia.<sup>86</sup> Although the letter Reagan signed obfuscated what legal norm authorized the transfer, Section 3 provided the only basis for action, he followed its procedures perfectly,<sup>87</sup> and he and his close associates later acknowledged it as the basis for his action.<sup>88</sup> Reagan may have reclaimed power too soon, and there has been some suggestion that he may have approved important overtures incident to the Iran-Contra debacle while in the hospital a few days after the surgery.<sup>89</sup> Reagan certainly could, and should have done a better job implementing Section 3, but he at least deserves some credit for transferring presidential powers and duties. President George W. Bush twice transferred power to Vice President Dick Cheney under Section 3 during brief periods when he was undergoing or recovering from minor surgery.<sup>90</sup>

On at least two other occasions, Presidents were prepared to delegate their power under Section 3 incident to anticipated anesthesia. In May 1991, George H.W. Bush planned to transfer powers to Vice President Dan Quayle when it appeared that he would have a procedure under anesthesia to shock his heart back into its normal rhythm.<sup>91</sup> Medicine brought Bush's heart back to its normal rhythm, thereby averting the transfer.<sup>92</sup>

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85. MILLER CTR. COMM'N NO. 4, REPORT OF THE COMMISSION ON PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT 7-8 (1988), available at [http://web1.millercenter.org/commissions/comm\\_1988.pdf](http://web1.millercenter.org/commissions/comm_1988.pdf).

86. Letter to the President Pro Tempore of the Senate and the Speaker of the House on the Discharge of the President's Powers and Duties During His Surgery, 2 PUB. PAPERS 919-20 (July 13, 1985).

87. FEERICK, *supra* note 48, at xvi; Joel K. Goldstein, *First Test for the 25th Amendment*, ST. LOUIS POST-DISPATCH, July 21, 1985, at 3B.

88. *See, e.g.*, RONALD REAGAN, AN AMERICAN LIFE: THE AUTOBIOGRAPHY 500 (1990); NANCY REAGAN WITH WILLIAM NOVAK, MY TURN: THE MEMOIRS OF NANCY REAGAN 274 (1989); *see also* FEERICK, *supra* note 48, at xvi-xvii.

89. *See generally* HERBERT L. ABRAMS, "THE PRESIDENT HAS BEEN SHOT": CONFUSION, DISABILITY, AND THE 25TH AMENDMENT IN THE AFTERMATH OF THE ATTEMPTED ASSASSINATION OF RONALD REAGAN 209-14 (1992); MCDERMOTT, *supra* note 21, at 28.

90. Letter to Congressional Leaders on the Temporary Transfer of the Powers and Duties of the President of the United States, 43 WEEKLY COMP. PRES. DOC. 1003-04 (July 21, 2007); Letter to Congressional Leaders on the Temporary Transfer of the Powers and Duties of President of the United States, 1 PUB. PAPERS 1083 (June 29, 2002). Bush claimed that he was the first President to transfer power for a routine colonoscopy and that he did so "because we're at war, and I just want to be super—you know, super cautious." Exchange with Reporters on Departure for Camp David, Maryland, 1 PUB. PAPERS 1080 (June 28, 2002).

91. Marlin Fitzwater, White House Press Sec'y, Statement on the Health of President George Bush (May 5, 1991), in THE AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=19549&st=bush&st1=> ("During the short time that the President would be under anesthesia, the Vice President would be Acting President under the 25th amendment."); *see also* MARLIN FITZWATER, CALL THE BRIEFING! 286-90 (1995).

92. Marlin Fitzwater, White House Press Sec'y, Statement on the Health of President George Bush (May 6, 1991), in THE AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=19550&st=&st1=>.

When President Clinton had knee surgery in March 1997, his doctors avoided general anesthesia and administered an epidural that only affected the lower part of his body.<sup>93</sup> At that time, press secretary Mike McCurry announced, “We have a procedure that is in place and a plan if anything about the 25th Amendment is indicated.”<sup>94</sup> McCurry said that Chief of Staff Erskine Bowles had been in close contact with Vice President Gore’s staff and that “it would be irresponsible for us not to at least anticipate that situation. If that need arises, we can very quickly act—deal with the situation, but that’s not anticipated at this time.”<sup>95</sup> White House physician Dr. E. Connie Mariano had recommended that Section 3 be invoked if a general anesthesia was used.<sup>96</sup>

On at least two other occasions a President or those close to him have contemplated the use of Section 3 or perhaps Section 4. When Reagan was shot on March 30, 1981, two different groups of aides thought about whether to invoke the Twenty-Fifth Amendment. Reagan’s triumvirate, consisting of chief of staff James Baker, counselor Edwin Meese, and deputy chief of staff Mike Deaver, were with Reagan at the hospital and decided not to transfer power.<sup>97</sup> White House counsel Fred Fielding had papers to effectuate a transfer related to the Twenty-Fifth Amendment available in the White House Situation Room, where some of the central Cabinet figures had gathered.<sup>98</sup> Attorney General William French Smith, a close friend of Reagan’s, and Fielding briefed those in the Situation Room about the provision.<sup>99</sup> Another aide, Richard Darman, confiscated the papers from Fielding and reported that action to James Baker who approved it.<sup>100</sup> Ultimately, Baker, Meese, and Deaver decided against invoking the Amendment, and no one else acted to force the issue.

The episode produced some troubling events regarding the disability provisions of the Twenty-Fifth Amendment. Reagan was clearly unable to discharge his powers and duties from the time he was wounded and rapidly losing blood until sometime after he came out of recovery following surgery under anesthesia. There was some reason to fear the Soviet Union might try to exploit the situation to invade Poland.<sup>101</sup> Moreover, the Twenty-Fifth Amendment vests constitutional power in the Vice President and principal heads of the executive departments, not in a triumvirate of

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93. Mike McCurry, White House Press Sec’y, & David Wade, M.D., *Press Briefing at the National Naval Medical Center*, THE AM. PRESIDENCY PROJECT (Mar. 14, 1997), <http://www.presidency.ucsb.edu/ws/index.php?pid=48584&st=surgery&st1=>

94. *Id.*

95. *Id.*

96. E. Connie Mariano, *In Sickness and in Health: Medical Care for the President of the United States*, in *MANAGING CRISIS: PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT* 83, 93 (Robert E. Gilbert ed., 2000).

97. ABRAMS, *supra* note 89, at 180.

98. JAMES A. BAKER, III WITH STEVE FIFFER, *WORK HARD, STUDY . . . AND KEEP OUT OF POLITICS! ADVENTURES AND LESSONS FROM AN UNEXPECTED PUBLIC LIFE* 146 (2006); FEERICK, *supra* note 48, at xiii.

99. ABRAMS, *supra* note 89, at 180.

100. BAKER, *supra* note 98, at 146.

101. *See* ABRAMS, *supra* note 89, at 40–41, 100–02.

White House aides accountable only to the President. The Twenty-Fifth Amendment should have been invoked.

As a practical matter, three factors justify somewhat softening criticism of the administration's handling of the episode. First, Vice President Bush was on Air Force Two en route from Texas to Washington, D.C. during much of the time Reagan was unconscious.<sup>102</sup> The communications with his aircraft were apparently difficult and not secure. It is not at all clear that transferring power to the Vice President while he was en route under those circumstances would have enhanced national security. Shortly after Bush arrived at the White House, Reagan emerged from surgery. The completion of the surgery did not effectively end the period of time during which a transfer of presidential powers might have been appropriate. Having undergone the trauma of the shooting and surgery, experiencing the disorientation associated with the accompanying regime of medicine, and suffering subsequent infection and significant fever, Reagan's capacity to act as President was surely compromised for some period of time. He remained in the hospital for twelve days and did not return to the Oval Office for three and a half weeks.<sup>103</sup> Once Reagan regained consciousness, however, his close associates may have plausibly concluded that a temporary transfer of powers could be accomplished when, and if, needed.

Second, the Reagan assassination attempt constituted the first occasion when decision makers seriously contemplated invoking the disability provisions due to presidential injury or sudden illness. There were no precedents to guide them. The issue was unanticipated and it arose amidst a host of other concerns, both personal and professional.

These circumstances interacted with a third complicating factor—the assassination attempt occurred early in the administration before it was prepared to respond. There were at least two problems. The administration had not considered how to handle various contingencies relating to the president's health. White House counsel Fred Fielding was preparing, but had not finished, a manual regarding the subject. When he briefed Cabinet officers regarding the Twenty-Fifth Amendment in the Situation Room, Fielding "could see eyes glazing over" among officials who were ignorant of the Amendment.<sup>104</sup>

Moreover, the assassination attempt occurred before relationships had solidified and before central figures had developed mutual credibility. Divisions existed between longtime Reagan loyalists and those identified with Vice President Bush and his close friend (but also Reagan's surprise choice as Chief of Staff) James Baker. Long-time Reagan supporters were suspicious of Bush, Baker, and others who had not initially supported

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102. *See id.* at 83–84; ALEXANDER M. HAIG, JR., *CAVEAT: REALISM, REAGAN AND FOREIGN POLICY* 151–52 (1984).

103. *See generally* ABRAMS, *supra* note 89, at 57–74 (summarizing Reagan's schedule).

104. *See* MILLER CTR. COMM'N NO. 4, *supra* note 85, at App. C (quoting Fielding's testimony).

Reagan.<sup>105</sup> These figures, in turn, were anxious to demonstrate their loyalty. Those on all sides acted more cautiously and more hesitantly than they might have had the episode occurred later in Reagan's Presidency.

High ranking presidential advisers briefly considered the disability provisions of the Twenty-Fifth Amendment in 1987 when Howard Baker replaced Donald Regan as Reagan's third Chief of Staff. Baker was advised, based on interviews with White House aides, that consideration should be given to whether Reagan was able to discharge the powers and duties of his office.<sup>106</sup> These aides claimed Reagan was inattentive and disengaged and spent his time watching television and movies in the residence rather than working in the Oval Office.<sup>107</sup> Baker was dubious about these reports; after meeting Reagan and seeing him in action, Baker and his associates concluded that Reagan was able to act as President.<sup>108</sup>

Despite Reagan's reluctance to establish a precedent, since 1985 administrations have followed a practice of transferring presidential powers and duties to the Vice President whenever the President undergoes a medical procedure under anesthesia. Two different administrations have done so and two others were prepared to do so. This practice seems a prudent safeguard of the nation's security.<sup>109</sup>

The more difficult problems relate to situations in which Section 4 might be considered. These fall into two general categories—situations in which a President is unconscious due to a sudden injury or illness and situations in which a President is or may be no longer physically or mentally able to discharge presidential functions yet denies that incapacity. The unconscious President scenario presents a clear case in which to transfer power. A Vice President is unlikely to take dramatic steps while acting as President for a short time absent an emergency,<sup>110</sup> yet it would seem more prudent for presidential powers and duties to be transferred from a comatose to a conscious figure. The common sense of this conclusion may

105. See BAKER, *supra* note 98, at 145–46; see also JULES WITCOVER, FROM ADAMS AND JEFFERSON TO TRUMAN AND QUAYLE: CRAPSHOOT—ROLLING THE DICE ON THE VICE PRESIDENCY: FROM ADAMS AND JEFFERSON TO TRUMAN AND QUAYLE 319–20 (1992).

106. JANE MAYER & DOYLE MCMANUS, LANDSLIDE: THE UNMAKING OF THE PRESIDENT, 1984–1988, at x (1988).

107. *Id.* at ix.

108. *Id.* at x–xi; Interview by Stephen Knott et al. with Howard Baker, former Reagan Chief of Staff, in Wash., D.C., 3–4 (Aug. 24, 2004) (on file with the Miller Center of Public Affairs, Ronald Reagan Oral History Project), available at [http://web1.millercenter.org/poh/transcripts/ohp\\_2004\\_0824\\_baker.pdf](http://web1.millercenter.org/poh/transcripts/ohp_2004_0824_baker.pdf).

109. Quite clearly, some issues regarding presidential inability remain to be considered. Could the provisions have been used, as some have suggested, for Presidents Richard M. Nixon or William J. Clinton to have transferred powers during their impeachment proceedings? Although the Amendment clearly was not designed as a political no-confidence remedy, presumably Section 3 could be used by a President who found that the stress of defending against removal precluded him or her from discharging the executive power, unlikely as that scenario is. For discussions of the range of possible applications, see FEERICK, *supra* note 48, at 197–200; Goldstein, *supra* note 1, at 98–102.

110. See Joel K. Goldstein, *The Vice Presidency and the Twenty-Fifth Amendment: The Power of Reciprocal Relationships*, in MANAGING CRISIS: PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT, *supra* note 96, at 165, 198–201.

sometimes yield to other considerations. If the President could have, but did not, transfer power under Section 3 before losing consciousness, the Vice President and Cabinet may hesitate to invoke Section 4. If the loss of consciousness is brief, the Cabinet may not have time to act. Having not transferred power while the President was unconscious, it may be difficult to do so once the President wakes up even though there may be a period before the President can truly resume the powers and duties of the office.

The mishandling of disability issues incident to the Reagan assassination attempt focused attention on some of those issues and some remedial actions have been taken. Administrations now have contingency plans in place and White House counsels, presidential physicians, and other important personnel are schooled in the Twenty-Fifth Amendment. President George H.W. Bush met with Vice President Dan Quayle and other interested parties in April 1989, early in their term, to discuss the matter and responses to possible disability scenarios.<sup>111</sup> Their successors have also taken positive steps.<sup>112</sup> Each administration should adopt appropriate contingency plans prior to inauguration and make sure central figures are familiar with them. Moreover, Presidents need to make clear, to the Vice President, Cabinet members, key White House aides, and their families, their wish that powers and duties should be transferred to the Vice President when the President is unable to exercise presidential powers and duties.

The most difficult predicament, from a medical and political perspective, arises when a President clings to power despite being disabled. No procedure can guarantee results here.<sup>113</sup> Alternative approaches carry their own risks. For reasons discussed below, the architects of the Twenty-Fifth Amendment designed Sections 3 and 4 as they did, and they provide a foundation to address this inherently complicated problem.

## II. THE FOUNDATIONS OF THE TWENTY-FIFTH AMENDMENT

The Twenty-Fifth Amendment offers more than the sum of its provisions. In addition to the rules and procedures it provides, its design and history should shape discussion of further reform in two distinct ways. First, a number of constitutional principles animated, and are implicit in, its provisions. As such, it introduces certain ideas into the structure of the Constitution and reinforces (or mitigates) others. Moreover, the story of the Amendment offers strategic and tactical lessons regarding how to achieve meaningful reform regarding presidential continuity. Ratification of the Twenty-Fifth Amendment was not serendipitous. It was accomplished due

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111. FITZWATER, *supra* note 91, at 286; DAN QUAYLE, *STANDING FIRM: A VICE-PRESIDENTIAL MEMOIR* 251–52 (1994).

112. *See, e.g.*, Mariano, *supra* note 96, at 92–93.

113. *See* ROBERT E. GILBERT, *THE MORTAL PRESIDENCY: ILLNESS AND ANGUISH IN THE WHITE HOUSE* 277–78 (2d ed. 1998) (suggesting that the Twenty-Fifth Amendment is unlikely to handle well many psychological illnesses); GEORGE E. REEDY, *THE TWILIGHT OF THE PRESIDENCY* 160–70 (1970) (discussing the difficulty of handling a psychologically disturbed President).

to wise choices its architects made. Even though the modern context introduces some novel considerations, the story of the Amendment offers valuable lessons regarding achieving reform in a difficult area.

Accordingly, studying the principles and choices that provided the foundation for the Twenty-Fifth Amendment serves a retrospective and a prospective purpose. Looking backward, a review provides insight into the ideas and objectives of the Amendment and the constraints and choices its proponents made. Looking forward, such a study may help address remaining problems, both by suggesting constitutional principles which may inform the effort as well as presenting lessons regarding legislative strategy which may enhance prospects of success for future reform efforts. The retrospective survey confirms that the framers of the Twenty-Fifth Amendment struck prudent balances among basic, yet often competing, principles and achieved success through skillful political behavior. The prospective discussion suggests that some of these principles might prove helpful in addressing remaining problems.

### A. *Constitutional Principles*

#### 1. Presidential Continuity

The Twenty-Fifth Amendment reflected the conviction that having a functioning Chief Executive at all times is mandatory. That commitment flowed from the Constitution's vesting of the executive power in a President of the United States<sup>114</sup> and from historical change that had increased the importance of that office in a nuclear age. "There can be no doubt in anybody's mind that this Nation cannot permit the Office of the President to be vacant even for a moment,"<sup>115</sup> said Representative Emanuel Celler. Those who drafted the Twenty-Fifth Amendment urged that resolution of issues relating to presidential inability was "imperative if continuity of Executive power is to be preserved with a minimum of turbulence at times when a President is disabled. Continuity of executive authority is more important today than ever before" due to the increased importance of the Presidency.<sup>116</sup>

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114. U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

115. *1965 House Hearings*, *supra* note 5, at 2 (statement of Rep. Celler); *see also id.* at 3 (statement of Rep. William M. McCulloch) (referring to the constant need for "capable, dynamic, and certain leadership" from the President); 111 CONG. REC. 7938 (1965) (statement of Rep. Celler) ("We are thus assured of the continuity of Executive authority, which is highly important, the continuity of Executive authority."); *id.* at 7954 (statement of Rep. Don Fuqua) ("More important than ever before is the continuity of the powers of the Executive Office and it is imperative that this continuity be maintained with the least possible disturbance at the time of a President's disability.").

116. H.R. REP. NO. 89-203, at 8 (1965); S. REP. NO. 89-66, at 8 (1965); S. REP. NO. 88-1382, at 6 (1964); *see also* 111 CONG. REC. 7942 (1965) (statement of Rep. William M. McCulloch) (speaking of the increased importance of executive continuity); *id.* at 7956 (statement of Rep. William Randall) (discussing the importance of presidential continuity); *id.* at 7957 (statement of Rep. Herbert Tenzer) (discussing importance of Presidency); *id.* at 3168 (statement of Sen. George Smathers); *id.* at 3264 (statement of Sen. Hugh Scott).

“Continuity of executive authority” was used in two different senses. Most basically, it meant that there should always be someone authorized to exercise presidential powers and duties and capable of doing so.<sup>117</sup> In an age in which “it is possible to destroy civilization as we know it in a manner of minutes,” national security “demands a President who is always capable of making rational decisions and rational determinations.”<sup>118</sup> The Amendment pursued this objective by establishing a means to transfer power and duties from a disabled President to a Vice President and by providing a mechanism to fill the Vice Presidency whenever it fell vacant. Although Sections 3 and 4 reflected a bias in favor of a President’s entitlement to the office to which she was elected, the belief in the importance of presidential continuity was sufficiently strong that Section 4 allowed the Vice President to continue to act as President during the period in which the Vice President and Cabinet decided to challenge her declaration of fitness and during the period in which Congress had to referee a dispute.<sup>119</sup>

Yet the framers of the Amendment were not indifferent regarding who the presidential pinch hitter should be. They associated “continuity of executive authority” with certain qualities they identified with the Vice President. Accordingly, they concluded it was essential to have a Vice President “at all times.”<sup>120</sup> Section 2 would “assure that the person nominated was a member of the President’s own party, of compatible temperament and views, and someone with whom [the President] could work effectively.”<sup>121</sup>

#### *a. A Prepared Successor*

The Twenty-Fifth Amendment identified the Vice President as the optimal first successor for three interrelated reasons. It saw the Vice

117. 1965 *House Hearings*, *supra* note 5, at 40 (statement of Sen. Bayh) (emphasizing the importance of executive continuity); 1964 *Senate Hearings*, *supra* note 6, at 214 (statement of Clinton Rossiter, Professor of American Institutions, Cornell University) (“Perhaps the most pressing requirement of good Government in the United States today is an uninterrupted, unchallengeable exercise of the full authority of the Presidency. We need a man in the Presidency at all times who is capable of exercising this authority, and we need one, moreover, whose claim to that authority is undoubted.”).

118. 110 CONG. REC. 22,990 (1964) (statement of Sen. Bayh); *see* 1965 *House Hearings*, *supra* note 5, at 3 (statement of Rep. McCulloch) (rejecting permissibility of gap in presidential power in “space age”); 111 CONG. REC. 7951 (1965) (statement of Rep. William Cahill) (“In this day and age with immediate decisions required on a myriad of subjects, it is inconceivable that this country should continue without the full service of a chief executive.”); 110 CONG. REC. 23,060 (1964) (statement of Sen. Bayh); *id.* at 22,994 (statement of Sen. Alan Bible).

119. John D. Feerick, *The Twenty-Fifth Amendment: Its Origins and History*, in *MANAGING CRISIS: PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT*, *supra* note 96, at 1, 14–15.

120. 111 CONG. REC. 3252 (1965) (statement of Sen. Bayh); Memorandum from John D. Feerick, scholar on presidential succession, to Sen. Birch Bayh, Section 2 of the Twenty-Fifth Amendment (Sept. 24, 1973) in *Selected Materials on the Twenty-Fifth Amendment*, S. DOC. No. 93-42, at 279, 281 (1973) [hereinafter Feerick Memorandum].

121. Feerick Memorandum, *supra* note 120, at 281.

President as well suited to function in an understudy role. This experience would position the Vice President “to become familiar with the problems he will face should he be called upon to act as President.”<sup>122</sup> Succession of a Vice President would allow “no break in the informed exercise of executive authority” in the event of tragedy.<sup>123</sup> The Vice President could assume the Presidency “on a moment’s notice.”<sup>124</sup> Someone who held another office would be hard-pressed to achieve the desired familiarity that the understudy role could offer while discharging duties attached to another demanding position.

*b. Harmony Breeds Preparation*

The framers thought it essential that the successor be someone with whom the President could work well.<sup>125</sup> Such a harmonious relationship between the President and Vice President would protect the operation of the executive branch and would encourage vice presidential involvement. The Vice President, as someone who was chosen by the President,<sup>126</sup> would be more likely to receive confidential information from the President than someone outside the Administration.<sup>127</sup>

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122. H.R. REP. NO. 89-203, at 11–12 (1965); S. REP. NO. 89-66, at 11–12 (1965); S. REP. NO. 88-1382, at 10 (1964); *see also* 1964 Senate Hearings, *supra* note 6, at 26 (statement of Sen. Kenneth Keating) (noting impediments to the Speaker serving as understudy); 111 CONG. REC. 7953 (1965) (statement of Rep. Jacob H. Gilbert) (discussing need for “presidential successor fully conversant with domestic and world affairs” and prepared for succession “on short notice”); 110 CONG. REC. 23,059 (1964) (statement of Sen. Bayh); *id.* at 22,996 (Vice President in “training”); John D. Feerick, *The Vice Presidency and the Problem of Presidential Succession and Inability*, 32 FORDHAM L. REV. 457, 489 (1964) (speaking of the importance of ““on the job training”” purpose of the Vice Presidency).

123. H.R. REP. NO. 89-203, at 15; S. REP. NO. 89-66, at 14; S. REP. NO. 88-1382, at 13; *see also* 111 CONG. REC. 7949 (1965) (statement of Rep. Jeffery Cohelan) (stating that the Vice President must be prepared to succeed on a moment’s notice).

124. 111 CONG. REC. 7961–62 (1965) (statement of Rep. John V. Lindsay).

125. *See* 1965 House Hearings, *supra* note 5, at 89 (statement of Sen. Bayh) (emphasizing need for harmony between the President and Vice President); 110 CONG. REC. 23,060 (1964) (statement of Sen. Bayh).

126. 1964 Senate Hearings, *supra* note 6, at 81 (statement of Sen. Frank Church) (stating that the Vice President “would have the President’s full confidence”); *id.* at 93–95 (statement of Lewis F. Powell, Jr., president-elect, American Bar Association) (noting the importance of “harmonious relations and mutual confidence”); *id.* at 130–31 (statement of Paul A. Freund, Professor of Law, Harvard Law School) (noting the need for “harmony” between the President and Vice President); 111 CONG. REC. 7941 (1965) (statement of Rep. Richard Poff) (“[A] man originally chosen by the President . . .”).

127. *See, e.g.,* Presidential Inability and Vacancies in the Office of Vice President: Hearing Before the Subcomm. on Constitutional Amendments of S. Comm. on the Judiciary, 89th Cong. 11 (1965) [hereinafter 1965 Senate Hearings] (statement of Nicholas deB. Katzenbach, acting Att’y Gen. of the United States); 111 CONG. REC. 15,591 (1965) (statement of Sen. Everett Dirksen) (stating the importance of a working relationship between the President and Vice President); *id.* at 7941 (statement of Rep. Poff) (describing the Vice President as “a man who knows what great decisions of state are waiting to be made . . .”); *id.* at 3262 (statement of Sen. Hiram Fong) (stating that a close relationship between the President and Vice President will promote vice presidential preparation); 110 CONG. REC. 23,060 (1964) (statement of Sen. Bayh); *id.* at 22,992 (statement of Sen. Leverett Saltonstall); *id.* at 22,993–94 (statement of Sen. Fong); *id.* at 22,994 (statement of Sen. Bible); Feerick, *supra* note 122, at 489.

*c. Party Continuity*

Finally, the Vice President was likely to be ideologically compatible with the President. The framers of the Twenty-Fifth Amendment noted that the “importance of this compatibility is recognized in the modern practice of both major political parties in according the presidential candidate a voice in choosing his running mate subject to convention approval” and that it was critical that the procedure for filling a vice presidential vacancy replicate that model.<sup>128</sup> Since proposed Section 2 would allow the President to nominate a Vice President subject to congressional approval, “the country would be assured of a Vice President of the same political party as the President, someone who would presumably work in harmony with the basic policies of the President.”<sup>129</sup> That arrangement “would assure a reasonable continuity of Executive policy, should the Vice President become President.”<sup>130</sup> By contrast, a Speaker of the House, the person who was next in line, might belong to the opposite party. “What implications would that have for the continuity of Executive policy?” Bayh asked rhetorically.<sup>131</sup> “The people, by voting in an election, should be the ones to decide a change of policy and a change of direction in our Government, and not some illness, some assassin’s bullet, or some other unfortunate situation which would remove a President from the scene.”<sup>132</sup>

Section 2’s strong emphasis on party continuity introduced an important concept into the Constitution. In short, presidential succession should not shift party control of the executive branch. Whereas previously this idea simply made good sense, the Twenty-Fifth Amendment elevated it to a constitutional concept.

128. H.R. REP. NO. 89-203, at 15; S. REP. NO. 89-66, at 15; S. REP. NO. 88-1382, at 13.

129. H.R. REP. NO. 89-203, at 15; S. REP. NO. 89-66, at 15; S. REP. NO. 88-1382, at 13. This language borrowed from the testimony of former Attorney General Herbert Brownell before the Senate Subcommittee on Constitutional Amendments in 1964. *See 1964 Senate Hearings, supra* note 6, at 137–38; *see also 1965 House Hearings, supra* note 5, at 245 (statement of Herbert Brownell, former Att’y Gen. of the United States); *1965 Senate Hearings, supra* note 127, at 45 (statement of Sen. Birch Bayh); *1964 Senate Hearings, supra* note 6, at 26 (statement of Sen. Keating) (noting the importance of party continuity and the possibility of a Speaker from the other party); *id.* at 28 (criticizing proposal for congressional election of the Vice President due to the possibility of cross-party result); 111 CONG. REC. 7941 (1965) (statement of Rep. Poff) (“The Vice President, a man of the same political party . . .”); *id.* at 7953 (statement of Rep. Gilbert) (discussing the importance of the Vice President having “harmonious relations and mutual confidences” with the President); *id.* at 7954 (statement of Rep. Fuqua) (discussing the increased importance of the relationship between the President and Vice President); *id.* at 7962 (statement of Rep. McCulloch) (criticizing proposal for special election for the Vice President which might choose a member of the opposition party); *id.* at 3262 (statement of Sen. Fong) (noting the importance of party identity between the President and Vice President); 110 CONG. REC. 22,992 (1964) (statement of Sen. Saltonstall); *id.* at 22,994 (statement of Sen. Bayh).

130. *1964 Senate Hearings, supra* note 6, at 4 (statement of Sen. Birch Bayh); 111 CONG. REC. 3256 (1965) (statements of Sens. Samuel Ervin, Jr. and Bayh).

131. *1964 Senate Hearings, supra* note 6, at 2; *see also id.* at 59–60, 65 (statement of Sen. Frank Moss); 111 CONG. REC. 7956 (1965) (statement of Rep. Randall) (calling the fact that Section 2 avoids succession of someone of “a different political faith” “one of the strong arguments” in its favor).

132. 110 CONG. REC. 22,988 (1964) (statement of Sen. Bayh).

## 2. A Presidential Vice President

The framers of the Twenty-Fifth Amendment thought that the Vice President needed to be a presidential figure. They attributed to the founders the intent that the Vice President be a person “equal in stature to the President” and someone who was “qualified and able” to be President.<sup>133</sup> They shared that aspiration for the caliber of Vice Presidents and thought the recent development of the office had brought it to that standard.<sup>134</sup> They rejected the proposal to create a second Vice President in part because they thought it would attract people whose qualifications were insufficient to be a heartbeat or two from the Presidency.<sup>135</sup> The prime qualification to be Vice President, Bayh said, was fitness to be President.<sup>136</sup> The Vice President should be “the best possible man to serve in that post.”<sup>137</sup> Presidential scholar Clinton Rossiter thought the President would have “a clear burden” to choose someone “of the highest stature and abilities.”<sup>138</sup> Congressional confirmation would furnish “an added safeguard that only fully qualified persons of the highest character and national stature” would be nominated to be Vice President.<sup>139</sup>

## 3. A New Vice Presidential Vision

The Twenty-Fifth Amendment was premised on and reflected a new appreciation of the Vice Presidency as it was then perceived.<sup>140</sup> Its text manifested this new attitude. Section 2 provided a method to fill a vice presidential vacancy to substantially reduce periods when that position was unoccupied. That innovation was a striking departure from the original Constitution, which viewed the Vice President primarily as an expedient to facilitate the presidential election system but as superfluous once that mission was completed.<sup>141</sup> Moreover, Sections 3 and 4 made the Vice President a necessary participant in disability determinations.

Numerous comments during hearings and floor debates underscored this new appreciation of the Vice Presidency.<sup>142</sup> Those who framed the

133. S. REP. NO. 88-1382, at 8–9.

134. *See id.*

135. *1964 Senate Hearings, supra* note 6, at 5 (statement of Sen. Bayh) (arguing that two Vice Presidents would “invite men of small political stature and questionable qualifications”).

136. 110 CONG. REC. 22,987 (1964) (statement of Sen. Bayh).

137. *Id.* at 22,996 (statement of Sen. Bayh); *see also 1965 House Hearings, supra* note 5, at 90 (statement of Sen. Bayh) (predicting the President would have the incentive “to get the very best possible man”); *id.* at 91 (stating the electorate would insist on an “extremely well qualified” Vice President); *id.* at 256 (statement of former Att’y Gen. Brownell) (stating the President would have “very strong self-interest” to choose “the best possible man”).

138. *1964 Senate Hearings, supra* note 6, at 218 (statement of Professor Rossiter).

139. 111 CONG. REC. 7955 (1965) (statement of Rep. Peter Rodino).

140. Joel K. Goldstein, *The New Constitutional Vice Presidency*, 30 WAKE FOREST L. REV. 505, 508 (1995); *see* Feerick Memorandum, *supra* note 120, at 279 (“In recognition of the growing importance of the Vice Presidency . . .”).

141. *See* Goldstein, *supra* note 140, at 511–13.

142. *See, e.g., 1964 Senate Hearings, supra* note 6, at 1–2 (statement of Sen. Bayh) (arguing for the need for a Vice President at all times and broad consensus to that effect).

Amendment saw the Vice Presidency as a useful institution in the executive branch. They believed the officer, if utilized by the President, could enhance the operation of that branch.<sup>143</sup> They recognized that Presidents had discretion whether, and how much, to involve their Vice Presidents. They reasoned that Presidents would be most likely to involve the Vice President if the two were compatible and were bound together by feelings of loyalty and responsibility. To nurture those attitudes, they provided that the President would nominate the Vice President subject to approval by each house of Congress, thereby simulating the selection process whereby the party standard bearer chooses the running mate.<sup>144</sup>

They saw the development of the Vice Presidency as a virtue in American government, one which should be protected. Accordingly, they rejected the proposal of Senator Kenneth Keating to create two Vice Presidents, a reform many thought would check the growth of the office in addition to presenting other problems.<sup>145</sup> The design of Section 4 also reflected a concern for the Vice President; the addition of the Cabinet as a partner in disability determinations was largely motivated by a desire to protect the Vice President from the perception that he or she was trying to usurp power.

Section 2 rested on the promise that the Vice President was the optimal presidential successor. The Kennedy assassination and Johnson succession “pointed up once again the abyss which exists in the executive branch when there is no incumbent Vice President.”<sup>146</sup> On sixteen occasions, then totaling more than thirty-seven years, the Vice Presidency had been vacant. “In any one of those years something could have happened to the President. This would have required an officer other than the Vice President to act as President,”<sup>147</sup> said Bayh in his opening remarks at the 1964 hearings to consider proposed constitutional amendments two months after the Kennedy assassination. The implication was clear: it was better if succession did not extend beyond the Vice President. Section 2 was designed to address the problem of presidential succession after the Vice President by minimizing the instances when someone other than a Vice President would stand a heartbeat from the Presidency. It sought to route succession away from those other than the Vice President by creating a mechanism to fill that position. The Committee Reports that accompanied the legislation in both houses confessed that “Section 2 is intended to virtually assure us that the Nation will always possess a Vice President.”<sup>148</sup>

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143. *Id.* at 2–3.

144. *See id.* at 4.

145. *See, e.g., id.* at 245–46 (statement of Richard M. Nixon, former Vice President of the United States); Feerick, *supra* note 122, at 470.

146. S. REP. NO. 88-1382, at 9 (1964).

147. *1964 Senate Hearings, supra* note 6, at 1.

148. H.R. REP. NO. 89-203, at 14 (1965); S. REP. NO. 89-66, at 14 (1965); S. REP. NO. 88-1382, at 13; *see also 1964 Senate Hearings, supra* note 6, at 217 (statement of Professor Rossiter) (“I think that we should go against this problem today and solve it, except in the most ghastly and unforeseen of circumstances, by providing a dignified, open and conclusive means of filling the Vice Presidency whenever it has been vacated.”).

As President Johnson said in his Message to Congress, “[i]n these times” the statutory line of succession was “no substitute for an office of succession.”<sup>149</sup>

#### 4. Separation of Powers/Checks and Balances

The framers of the Twenty-Fifth Amendment adopted solutions that incorporated basic principles of separation of powers and checks and balances. The commitment to separation of powers ideas, which emphasize, in part, protection of institutional boundaries, was primary.<sup>150</sup> Concerns relating to checks and balances, which focus on limiting governmental power and promoting governmental accountability, were secondary.

The Twenty-Fifth Amendment rested on the premise that solutions to continuity problems should respect the institutional integrity of the executive branch and protect the President. As such, it prevented Congress from imposing a Vice President the President did not want and it structured inability procedures to create a substantial presumption in favor of the President’s entitlement to his office.

Separation of powers ideas influenced the approach to filling a vice presidential vacancy. Although nominally the Vice President was President of the Senate, the framers of the Twenty-Fifth Amendment recognized that the Vice President had increasingly become an executive official, a role they repeatedly emphasized.<sup>151</sup> Accordingly, the framers gave the President the sole power to nominate the Vice President. They rejected approaches that would have allowed Congress to elect a Vice President or choose from a slate of nominees.<sup>152</sup> Congress should not be able to impose on the President an unwanted Vice President.

Similarly, they devised methods for handling presidential inability that were extremely sensitive to the institutional integrity of the executive branch generally and to the particular interests of the President. Only members of the executive branch could initiate a transfer of power—the President, under the voluntary transfer process of Section 3, and the Vice President and Cabinet, under the involuntary procedures of Section 4. Section 4 was crafted so that “no door is opened for undue pressure on the executive branch” from other branches of government,<sup>153</sup> explained Herbert Brownell, whose ideas influenced the Amendment. Testifying for the American Bar Association (ABA), Lewis Powell, Jr., its president-elect,

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149. Special Message to the Congress on Presidential Disability and Related Matters, 1 PUB. PAPERS 100, 102 (Jan. 28, 1965).

150. See, e.g., 1965 House Hearings, *supra* note 5, at 241, 253 (statement of former Att’y Gen. Brownell); 1964 Senate Hearings, *supra* note 6, at 4–5, 66 (statement of Sen. Bayh); *id.* at 70–71 (statement of Sen. Roman Hruska); *id.* at 133–34 (statement of Professor Freund); 111 CONG. REC. 3269 (1965) (statement of Sen. Roman Hruska).

151. See Goldstein, *supra* note 140, at 529–32.

152. See Feerick Memorandum, *supra* note 120, at 280.

153. 1965 House Hearings, *supra* note 5, at 241 (statement of former Att’y Gen. Brownell); see also 111 CONG. REC. 7952 (1965) (statement of Rep. Byron Rogers) (Cabinet will be “hesitant” to declare the President disabled); BROWNELL, *supra* note 14, at 279.

thought that the “independence of the executive branch must be preserved, and a President who has regained his health should not be harassed by a possibly hostile Congress.”<sup>154</sup> Although Congress could replace the Cabinet with some other body,<sup>155</sup> until it did, only presidential appointees could displace the Chief Executive. “[W]e must take every precaution to safeguard the President from unwarranted usurpation of his power,” said Bayh.<sup>156</sup> “The point” behind the disability provisions was “to safeguard the President—to give him every advantage in any action or contemplated action.”<sup>157</sup>

Even if Congress replaced the Cabinet with some other body, the Vice President remained a crucial actor under Section 4, thereby giving one executive officer an effective veto in any event. Indeed, the Senate-House conference added language “to make crystal clear that the Vice President must be a party to any action declaring the President unable to perform his powers and duties.”<sup>158</sup> The design was intended to protect the President from the threat of “unwarranted usurpation of his power” by assigning the primary roles to the President and his close political allies; Congress could intervene only to resolve an irreconcilable dispute in the executive branch.<sup>159</sup> Section 4 required that the House and Senate adjudicate a

154. *1964 Senate Hearings*, *supra* note 6, at 93; *see also id.* at 152 (statement of Feerick, scholar of presidential succession). The position of Senator Eugene McCarthy that Congress should be able to initiate an inability determination was rejected. 111 CONG. REC. 15,586 (1965) (statement of Sen. Eugene McCarthy); *id.* at 15,383; *see also id.* at 15,590 (statement of Sen. Ervin) (reporting his initial view, now changed, that Congress should initiate an inability determination).

155. Such a change would, of course, be subject to a presidential veto in which case the “other body” would only supersede the Cabinet if each house overrode the president’s veto by a two-thirds majority vote. *See* U.S. CONST. art. I, § 7, cl. 2 (“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.”).

156. *1964 Senate Hearings*, *supra* note 6, at 4 (statement of Sen. Bayh).

157. *Id.* at 4–5.

158. 111 CONG. REC. 15,379 (1965) (statement of Sen. Bayh). Ironically, the Senator most troubled by that addition was Albert Gore, Sr., father of a subsequent Vice President. *See also id.* at 15,383–84 (stating the Vice President is a necessary actor under Section 4 with the Cabinet or other body Congress creates). *But see id.* at 15,586 (statement of Sen. McCarthy) (arguing that the Vice President should have been excluded); *id.* at 15,588 (statement of Sen. Albert Gore) (labeling the participation of the Vice President in an inability determination “to say the least, debatable”); *id.* at 15,590 (statement of Sen. Ervin) (reporting his prior view that the Vice President should not be involved).

159. *1964 Senate Hearings*, *supra* note 6, at 4–5 (statement of Sen. Bayh) (“In the question of Presidential inability, we must take every precaution to safeguard the President

disability dispute within twenty-one days; the time limit was imposed “to place a safeguard around the President.”<sup>160</sup> Finally, the Amendment incorporated the requirement that each house of Congress conclude by a supermajority vote that the President was unable to perform the powers and duties of his office. Unless each house agreed that he was disabled within the twenty-one day period, the President was entitled to resume the exercise of those functions.<sup>161</sup>

In reserving to members of the executive branch the exclusive right to initiate a transfer of presidential power under Sections 3 and 4, the Twenty-Fifth Amendment ran the risk that the President’s allies might conceal a disability. Its authors believed that course posed a lesser danger than a regime that would allow Congress to wield a disability determination as a weapon against the executive branch. This resolution reflected a bias in favor of protecting the executive branch generally, and the President specifically, from legislative intrusion in this matter. It also represented a judgment that executive officials would be most likely to recognize presidential inability and transfer power if they were authorized to initiate the process and determine when the disability had ended. Thus, a President who voluntarily transferred power under Section 3 could reclaim it immediately without review.<sup>162</sup> And the Cabinet was associated with the Vice President in Section 4 to provide some political cover for someone history suggested would otherwise be reluctant to initiate a disability determination.<sup>163</sup> The framers of the Twenty-Fifth Amendment emphatically rejected a medical commission in part because they thought a

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from unwarranted usurpation of his power. . . . The point of this is to safeguard the President—to give him every advantage in any action or contemplated action.”). The framers rejected the approach proposed by Senator Sam Ervin, Jr. to have Congress initiate and decide inability through a procedure like that of impeachment. *See 1964 Senate Hearings, supra* note 6, at 254–56 (describing Sen. Ervin’s approach); *see also* 111 CONG. REC. 7938 (1965) (statement of Rep. Celler) (“Throughout all these sections are thrown in that if there is any doubt the President is favored without doubt. The resolution shall always be in favor of the President because he is the elected representative of the people, the first officer of the land, and he shall be favored without doubt.”); 110 CONG. REC. 22,995 (1964) (statement of Sen. Bible). Some thought Section 4 did not go far enough to protect the President since it provided that in case of a dispute between the President and Vice President-Cabinet, the Vice President would remain in power until Congress resolved the matter. *See* 111 CONG. REC. 7948 (1965) (statement of Rep. Lindsay); *id.* at 7949–50 (statement of Rep. Arch Moore); *id.* at 7958 (statement of Rep. Richard C. White).

160. 111 CONG. REC. 15,385 (1965) (statement of Sen. Bayh).

161. Either house could unilaterally restore the President to power in a shorter period of time by an earlier vote to resolve the inability dispute, which did not produce a two-third super majority in support of the Vice President’s position. *Id.* at 15,379.

162. Language was added to Section 3 in conference to make this point explicit. *See id.* at 15,378.

163. *See, e.g., 1964 Senate Hearings, supra* note 6, at 129 (statement of Professor Freund) (stating the Vice President “should be spared the task of shouldering the responsibility alone” since “the very appearance of self-interest might impel him to refrain from a decision which by objective standards ought to be taken”).

divided vote among medical experts regarding the President's capacity would degrade presidential power.<sup>164</sup>

Notwithstanding the emphasis on separation of powers ideals, the framers also included checks and balances features. A vice presidential nominee only took office if each house of Congress approved, thereby affording a check against an improvident appointment. Significantly, they chose bicameral approval of a nominee by the houses of Congress instead of Electoral College review.<sup>165</sup> The latter approach would have imposed no meaningful check since electors have become party functionaries, not independent discretionary actors.

Similarly, Section 4 designated Congress the referee if the President contested the inability determination of the Vice President and Cabinet.<sup>166</sup> Congress's role provided some check against an incapacitated President trying to resume power and against usurpation of the Chief Executive's position by others.

The predominance of separation of powers thinking, over that of checks and balances, becomes more evident when the disability provisions in Section 4 are contrasted with the Constitution's impeachment arrangements. These two procedures are linked in offering the only constitutional processes to remove a President permanently *from office* in the case of impeachment, and at least temporarily *from exercising the powers and duties*, in the case of the disability.

The two constitutional remedies follow quite different models. Whereas Congress initiates and concludes presidential impeachment, with the House impeaching and the Senate deciding whether to convict and remove,<sup>167</sup> Congress is assigned a more passive role regarding presidential inability. It cannot initiate a disability determination and it only has a role in the somewhat unlikely event that the President finds himself in an irreconcilable public conflict with the Vice President and Cabinet regarding his ability to discharge the powers and duties. Congress's role as umpire serves as a disincentive to usurpation by a Vice President and Cabinet as well as to the President's improvident return. By virtue of the bicameral supermajority requirement, which is a prerequisite for the Vice President continuing to act as President, Congress acts as a check on the Vice President and Cabinet more than on the President.

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164. See, e.g., *1965 House Hearings*, *supra* note 5, at 241–42 (statement of former Att'y Gen. Brownell).

165. See GOLDSTEIN, *supra* note 20, at 233–34.

166. 111 CONG. REC. 15,379 (1965) (statement of Sen. Hruska) (stating that Congress was reduced to “an appellate body” under Section 4); see also *1965 House Hearings*, *supra* note 5, at 47 (statement of Sen. Bayh) (stating that Congress provides a check against usurpation of presidential power); *id.* at 241 (statement of former Att'y Gen. Brownell) (stating that the Cabinet provides a check on the Vice President); *1964 Senate Hearings*, *supra* note 6, at 5 (statement of Sen. Bayh) (discussing the importance of checks and balances since the President is fallible).

167. U.S. CONST. art. I, § 2, cl. 5 (“The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.”); *id.* art. I, § 3, cl. 6 (“The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation.”).

The two models diverge in another significant respect. The conflict of interest concerns that inform the Impeachment provisions are absent from the Twenty-Fifth Amendment. Whereas the Constitution specifically precludes the Vice President from presiding over the Senate when trying a presidential impeachment,<sup>168</sup> it makes the Vice President a necessary initiator (or co-initiator) of disability decisions. Rather than sidelining the Vice President, the Amendment explicitly sanctions his or her participation. Although the Amendment specifically allows Congress to replace the Cabinet as a necessary co-actor under Section 4, Congress cannot replace the Vice President by statute. Indeed, the Cabinet (or other body) was included as much to provide cover for the Vice President against the charge of self-aggrandizement as to check ambitious vice presidential behavior.

### 5. Democratic Pedigree

The framers of the Twenty-Fifth Amendment thought it important that the presidential successor have a democratic pedigree. They were not prepared to allow Congress to elect the new Vice President outright, an approach which would have undermined the continuity, vice presidential vision, and separation of powers concerns. They did seek, however, to introduce a democratic element into the process in a manner consistent with those objectives.

They saw the submission of the nomination to the people's representatives as consistent with the "democratic system" in which they operated.<sup>169</sup> Confirmation by Congress would give "the people of the United States a voice through their elected representatives."<sup>170</sup> The inclusion of the House reflected an effort to make the confirmation process a surrogate for an election.<sup>171</sup> Congress would "consider this serious responsibility and act as the voice of the people."<sup>172</sup> "What better opportunity is there for the people to express their wishes than through those who serve in Congress?" Bayh asked rhetorically.<sup>173</sup>

They also thought that Congress's democratic character well-positioned it to umpire a disability dispute between the President and Vice President.

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168. *Id.* art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. *When the President of the United States is tried, the Chief Justice shall preside:* And no Person shall be convicted without the Concurrence of two thirds of the Members present." (emphasis added)).

169. 110 CONG. REC. 22,988 (1964) (statement of Sen. Bayh).

170. *id.* at 22,994 (statement of Sen. Bible); *see also* 111 CONG. REC. 3252 (1965) (statement of Sen. Bayh); *id.* at 3255; 110 CONG. REC. 22,996 (1964) (statement of Sen. Bayh).

171. *See* 111 CONG. REC. 3252 (1965) (statement of Sen. Bayh) (comparing bicameral confirmation to election); 110 CONG. REC. 22,994 (1964) (statement of Sen. Bible).

172. 110 CONG. REC. 22,996 (1964) (statement of Sen. Bayh).

173. *Id.*; *see also id.* at 23,060 ("[I]t guarantees to the people that their representatives in Congress, those who are most responsive to the wishes of the people at any given time, will be able to express the voice of those whom they represent."). *But see* 111 CONG. REC. 7950 (1965) (statement of Rep. Charles Mathias, Jr.) (criticizing Section 2 as not sufficiently democratic).

Congress was given that role “because it is believed that, as the elected representative of the people, they share the greatest trust of the people.”<sup>174</sup>

#### 6. Accountable Decision Making

The Amendment emphasized accountability as an important attribute in decision making on presidential continuity. This ideal required that public officials make decisions regarding presidential continuity and that their actions be transparent. These features were thought critical to producing public confidence in the decisions reached.<sup>175</sup> This preference was particularly evident in the design of Sections 2 and 4, and, in a lesser way, Section 3.

The reliance on the House and Senate, rather than the Electoral College, to consider a vice presidential nominee reflected the ideal that decision makers should be accountable public figures. Among the disadvantages of the Electoral College was the fact that “[m]uch of the general public has no earthly idea who their State’s electors are.”<sup>176</sup> Accordingly, the public “would be understandably hesitant to allow any such unknown quantity to make an important decision” like confirming a Vice President<sup>177</sup> and its decision would not “command the requisite respect and support of the people.”<sup>178</sup> Bayh thought the public “would wonder what in the world was being perpetrated upon them if we brought in members of the electoral college whom they did not know from Adam.”<sup>179</sup>

The framers thought the Vice President and Cabinet were preferable to a medical commission to decide inability in part because of their accountability. Similarly, they rejected the proposal of President Eisenhower that a high-level commission<sup>180</sup> resolve disputes regarding the President’s fitness to reclaim his powers and duties. “Commissions are not

174. 111 CONG. REC. 7943 (1965) (statement of Rep. McCulloch); *see also id.* at 7955 (statement of Rep. Dante Fascell) (praising Section 4 as providing “fully democratic procedures and safeguards”); *id.* at 7957 (statement of Rep. Tenzer) (confirmation by Congress “would tend to create public confidence in the selection”).

175. 1964 Senate Hearings, *supra* note 6, at 47 (statement of Sen. Bayh).

176. *Id.* at 5.

177. *Id.*; *see also id.* at 60 (statement of Sen. Moss); 110 CONG. REC. 22,996 (1964) (statement of Sen. Bayh).

178. 1964 Senate Hearings, *supra* note 6, at 94 (statement of Powell, president-elect, American Bar Association); *see also* 110 CONG. REC. 22,994 (1964) (statement of Sen. Bible) (noting that the Electoral College is “not subject to the direct will of the people” outside an election year); Feerick Memorandum, *supra* note 120, at 280 (noting that the Electoral College should be rejected since it would not “command the respect and support of the people”).

179. 111 CONG. REC. 3274 (1965) (statement of Sen. Bayh). The Senate rejected by voice vote an amendment offered by Senator Strom Thurmond which would use the Electoral College to fill a vice presidential vacancy. *Id.*

180. Eisenhower proposed that the Commission consist of three senior members of the Cabinet, the Speaker and Minority Leader of the House, the President pro tempore and minority leader of the Senate, and “four medical personnel recognized by the American Medical Association as competent in their fields” who would advise the others. 1964 Senate Hearings, *supra* note 6, at 232 (statement of Sen. Bayh, quoting a letter from former President Eisenhower).

responsive, and they do not have to, of course, account to the electorate,” explained Nixon.<sup>181</sup>

Even the requirement that the President notify the Speaker and President pro tempore of his or her inability by letter reflected a concern with accountability. This method provided a transparent way to announce the beginning and end of a voluntary transfer of power, thereby shielding against a situation where a Vice President claimed authority based on a letter he or she generated.<sup>182</sup>

### 7. Deliberative Decision Making

The Amendment also reflected a belief that decision making should be based on data and deliberation. The Electoral College was unsuited for a role in considering a vice presidential nominee because, unlike Congress, it was not chosen “to exercise any considered judgment or reasoning.”<sup>183</sup> It was not “equipped . . . to conduct hearings on the qualifications of [a] nominee.”<sup>184</sup>

The Cabinet was included in disability deliberations because it was thought to have valuable information regarding the President. The framers thought that working with the President on a regular basis would afford insight into his or her fitness to serve.<sup>185</sup> Nonetheless, they clearly thought that a decision should be informed by medical expertise and specifically so stated in conspicuous places in the legislative history.<sup>186</sup>

181. *Id.* at 241 (statement of former Vice President Nixon).

182. 1965 *House Hearings*, *supra* note 5, at 53–54 (statement of Sen. Bayh) (discussing letters transmitted in Sections 3 and 4 to the President pro tempore of the Senate, not the President of Senate, to avoid the Vice President transmitting letter to himself and to avoid transmittal of letter to party in interest); 111 CONG. REC. 15,378 (1965) (statement of Sen. Bayh) (same).

183. 1964 *Senate Hearings*, *supra* note 6, at 5 (statement of Sen. Bayh).

184. *Id.*; *see also* 1965 *House Hearings*, *supra* note 5, at 66 (statement of Sen. Bayh) (stating that the extent of deliberations would be related to the identity of the vice presidential nominee).

185. S. REP. NO. 89-66, at 13 (1965) (stating that involvement of the Vice President and Cabinet “would enable prompt action by the persons closest to the President, both politically and physically, and presumably most familiar with his condition”); *see* H.R. REP. NO. 89-203, at 13 (1965) (same); S. REP. NO. 88-1382, at 11–12 (1964) (same); *see also* 1965 *House Hearings*, *supra* note 5, at 56 (statement of Sen. Bayh) (referring to close working relationship between the Vice President and Cabinet); 111 CONG. REC. 7941 (1965) (statement of Rep. Poff) (citing the Vice President’s and Cabinet’s knowledge of the President’s health); *id.* at 7942 (statement of Rep. McCulloch) (citing Cabinet’s “intimate contact” with the President as reason for entrusting it with disability decision); *id.* at 7954 (statement of Rep. Gilbert) (stating Section 4 “would enable prompt action by the persons closest to the President”); *id.* at 3262 (statement of Sen. Fong) (noting that the President’s proximity to the Vice President and Cabinet equip them to assess the President’s capacity).

186. S. REP. NO. 89-66, at 13 (“It is assumed that such decision would be made only after adequate consultation with medical experts who were intricately familiar with the President’s physical and mental condition.”); *see* H.R. REP. NO. 89-203, at 13 (same); S. REP. NO. 88-1382, at 12 (same); *see also* 1965 *House Hearings*, *supra* note 5, at 46 (statement of Sen. Bayh) (anticipating that Congress might call medical witnesses); *id.* at 251 (statement of former Att’y Gen. Brownell) (referring to medical input); 1964 *Senate Hearings*, *supra* note 6, at 71–73 (statement of Sen. Hruska) (discussing access to medical information and personal knowledge of President); *id.* at 119 (statement of Sen. Bayh); *id.* at

## 8. Preferring Procedures

Those who drafted the Twenty-Fifth Amendment believed that procedures for office-holders to use, rather than predetermined solutions, could best address the presidential continuity problems the drafters confronted. Sections 2, 3, and 4 of the Amendment each provide a procedure rather than a self-executing solution. Section 2, for instance, empowered a President to nominate a replacement Vice President who would take office upon confirmation by each house of Congress. Section 3 provided that a President could voluntarily transfer to the Vice President, and then resume, presidential powers and duties by transmitting an appropriate letter to the Speaker of the House of Representatives and President pro tempore of the Senate. Section 4 created a *mechanism* whereby the Vice President and a majority of the Cabinet (or of such other body as Congress might designate) could transfer power to the Vice President by declaring a President disabled in situations where the President did not voluntarily transfer power. It further provided that the President could resume powers unless the Vice President and the aforesaid majority challenged that right within four days, in which case the houses of Congress would resolve the issue.

This emphasis on procedures departed from past efforts to address problems of presidential continuity. Although neither the Constitution nor statutes had previously done more than mention disability as a possible contingency, past responses to presidential vacancy had designated a successor, or line of successors, rather than propose a process to fill a position.<sup>187</sup> To be sure, the Twenty-Fifth Amendment addressed different problems—filling a vice presidential (not presidential) vacancy<sup>188</sup> and handling presidential inability—than had those earlier measures. Yet the procedure-based remedy also responded to a belief in the value of decision

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156–57 (statement of Feerick, scholar on presidential succession); 111 CONG. REC. 7938–39 (1965) (statement of Rep. Durward G. Hall); *id.* at 7939 (statement of Rep. Poff) (“Surely, the decisionmakers, whoever they may be, would not undertake so critical a decision without first consulting the experts in the field, namely the gentlemen of the medical profession.”); *id.* (statement of Rep. Clark MacGregor) (expressing an expectation that the Vice President and Cabinet would not act “without a consultation with the very finest medical brains which were available to them here in the Nation’s Capital”); *id.* at 7954 (statement of Rep. Gilbert) (Section 4 decision would presumably “be made only after adequate consultation with medical experts”); *id.* at 3278 (statement of Sen. Hruska) (discussing possibility of psychiatric examination of the President); *id.* at 3279 (statement of Sen. Philip Hart) (assuming receipt of medical testimony to resolve a dispute between the President and Vice President).

187. *See also* 111 CONG. REC. 7946 (1965) (statement of Rep. Edward Hutchinson) (arguing that the Speaker should be automatically elevated to become Vice President). Section 3 of the Twentieth Amendment authorizes both approaches. *See* U.S. CONST. amend. XX, § 3 (“Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected . . .”).

188. *Cf.* 111 CONG. REC. 3279 (1965) (statements of Sen. Bayh and Sen. Ross Bass) (explaining omission of the requirement that Congress act “immediately” under Section 2 as relating to lesser urgency of filling Vice Presidency than Presidency).

making by interested officials able to assess and react to the political context when a continuity issue arose.<sup>189</sup>

In establishing procedures rather than prescribed outcomes, the Amendment reflected an implicit bias in favor of flexible, rather than rigid, approaches. It gave discretion to future decision makers acting within the context of an event rather than imposing a solution in advance for all times. Rather than identify someone to become Vice President when that position fell vacant, it opted for a method of choosing a new Vice President. Its framers rejected electing a second Vice President because that idea would interrupt the development of the Vice Presidency into a more robust institution and would attract “men of small political stature and questionable qualifications.”<sup>190</sup> They also resisted suggestions to provide bright-line tests for inability,<sup>191</sup> defining it only in broad terms.<sup>192</sup> Rather than dictating certain circumstances when presidential power would be transferred, voluntarily or involuntarily, to the Vice President, they specified officials to determine when the President was unable to discharge the powers and duties of the office. Rather than resolve a dispute automatically in favor of the President or Vice President, they entrusted that issue to Congress to decide by a supermajority. In essence, the Twenty-Fifth Amendment placed extensive discretion in specified decision makers who would be confronted with subsequent vice presidential vacancies or presidential disabilities rather than attempting to dictate future results from their mid-1960s vantage point.

#### 9. A Government of Laws

The reliance on procedures reflected a faith in the utility of rules to shape conduct. The framers of the Amendment attributed the failure of past government decision makers to act during prior presidential inability crises to the lack of clear guidelines.<sup>193</sup> They believed that rules could provide clarity and accordingly channel official conduct. Sections 2, 3, and 4 furnished a road map through certain succession crises. Moreover, the framers thought prior Vice Presidents had not acted during past presidential disabilities for fear that under the Tyler Precedent, recognizing and acting

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189. *Id.* at 3256 (statements of Sens. Ervin and Bayh) (arguing that Section 2 procedure is more likely to produce a qualified President than designating a particular officer); *see id.* at 7949 (statement of Rep. Cohelan) (decisions “must be based on the facts of the time”); *id.* at 7952 (statement of Rep. Seymour Halpern) (“We should leave room for human judgment.”).

190. *1964 Senate Hearings*, *supra* note 6, at 5 (statement of Sen. Bayh).

191. 111 CONG. REC. 7941 (1965) (statement of Rep. Poff) (arguing against defining disability to avoid “rigidity” and unworkability); *see id.* at 15,381 (statement of Sen. Bayh) (arguing that decision makers at the time would need to judge the severity of disability and national problems).

192. *Id.* at 3282 (statement of Sen. Bayh) (defining “inability” and “unable” as the President being “unable either to make or communicate his decisions as to his own competency to execute the powers and duties of his office”); *see id.* at 15,381 (statements of Sens. Robert F. Kennedy and Bayh) (“It involves physical or mental inability to make or communicate his decision regarding his capacity and physical or mental inability to exercise the powers and duties of his office.”); *see also id.* at 15,380–81, 3282–84.

193. *See* Feerick, *supra* note 122, at 490–91.

upon a President's disability would permanently transfer the office.<sup>194</sup> The framers thought clarifying those ambiguities would eliminate the disincentives to declaring a President disabled. They thought involving the Cabinet would provide the Vice President with political cover.<sup>195</sup> They thought the norms that these new constitutional duties suggested would encourage effective response.

#### 10. A Government of People Within Those Laws

This emphasis on procedures assumed that officials charged with responsibility would respond appropriately when contingencies arose.<sup>196</sup> The framers of the Twenty-Fifth Amendment thought the risk of future bad conduct was less severe than the hazard of trying to prescribe specific outcomes for times and circumstances they could not foresee. They had more confidence in the decisions of future generations acting in context than in those they could impose in advance.

The framers of the Amendment assumed that public officials would act with a proper sense of "constitutional morality,"<sup>197</sup> that they would not allow personal ambition or partisanship to interfere with their obligation to act in accordance with the constitutional values implicit in the Amendment. Absent this "sense of 'constitutional morality'"<sup>198</sup> no procedure could work. Regarding vice presidential vacancy, Bayh thought one needed to assume future Congresses would be composed of "reasonable" people who would give "reasonable consideration" to a presidential nominee.<sup>199</sup> Senator Sam Ervin put it more strongly: "God help this Nation if we ever get a House of Representatives, or a Senate, which will wait for a President to die so someone whom they love more than their country will succeed to the Presidency."<sup>200</sup> The committee reports of the proposed Twenty-Fifth Amendment articulated this faith regarding inability determination:

Without such a feeling of responsibility there can be no absolute guarantee against usurpation. No mechanical or procedural solution will provide a complete answer if one assumes hypothetical cases in which most of the parties are rogues and in which no popular sense of constitutional propriety exists. It seems necessary that an attitude be

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194. See, e.g., *1964 Senate Hearings*, *supra* note 6, at 162–63 (statement of Sen. Bayh).

195. *Id.* at 162 (statement of Professor Ruth C. Silva) (predicting that clarifying the status and tenure of the President would resolve eighty to ninety percent of the problem).

196. See 111 CONG. REC. 15,380 (1965) (statement of Sen. Bayh) (stating that the "perfection" of the Amendment "is based upon the ability of the men living at the time when the measure must be used to cope successfully with the problems and contingencies with which they are confronted").

197. H.R. REP. NO. 89-203, at 13 (1965); S. REP. NO. 89-66, at 13 (1965); S. REP. NO. 88-1382, at 11 (1964).

198. H.R. REP. NO. 89-203, at 13; S. REP. NO. 89-66, at 13; S. REP. NO. 88-1382, at 11.

199. *1965 House Hearings*, *supra* note 5, at 50 (statement of Sen. Bayh).

200. 111 CONG. REC. 3281 (1965) (statement of Sen. Ervin.).

adopted that presumes we shall always be dealing with ‘reasonable men’ at the highest governmental level.<sup>201</sup>

These conclusions did not reflect simply an optimistic assessment of human nature. They also rested on a belief that certain institutional constraints would promote good behavior. Legal scholar Paul A. Freund suggested that conferring “a solemn constitutional responsibility” on the Vice President and Cabinet regarding presidential inability would “impel” them to act objectively.<sup>202</sup> Brownell assumed that crisis would prompt good behavior from decision makers and, if it did not, public opinion would.<sup>203</sup> Rep. Richard Poff staked his faith that

the American form of government with its system of checks and balances is so structured, that the freedom of the American press is so secure, and that the conscience of the American electorate is so sensitive and its power so effective that rogues in public office are foredoomed to exposure and swift retribution.<sup>204</sup>

To be sure, Poff said, “[W]e want a government of laws and not of men, but somewhere in the process of administration of the laws, we must commit our fate to the basic honesty of the administrators. Somewhere, sometime, somehow, we must trust somebody.”<sup>205</sup> Bayh thought “a strong voicing of public opinion” and a tradition of deference to the President in high executive appointments would discourage misbehavior.<sup>206</sup>

This faith in public officials also influenced the discussion of whether some time limit should restrict the period during which Congress could deliberate on a disability dispute. Bayh reported a Senate consensus against such a limit since “the obedience to and implementation of any law depends

201. H.R. REP. NO. 89-203, at 13 (1965); S. REP. NO. 89-66, at 13 (1965); S. REP. NO. 88-1382, at 11 (1964). Brownell was essentially the source of this idea and language; it came almost verbatim from his testimony before the Senate Subcommittee on Constitutional Amendments in 1964. *See 1964 Senate Hearings, supra* note 6, at 136; *see also 1965 House Hearings, supra* note 5, at 242 (statement of former Att’y Gen. Brownell); 111 CONG. REC. 7942 (1965) (statement of Rep. Poff) (“If one assumes that the Vice President and most of the members of the President’s Cabinet are charlatans, revolutionaries and traitors, we are foolish to attempt any solution.”); *see id.* at 15,591–92 (statement of Sen. Dirksen) (arguing that disability decision makers would act in a forthright manner); 110 CONG. REC. 22,995 (1964) (statement of Sen. Bible).

202. *1964 Senate Hearings, supra* note 6, at 131 (statement of Professor Freund).

203. *See 1965 House Hearings, supra* note 5, at 241, 243 (statement of former Att’y Gen. Brownell); *see also* 111 CONG. REC. 3275 (1965) (statement of Sen. Bayh) (“I have more faith in the Congress acting in an emergency in the white heat of publicity, with the American people looking on. The last thing Congress would dare to do would be to become involved in a purely political move.”); *id.* at 3279 (statement of Sen. Ervin) (predicting Congressmen would “exercise intelligence and patriotism in a time of national crisis”); *id.* at 3280 (statement of Sen. Saltonstall) (arguing that “commonsense” of future Congressmen would prevent them from filibustering a disability dispute); 110 CONG. REC. 23,001 (1964) (statement of Sen. James Pearson) (“[R]eason in a time of crisis will prevail.”).

204. 111 CONG. REC. 7942 (1965) (statement of Rep. Poff).

205. *Id.*; *see also 1964 Senate Hearings, supra* note 6, at 42 (statement of Professor James C. Kirby, Jr.) (arguing that the partisan rejection of nominees would arouse public outrage).

206. *1965 House Hearings, supra* note 5, at 48 (statement of Sen. Bayh); *see also id.* at 65 (referring to “glare of publicity and public opinion”).

ultimately upon the good will of the vast majority of our governmental leaders at all levels.”<sup>207</sup> “Somewhere along the line, in our form of government, trust must be placed in men to obey and implement the letter and spirit of the law.”<sup>208</sup>

## 11. Conclusion

The Twenty-Fifth Amendment reflected the foregoing constitutional ideals and principles regarding presidential continuity. In some cases, these ideals simply reinforce well-established structural principles like separation of powers, accountable decision making, and democratic process. In other instances, the ideals may not have been entrenched in the Constitution or only dimly suggested. The importance of party continuity in succession provides a prime example of the Amendment giving constitutional dimension to an idea that previously lacked such stature. As will be suggested in Part IV below, many of these ideals can usefully inform discussions of successors after the Vice President.

### *B. Legislative Principles*

In addition to the constitutional values it represents, the Twenty-Fifth Amendment offers a useful case study in successful reform regarding presidential continuity. Its ratification represented an enormous legislative accomplishment.

Consider the particulars. Congress proposed, and the states ultimately ratified, a constitutional amendment that addressed the major gaps regarding presidential continuity. If, as David Mayhew has argued, most congressmen are motivated largely by a desire to win re-election,<sup>209</sup> the general topic of presidential continuity would not normally engage their attention since the topic offers few obvious electoral benefits. Moreover, the topics, vice presidential vacancy and presidential inability, posed institutional disincentives. The Amendment required Congress to approve arrangements that ceded prominence and initiative to the executive, reserving for Congress only a reactive and reduced role. Whereas in two of the three succession laws Congress had preferred legislative to executive figures,<sup>210</sup> the Twenty-Fifth Amendment asked Congress to reduce greatly the stature of its leaders in the line of succession.

Two decisions the Amendment’s framers made further complicated their task. First, they elected to pursue a constitutional amendment, which required supermajorities in each house and from the states,<sup>211</sup> rather than a statutory solution. In part, they reasoned that doubts regarding

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207. *Id.* at 42.

208. *Id.*

209. DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 13–17 (1974).

210. *See supra* notes 43, 45 and accompanying text.

211. *See* U.S. CONST. art. V (generally requiring that constitutional amendments be proposed by two-thirds votes of the House of Representatives and Senate and ratified by three-fourths of the states).

congressional power to address presidential continuity should be resolved in favor of a constitutional amendment.<sup>212</sup> Although some believed that Congress could address by statute vice presidential vacancy, presidential inability,<sup>213</sup> or both,<sup>214</sup> countervailing views existed. These were particularly strong regarding filling a vice presidential vacancy since the Twelfth Amendment to the Constitution prescribed a different procedure for choosing the Vice President through the Electoral College or, if need be, the contingent election in the Senate. There also were serious doubts as to whether Congress could by statute provide a means to address presidential inability.<sup>215</sup> The framers of the Twenty-Fifth Amendment concluded that divided opinion counseled in favor of the more onerous course of amending the Constitution. They reasoned that a statute “would be open to criticism and challenge at a time when absolute legitimacy was needed” and concluded that “[w]e must not gamble with the constitutional legitimacy of our Nation’s executive branch.”<sup>216</sup>

Having determined to pursue the onerous challenge of amending the Constitution, the architects of the Twenty-Fifth Amendment also decided to offer a proposal laden with procedures rather than one which would simply empower Congress to legislate later. There were strategic reasons to follow the path chosen. In part, Bayh and others thought state legislatures might be more reluctant to accept an empowering amendment that would

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212. H.R. REP. NO. 89-203, at 8–9 (1965); S. REP. NO. 89-66, at 8–9 (1965); S. REP. NO. 88-1382, at 7–8 (1964).

213. 111 CONG. REC. 3253–54, 3257 (1965) (statement of Sen. Allen Ellender); *see id.* at 7944 (statement of Rep. Basil Whitener); *id.* at 7945–46 (statement of Rep. Hutchinson).

214. *Id.* at 15,585 (statement of Sen. McCarthy).

215. The most common constitutional problem stemmed from the language in Article II, Section 1, Clause 6 of the Constitution empowering Congress to decide legislatively what officer would act as President following the death, resignation, removal or failure to qualify of both the President and Vice President. Some argued that the explicit grant of power to Congress in the event of a double vacancy implicitly denied Congress power to legislate regarding a single vacancy. (In answer to this *expressio unius* argument, it might be suggested that the express power regarding double vacancy may have simply been intended as a constitutional reminder to future Congresses of this potential gap needing further action.) In addition, if one thought, as some did, that the Vice President implicitly had power to decide whether a presidential inability existed, and if that power was rooted in the Constitution, creating an alternative procedure in which others (e.g., the Cabinet) would share that power would require a constitutional amendment. Finally, if one believed that repeated practice had given the Tyler Precedent constitutional dimension so that the Vice President became President following a presidential death and that the text of the Constitution mandated the same result following presidential removal, resignation, or inability, an amendment was required to allow a Vice President to act as President temporarily when presidential inability occurred.

216. H.R. REP. NO. 89-203, at 11, 12; S. REP. NO. 89-66, at 11, 12; S. REP. NO. 88-1382, at 9, 10; *see also 1964 Senate Hearings, supra* note 6, at 3–4 (statement of Sen. Bayh) (arguing for need to eliminate constitutional doubt); *id.* at 128–29 (statement of Professor Freund) (arguing for constitutional amendment); *id.* at 135 (statement of Herbert Brownell, former Att’y Gen. of the United States) (arguing that constitutional amendment was necessary); 111 CONG. REC. 7940 (1965) (statement of Rep. Poff); *id.* at 7942 (statement of Rep. McCulloch); *id.* at 7947 (statement of Rep. Robert McClory); *id.* at 3254 (statement of Sen. Bayh) (“Should we not reconcile such doubt once and for all by inserting in the Constitution an amendment which would provide for these contingencies?”); 110 CONG. REC. 22,993 (1964) (statement of Sen. Fong).

essentially give Congress a blank check to legislate in the future.<sup>217</sup> The course also guarded against the possibility, perhaps likelihood, that Congress would never act to address the specific problems under an empowering amendment.<sup>218</sup> Finally, some thought a constitutional amendment would afford more protection to the President.<sup>219</sup> Yet the procedurally laden approach meant that Congress had to reach agreement on specific matters rather than defer the difficult work.

Although circumstances contributed to the success of the Twenty-Fifth Amendment, that accomplishment also resulted from decisions regarding its content and the strategic and skillful manner in which it was shepherded through the legislative process. Although some of those decisions may have been context dependent, others may suggest approaches that would be useful in fashioning future reforms regarding presidential continuity.

### 1. Seize the Moment

A confluence of events made the mid-1960s a propitious time to address long-standing problems relating to presidential continuity. The Eisenhower disabilities, the Kennedy assassination, the nuclear age, and the rise of the Vice Presidency were among the factors that made the times ripe for reform. “Let us stop playing Presidential inability roulette,”<sup>220</sup> implored Representative Celler in his opening remarks during the House’s 1965 debate; these factors helped that sentiment resonate.

Although contemporary events, especially the Kennedy assassination,<sup>221</sup> made presidential continuity a salient issue in the mid-1960s, the heightened interest in the topic did not guarantee a favorable outcome. Earlier periods had presented crises that had not produced constructive change.<sup>222</sup> And the events of 9/11 raised the specter of a much more serious continuity crisis without corresponding legislative response. On that day, one plane hit the Pentagon and another was headed for either the White House or Capitol Building.<sup>223</sup> It was not difficult to imagine events

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217. 1964 Senate Hearings, *supra* note 6, at 132–33 (statement of Professor Freund).

218. BIRCH BAYH, ONE HEARTBEAT AWAY: PRESIDENTIAL DISABILITY AND SUCCESSION 35 (1968); *see e.g.*, U.S. CONST. amend. XX, § 4 (amendment empowering Congress to provide for death of presidential or vice presidential candidate in contingent election before House or Senate, which has yet to prompt congressional action).

219. 111 CONG. REC. 7940 (1965) (statement of Rep. Poff); *see* BAYH, *supra* note 218, at 29–30, 34 (presenting criticisms of empowering amendment based on usurpation of presidential position).

220. 111 CONG. REC. 7936 (1965) (statement of Rep. Celler); *see id.* at 7938 (urging action “lest a catastrophe find us unprepared once again”).

221. *See* Arthur Krock, *In the Nation: Presidential Disability*, N.Y. TIMES, Feb. 7, 1965, at E11 (attributing final impetus to action to Kennedy assassination).

222. For instance, the Lincoln assassination included efforts to eliminate other leading figures. The Garfield assassination left the President incapacitated for eighty days and the Wilson strokes did the same for a lengthy period. Franklin Roosevelt’s death in 1945 occurred on the eve of the nuclear age, and it took nearly a decade after Eisenhower’s last disability to accomplish change.

223. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 45 (2004) (stating that United 93 may have attacked the White House or Capitol Building had passengers not intervened).

that would have compromised America's arrangements for assuring presidential continuity. Clearly, the executive branch got the message. Vice President Cheney retreated to "undisclosed locations" as a means to insure continuity of government.<sup>224</sup> Yet no legislative change occurred to address gaps in governmental continuity, which in some respects were more serious than those addressed in the mid-1960s.<sup>225</sup>

Significant reform occurred in the mid-1960s, unlike these other occasions, in part because the principal advocates of the Twenty-Fifth Amendment recognized the opportunity history had provided and crafted an effective strategy to capitalize on it. They understood that President Kennedy's assassination presented a relatively narrow window in which to accomplish reform.<sup>226</sup> The impetus to act would dissipate as memory faded and attention became diverted.<sup>227</sup> They exploited the situation to convert opportunity into constructive action.

## 2. Sticking with the Conventional

Although the framers of the Twenty-Fifth Amendment embraced the more arduous constitutional approach instead of a statutory remedy, in other respects they opted for conventional, rather than novel, solutions. The Twenty-Fifth Amendment boldly tackled problems which prior generations had ignored, yet its success owed to the fact that it borrowed heavily from existing institutions and practices rather than pushing new or exotic approaches. To a great extent, the Twenty-Fifth Amendment simply codified common law developments in governmental operation that practice had made familiar. Its genius lay in part in its willingness to offer conventional, not threatening, solutions to vexing problems.

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224. Goldstein, *supra* note 1, at 84; see NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *supra* note 223, at 39–40.

225. The greatest problems relate to Congress, not the Presidency. An attack that killed or disabled a large portion of the House of Representatives could prevent government from operating as the Constitution prescribes. Although most states allow the governor to fill a Senate vacancy pending a special election, see U.S. CONST. amend. XVII, the Constitution does not allow for such appointments to the House of Representatives pending a special election. See *id.* art. I, § 2, cl. 4 ("When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies."); *cf. id.* amend. XVII ("When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct."). For a comprehensive discussion, see CONTINUITY OF GOV'T COMM'N, *supra* note 7; Howard M. Wasserman, *Continuity of Congress: A Play in Three Stages*, 53 CATH. U. L. REV. 949 (2004).

226. *1964 Senate Hearings*, *supra* note 6, at 1 (statement of Sen. Bayh) (stating that continuity issues "have a ringing urgency today with the tragedy of our martyred President so fresh in our memory"); *id.* at 150 (statement of Feerick, scholar on presidential succession) ("On November 21, 1963, this problem was all but forgotten by the Congress and the public. On November 22 it almost caused a national crisis.").

227. Feerick, *supra* note 122, at 498; see also *1965 House Hearings*, *supra* note 5, at 1 (statement of Rep. Celler) ("The recent tragic death of President Kennedy has served to arouse public interest in the problem. We cannot permit this interest to languish into apathy again.").

Section 1 simply gave textual sanction to the Tyler Precedent with respect to death, resignation, or removal of the President. In those instances, the Vice President would become President (rather than simply assuming the powers and duties of the office), a practice that had been followed eight times between 1841 and the Kennedy assassination on November 22, 1963.<sup>228</sup>

Although Section 2 created a novel procedure,<sup>229</sup> by design, that arrangement mirrored the practice that had developed since 1940 that the presidential nominee chose his or her running mate.<sup>230</sup> That pattern, and the migration of the Vice Presidency to the executive branch,<sup>231</sup> lent logic to allowing the President to initiate the Section 2 selection. The confirmation by the House and Senate drew upon the use of the Senate to advise and consent to presidential nominees,<sup>232</sup> the involvement of the House and Senate in selecting a President and Vice President under the contingency election feature of the Constitution, and the fact that together, the House and Senate essentially reflected the size of the Electoral College (less the District of Columbia, which had three electoral votes but no voting representation in Congress). Thus, Section 2 tracked the manner in which vice presidential candidates were chosen and in which Vice Presidents were selected.

Sections 3 and 4 resembled, to a great extent, prior understandings regarding inability determinations. Attorneys General Brownell, William Rogers, and Robert F. Kennedy had all concluded that the President could temporarily transfer his power to the Vice President,<sup>233</sup> and the agreements that Presidents Eisenhower, Kennedy, and Johnson reached with their potential successors had included such provisions.<sup>234</sup> Section 3 anchored that interpretation and procedure in the constitutional text.

The Attorneys General had also concluded that the Vice President, as the person charged to act in the event of a presidential inability, implicitly had power to determine its existence.<sup>235</sup> The presidential agreements had empowered the Vice President to make that decision after such consultation

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228. See *supra* note 38 and accompanying text.

229. 111 CONG. REC. 7955 (1965) (statement of Rep. Rodino) (calling Section 2 “a very marked departure from anything that we have heretofore known”).

230. 1965 *House Hearings*, *supra* note 5, at 90 (statement of Rep. McCulloch) (noting that presidential nominee chooses running mate); 1964 *Senate Hearings*, *supra* note 6, at 4 (statement of Sen. Bayh) (noting that presidential candidate has “great influence” in choice of running mate); *id.* at 137 (statement of former Att’y Gen. Brownell) (observing that political conventions ask presidential nominee to choose running mate); Feerick, *supra* note 122, at 489 (“The presidential candidate now selects his running mate so that such a nomination would be consistent with present practice.”).

231. See generally GOLDSTEIN, *supra* note 20, at 134, 140–42, 146–50; Goldstein, *supra* note 140, at 525.

232. 111 CONG. REC. 3256 (1965) (statement of Sen. Bayh).

233. See, e.g., Presidential Inability, 42 Op. Att’y Gen. 69 (1961) (stating opinion of Robert F. Kennedy).

234. See *supra* notes 18–19 and accompanying text.

235. See Presidential Inability, *supra* note 233, at 88–89.

as he deemed appropriate.<sup>236</sup> Section 4 began with that premise but added checks on vice presidential and presidential behavior. The inclusion of the Cabinet or such other body as Congress might create provided a check on the Vice President (although it also provided political cover for him); the ability of the Vice President and Cabinet to challenge the President's determination that he was fit to resume was a check on the President. The provisions governing a disability dispute reflected, with some modification, a proposal that Attorney General Rogers made for the Eisenhower Administration in early 1958 and that the Senate Subcommittee on Constitutional Amendments endorsed in 1958 and 1959.<sup>237</sup> The ABA conference in January 1964 also essentially favored the approach that became the Twenty-Fifth Amendment.<sup>238</sup>

The familiarity of the procedures in the Twenty-Fifth Amendment made them more palatable. Novel though it was, the Amendment essentially gave constitutional imprimatur to accepted practice or to familiar proposals from credible sponsors. It simply imported common sense into the Constitution.

### 3. Something Is Better Than Nothing

The principal advocates of the Twenty-Fifth Amendment made substantial progress, not perfection, their goal. They proceeded on the assumption that many possible outcomes would improve the status quo. They did not insist on any particular fix, just some solution. As Senator Jacob K. Javits put it, after submitting a different proposal than that which was adopted, “[a]ny action in this within the range presented . . . is almost better than no action, which is the way the situation stands today.”<sup>239</sup> It was not important, said private citizen (and future President) Richard M. Nixon, that Congress adopt his proposals but that it take some action to address inability and succession.<sup>240</sup> Senator Robert F. Kennedy had misgivings about Section 4's reliance on the Cabinet but thought the dangers of inaction were “greater still.”<sup>241</sup>

The architects of the Twenty-Fifth Amendment did not make perfection the enemy of the good. Representative Celler acknowledged that the proposed Twenty-Fifth Amendment was “by no means . . . a perfect bill.

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236. Agreement Between the President and the Vice President as to Procedures in the Event of Presidential Disability, PUB. PAPERS 196 (Mar. 3, 1958); *see supra* notes 18–19 and accompanying text.

237. *See* FEERICK, *supra* note 8, at 240–42.

238. *See* AM. BAR ASS'N, CONSENSUS ON PRESIDENTIAL INABILITY AND SUCCESSION, JANUARY 20 AND 21, 1964, *reprinted in 1964 Senate Hearings, supra* note 6, at 6–7. The ABA consensus differed from the Twenty-Fifth Amendment in two relatively minor respects. It would have provided that in the absence of a Vice President the person next in line could act in his stead under the presidential inability procedures and that the Vice President would be confirmed by a joint session of Congress. *See id.*

239. *1964 Senate Hearings, supra* note 6, at 55 (statement of Sen. Jacob K. Javits).

240. *Id.* at 234, 238, 244, 250 (statement of former Vice President Nixon).

241. 111 CONG. REC. 15,380 (1965) (statement of Sen. Robert F. Kennedy); *see also id.* at 15,382 (describing Amendment better than status quo notwithstanding remaining problems).

No bill can be perfect. Even the sun has its spots. The world of actuality permits us to attain no perfection.”<sup>242</sup>

Similarly, they reconciled themselves to the fact that they could not hope to address “every conceivable situation.”<sup>243</sup> They understood they were leaving some problems unsolved. They were aware of the possibility of a double vacancy occurring in various ways<sup>244</sup> and of the gaps in the electoral system,<sup>245</sup> for instance, but thought that trying to solve those more remote events would impede achieving agreement on more likely problems. When Poff asked whether “it would complicate matters greatly” if the Amendment included a provision empowering the next in line to initiate action declaring the President disabled in the absence of a Vice President, Bayh replied that since the next in line was the Speaker of the House such a provision would open up “the whole can of worms.”<sup>246</sup> Brownell conceded that Sections 3 and 4 did not cover every imaginable contingency but argued that they addressed at least ninety percent of the foreseeable problems and on that basis deserved adoption before further mishaps occurred.<sup>247</sup>

The framers of the Twenty-Fifth Amendment focused on the principal problems even at the cost of abandoning features to which some were

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242. *Id.* at 7936 (statement of Rep. Celler); *see also* 110 CONG. REC. 22,995 (1964) (statement of Sen. Bayh).

243. 1964 *Senate Hearings*, *supra* note 6, at 94 (statement of Powell, president-elect, American Bar Association); *see also* 111 CONG. REC. 7937 (1965) (statement of Rep. Celler) (referring to the impossibility of addressing “every conceivable contingency”).

244. 1965 *House Hearings*, *supra* note 5, at 5 (statement of Rep. McCulloch) (raising the possibility of simultaneous disabilities of the top two officers, a disabled President in the absence of a Vice President, and a double vacancy before inauguration); 1964 *Senate Hearings*, *supra* note 6, at 19–21 (statement of Sen. Samuel Ervin, Jr.) (“[I]t is quite conceivable in this day of nuclear weapons and even in long-range rifles that you might have had a situation where both the Vice President and President died simultaneously or about the same time . . . .”); 111 CONG. REC. 3253 (1965) (statements of Sens. Bayh and Hruska) (discussing the possibility of a double disability or presidential disability and vice presidential vacancy); *id.* at 3266, 3268 (statement of Sen. Dirksen) (discussing possibility of a double disability, vice presidential disability, or presidential disability and vice presidential vacancy); *see also* 1965 *House Hearings*, *supra* note 5, at 57 (statement of Rep. Peter Rodino) (raising possibility of disability of Acting President); *id.* (statement of Sen. Bayh) (noting possibility of death of President-Elect and Vice President-Elect); *id.* at 78 (statements of Rep. Richard Poff and Sen. Bayh) (raising possibility of presidential disability absent Vice President).

245. 1964 *Senate Hearings*, *supra* note 6, at 31–35 (statement of Sen. Mike Monroney); *see also* 1965 *House Hearings*, *supra* note 5, at 57 (statement of Sen. Bayh) (noting possibility of death of President-Elect and Vice President-Elect); *id.* at 78 (statement of Rep. Poff and Sen. Bayh). In his message asking Congress to approve the proposals offered by Bayh (Senate Joint Resolution 1) and Celler (House Joint Resolution 1) dealing with presidential inability and vice presidential vacancy, President Johnson proposed a separate constitutional amendment addressing continuity issues relating to death of a President-Elect or Vice President-Elect between the November election and the inauguration. *See* Special Message to the Congress on Presidential Disability and Related Matters, 1 PUB. PAPERS 100, 102 (Jan. 28, 1965); Felix Belair, Jr., *Senators Speed Disability Plan*, N.Y. TIMES, Feb. 2, 1965, at 15 (reporting Bayh’s plan to submit separate constitutional amendment regarding pre-inauguration contingencies and stating that issue was separated to expedite Senate Joint Resolution 1).

246. 1965 *House Hearings*, *supra* note 5, at 78.

247. *Id.* at 242 (statement of former Att’y Gen. Brownell).

strongly committed, such as restoring a Cabinet line of succession or addressing pre-inaugural problems.<sup>248</sup> Some contingencies were left unaddressed because

the more complicated you make a constitutional amendment, quite frankly, the more contingencies for which you provide, the more difficult it is to get it passed. . . . What we tried to do is provide for the most likely eventualities and hope we can get it through, feeling we would have most of these things covered.<sup>249</sup>

#### 4. Compromise

Consistent with the realization that the status quo was unacceptable, the architects of the Amendment understood progress depended on their willingness to compromise. Feerick sounded this theme when he told the Senate Subcommittee on Constitutional Amendments that “[t]he time has come for those who are genuinely interested in the safety of this Nation to stop emphasizing those points on which they differ and to start emphasizing those points on which they agree.”<sup>250</sup> The framers of the Twenty-Fifth Amendment believed that failure to reach consensus had, in the past, prevented reform.<sup>251</sup> By word and deed, they successfully cultivated a spirit of compromise and the Amendment Congress ultimately proposed reflected a series of compromises.<sup>252</sup> For instance, their formulation for filling a vice presidential vacancy fell somewhere on the middle of the spectrum of the proposals Congress considered. It gave the President greater control over the selection of a Vice President than did Senator Ervin’s proposal that Congress elect a new Vice President,<sup>253</sup> or that of Senator Frank Church that Congress choose a Vice President from two to five candidates that the President nominated,<sup>254</sup> but less control than the proposal former Vice President Nixon and others offered that would have allowed the President to nominate someone for consideration by the Electoral College.<sup>255</sup> They added language to Section 4 to allow Congress to replace the Cabinet with some other body in order to address the preference of some, that the entire issue be left to Congress to resolve

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248. 1964 Senate Hearings, *supra* note 6, at 48–49 (statements of Sen. Bayh and Professor Kirby).

249. 1965 House Hearings, *supra* note 5, at 57 (statement of Sen. Bayh); *see also* Krock, *supra* note 221 (explaining that proponents of Senate Joint Resolution 1 feared a comprehensive amendment would “invite a mass attack”).

250. 1964 Senate Hearings, *supra* note 6, at 150 (statement of Feerick, scholar on presidential succession).

251. 111 CONG. REC. 3255 (1965) (statement of Sen. Bayh); *id.* (statement of Sen. Ervin).

252. *Id.* at 7940 (statement of Rep. Poff); 110 CONG. REC. 22,997 (1964) (statement of Sen. Ervin); *see also* Editorial, *The Disability Amendment*, N.Y. TIMES, Feb. 21, 1965, at E8 (praising disability provisions for charting “middle course”); *Senators Would Let President Fill Vice-Presidential Vacancy*, N.Y. TIMES, May 24, 1964, at 45 (quoting Senator Keating as willing to support Senate Joint Resolution 139 if his proposed modification was rejected).

253. 1964 Senate Hearings, *supra* note 6, at 19–21 (statement of Sen. Ervin).

254. 110 CONG. REC. 22,997 (1964) (statement of Sen. Frank Church).

255. GOLDSTEIN, *supra* note 20, at 233–34.

through legislation.<sup>256</sup> That approach tried “to make the best of both worlds.”<sup>257</sup> The time limits in Section 4—that the Vice President and Cabinet had four days to challenge the President’s declaration that he was able to discharge the duties of the office, that Congress would assemble within forty-eight hours to decide a disability dispute between the President and Vice President, and that Congress would decide such a dispute within twenty-one days—were all products of compromises, and in some instances of multiple compromises, within the House and Senate and between the two branches.<sup>258</sup>

### 5. Dedicated Leadership

Congress would not have proposed the Twenty-Fifth Amendment but for the dedicated leadership of Bayh and others. For a freshman senator in the first third of his term, chairing the Senate Subcommittee on Constitutional Amendments provided a rare and precious early opportunity to demonstrate leadership in the Senate. Following the death of the prior chair, Senator Estes Kefauver, and less than two months before the Kennedy assassination, Senator James Eastland, chair of the Senate Committee on the Judiciary, acceded to Bayh’s request that he allow him to chair that subcommittee rather than closing it as planned.<sup>259</sup>

That decision, fortuitous in multiple ways, represented a turning point. Passing a constitutional amendment addressing presidential continuity became Bayh’s mission. He offered his proposal, Senate Joint Resolution 139, on December 12, 1963, less than three weeks after the Kennedy assassination, and announced that his subcommittee would conduct comprehensive hearings on presidential succession and inability the following month.<sup>260</sup> He helped formulate and articulate the strategic decisions reflected above—choosing the constitutional route, sticking with conventional solutions, pushing for some reform, and making compromises even when they meant leaving some areas untouched. But he also focused on the problem in a single-minded way, which a more senior senator with other responsibilities would not have done. He skillfully accessed the talents and resources of others to lend clout to the effort—enlisting Senator Ervin as a principal Senate advocate, using Brownell to obtain help from former President Eisenhower and from Representative Celler, the chair of

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256. *1965 House Hearings*, *supra* note 5, at 84–85 (statement of Sen. Bayh); *id.* at 253 (statement of former Att’y Gen. Brownell); *1964 Senate Hearings*, *supra* note 6, at 46 (statement of Professor Kirby).

257. *1964 Senate Hearings*, *supra* note 6, at 132 (statement of Professor Freund).

258. *See also* 111 CONG. REC. 15,594–95 (1965) (statement of Sen. Ervin) (attributing success of effort to Bayh’s willingness to compromise). *See generally* BAYH, *supra* note 218; FEERICK, *supra* note 48, at 83–110; E.W. Kenworthy, *Conferees Back Succession Plan*, N.Y. TIMES, June 25, 1965, at 1 (discussing Senate-House compromises).

259. BAYH, *supra* note 218, at 28–29; *see also* Krock, *supra* note 221 (crediting Bayh’s leadership).

260. John D. Morris, *Study of Succession Is Planned in Senate*, N.Y. TIMES, Dec. 13, 1963, at 1.

the House Committee on the Judiciary,<sup>261</sup> and lobbying friends at the White House to obtain a presidential endorsement of his proposal.<sup>262</sup>

Bayh was not the only leader in the effort. Celler had been interested in the issue since the mid-1950s<sup>263</sup> and had then articulated some of the basic principles that later became the basis for the Eisenhower-Nixon agreement and part of Sections 1, 3, and 4.<sup>264</sup> He was disposed to shepherd House Joint Resolution 1 through the House. Brownell had also played a critical role in developing the ideas behind Sections 1, 3, and 4 as Eisenhower's attorney general and resumed his involvement with the issue following the Kennedy assassination.<sup>265</sup> The ABA convened a conference of twelve prominent attorneys to consider the issue two months after Kennedy's assassination; it released its consensus report of guiding principles in January 1964.<sup>266</sup> Those principles largely tracked Bayh's proposal, Senate Joint Resolution 139, and the eventual Twenty-Fifth Amendment. Senior Senate colleagues—Ervin, Everett Dirksen, Roman Hruska, Javits, John Stennis, John Sherman Cooper, Mike Mansfield—and some in the House, most notably Representative Poff, in addition to Celler, played constructive roles at important junctures. But without Bayh's commitment to moving the measure, it would not have emerged.

## 6. Percolating Ideas

Contextual factors, particularly the Eisenhower disabilities and Kennedy assassination, had drawn attention to problems of presidential continuity. Yet scholars and a few public officials played an important role in keeping the problem and the search for solutions on the national radar screen. Celler had reached out to many in the academic community in 1955 in a search for solutions.<sup>267</sup> Brownell and then Rogers offered proposals regarding presidential inability in the late 1950s that foreshadowed Sections 1, 3, and 4.<sup>268</sup> These ideas and others were explored in hearings in both houses of

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261. BAYH, *supra* note 218, at 61–62, 75–77, 119–24, 162–63.

262. *Id.* at 95, 137, 163–68, 173–79; Interview by Paige E. Mulhollan with Birch Bayh, U.S. Senator from Ind., in Austin, Tex. (Feb. 12, 1969), at 2 [hereinafter Bayh Interview] (on file with the Lyndon Baines Johnson Library Oral History Collection), available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/oralhistory.hom/Bayh-B/Bayh.PDF>.

263. Celler had directed the staff of the House Judiciary Committee to study presidential inability before Eisenhower's heart attack in September 1955. FEERICK, *supra* note 48, at 52. It subsequently published the responses of an interdisciplinary assortment of scholars on the topic. See STAFF OF H. COMM. ON THE JUDICIARY, 84TH CONG., PRESIDENTIAL INABILITY (Comm. Print 1956) [hereinafter PRESIDENTIAL INABILITY]; see also 1965 House Hearings, *supra* note 5, at 238 (statement of former Att'y Gen. Brownell) (discussing Celler's and his prior roles).

264. See, e.g., Representative Emanuel Celler, Chairman, House Comm. on the Judiciary, The Problem of Presidential Inability—A Proposed Solution (Aug. 2, 1956), in 19 F.R.D. 153.

265. BROWNELL, *supra* note 14, at 273–79.

266. FEERICK, *supra* note 48, at 59–61.

267. See STAFF OF H. COMM. ON THE JUDICIARY, *supra* note 263, at 2.

268. See e.g., BROWNELL, *supra* note 14, at 277–79; FEERICK, *supra* note 48, at 52–56; FEERICK, *supra* note 8, at 227–29, 238–42.

Congress during the late 1950s and early 1960s.<sup>269</sup> Prior to the Kennedy assassination, Feerick, then a young lawyer, published an influential scholarly examination of the subject in the *Fordham Law Review*.<sup>270</sup> Following the assassination, Feerick wrote several other articles, which pointed out the importance of the problem and made the case for the proposals set forth in Senate Joint Resolution 139 and Senate Joint Resolution 1.<sup>271</sup> The esteemed constitutional law scholar, Paul A. Freund, made important contributions and Bayh drew from the testimony of some eminent academics, even those who had misgivings regarding some aspects of his proposed solutions, such as presidential scholars Clinton Rossiter and Richard Neustadt.<sup>272</sup>

The discussion of the issue, among public officials, scholars, lawyers, and others over a period of time<sup>273</sup> helped create a broad-based commitment to the importance of achieving some reform. Moreover, a consensus developed around the merits of Bayh's proposal, which essentially reflected the recommendations of the ABA conference on the subject.<sup>274</sup> Even those who offered different proposals viewed Bayh's proposal as a reasonable approach and a substantial improvement on the status quo. The endorsement of experts lent credibility to the enterprise.

### 7. Mobilized Support

The Amendment succeeded in part because of the broad support it attracted, at an elite and grass roots level. Its proponents enlisted the help of some who had been intimately involved with problems of presidential succession and inability. Presidents Eisenhower and Johnson both spoke publicly in support of the proposed Amendment or its central ideas as did

269. See generally FEERICK, *supra* note 48, at 52–57; FEERICK, *supra* note 8, at 238–42.

270. Feerick, *supra* note 17. Two days after President Kennedy's assassination, Feerick's article was praised as among the "best studies" of presidential inability in a comprehensive story about constitutional issues relating to presidential continuity. Arthur Krock, *The Continuum*, N.Y. TIMES, Nov. 24, 1963, at E9. Feerick also wrote a letter on November 8, 1963, which the *New York Times* published on November 17, 1963, five days before the assassination of President Kennedy, in which he discussed the need for action regarding presidential inability. See John D. Feerick, Letter to the Editor, N.Y. TIMES, Nov. 17, 1963, at E8. Feerick said that Congress had "consistently failed the American people" by not addressing presidential inability issues. *Id.* Other scholars and officials had discussed the issues during the 1950s and early 1960s. See e.g., RICHARD H. HANSEN, *THE YEAR WE HAD NO PRESIDENT* (1962); RUTH C. SILVA, *PRESIDENTIAL SUCCESSION* (1951); Herbert Brownell, Jr., *Presidential Inability: The Need for a Constitutional Amendment*, 68 YALE L.J. 189 (1958).

271. See e.g., Feerick, *supra* note 122; John D. Feerick, *Problem of Presidential Inability: The Problem and a Solution*, 50 A.B.A. J. 321 (1964); John D. Feerick, *Proposed Amendment on Presidential Inability and Vice-Presidential Vacancy*, 51 A.B.A. J. 915 (1965); John D. Feerick, *The Problem of Presidential Inability—It Must be Solved Now*, 36 N.Y. ST. B.J. 181 (1964); John D. Feerick, *The Proposed Twenty-Fifth Amendment to the Constitution*, 34 FORDHAM L. REV. 173 (1965); John D. Feerick, *Vice Presidential Succession: In Support of the Bayh-Celler Plan*, 18 S.C. L. REV. 226 (1966).

272. See 1964 Senate Hearings, *supra* note 6, at 128, 166, 214.

273. 1965 House Hearings, *supra* note 5, at 238 (statement of former Att'y Gen. Brownell) (referring to hearing as "climax" of ten year study); *id.* at 245 (same).

274. FEERICK, *supra* note 48, at 65.

former Vice President Nixon.<sup>275</sup> Former Attorney General Brownell was an active and effective voice and some of his successors also played helpful roles.<sup>276</sup> Attorney General Nicholas Katzenbach ultimately abandoned his earlier support for an amendment empowering Congress to act to endorse Senate Joint Resolution 1.<sup>277</sup>

Bayh involved the ABA in his push for a constitutional amendment in December 1963. It had previously favored the empowering amendment, which Senator Keating championed.<sup>278</sup> Beginning in January 1964, the ABA held a variety of public and private sessions on the topic and endorsed and lobbied in its favor at a national and local level. A blue ribbon ABA group endorsed a consensus approach, which largely coincided with Bayh's proposal in January 1964.<sup>279</sup> Bayh spoke to the ABA House of Delegates, after which it voted to endorse his plan.<sup>280</sup> ABA Presidents Walter Craig and Lewis Powell testified in support of Bayh's proposals and wrote and spoke on the topic. Powell pledged that the ABA would "throw our full weight" behind the Bayh-Celler proposal in January 1965,<sup>281</sup> and ABA staff worked to lobby members of Congress and to develop support around the country. When the Senate and House conferees were unable to reach agreement on the last sticking point, ABA President Powell met with Celler to urge him to persuade his colleagues to compromise. The media ran any number of stories on the proposed measure and it received widespread endorsement. The ABA also worked to persuade states to ratify the proposed amendment.<sup>282</sup> From inception to ratification, the ABA played a critical role in the Twenty-Fifth Amendment.<sup>283</sup>

## 8. Something for Everyone

The Amendment's prospects were enhanced by its inclusive nature.<sup>284</sup> The measure won the support of the executive branch in part because it rejected approaches—congressional nomination of a Vice President, congressional initiation of inability proceedings—which would have intruded on presidential turf. Sections 3 and 4 paralleled proposals of Eisenhower's Attorneys General and were accepted by the Johnson White

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275. See e.g., Russell Baker, *Nixon, in Capitol, Essays 2 Roles*, N.Y. TIMES, Mar. 6, 1964, at 15; *Eisenhower Lists Succession Views*, N.Y. TIMES, Mar. 5, 1964, at 25; Krock, *supra* note 221 (citing importance of Johnson's support in House of Representatives).

276. BROWNELL, *supra* note 14, at 279.

277. Bayh Interview, *supra* note 262, at 3.

278. BAYH, *supra* note 218, at 36, 42–50.

279. *Id.* at 171–73.

280. *Id.* at 62–63.

281. Felix Belair, Jr., *Capitol Hearings Set on Succession*, N.Y. TIMES, Jan. 26, 1965, at 15 (quoting Powell).

282. BROWNELL, *supra* note 14, at 279.

283. See, e.g., BAYH, *supra* note 218, at 42–43, 45–46, 50, 52, 62–63, 336; Kenworthy, *supra* note 258, at 16 (citing Bayh's acknowledgement of the ABA's role); Bayh Interview, *supra* note 262, at 3.

284. See, e.g., Fred Graham, *What Kind of Amendment on Disability?*, N.Y. TIMES, July 4, 1965, at E4 (crediting Bayh with pasting together provisions "borrowed" from powerful sources).

House and Justice Department. Congress was given roles in Sections 2 and 4. Although the framers wanted to elevate vice presidential confirmation beyond the normal advice and consent procedure and to mimic in some respects the size of the Electoral College, they also recognized that a confirmation procedure which included both houses was more likely to win bicameral approval than one which, like the normal advice and consent procedure, only involved the Senate.<sup>285</sup> The provision giving Congress the option of replacing the Cabinet with an “other body” made the Amendment more palatable to those who thought Congress should have a greater role.<sup>286</sup>

### 9. Navigating Around Personal Sensitivities

The Twenty-Fifth Amendment was ratified in part because the framers were able to navigate away from proposals that were seen as disparaging powerful figures who were in the line of succession. In particular, much discussion regarding the need to change the system as it existed following Kennedy’s assassination focused on the common perception that neither McCormack nor Hayden provided an acceptable successor.<sup>287</sup> Some of McCormack’s allies regarded Section 2 as an affront and the perceived insult to McCormack made House action impossible until the election of a new Vice President removed that innuendo.

Bayh took four steps to numb any insult. First, he dropped from the original version of his proposal provisions that would have changed the line of succession following the Vice President to run through the Cabinet as a matter of constitutional law.<sup>288</sup> Second, he consistently emphasized that the need for a Vice President was independent of the identity of the Speaker. The inherent nature of the Vice President, as the office had developed, made it ideally suited to serve as the successor while the possibility that the Speaker would belong to the opposite party and his ongoing duties made him ill-suited for the role.<sup>289</sup> Third, Bayh felt compelled to rebut frequently the suggestion that McCormack was not up to acting as President, as in his opening statement at the 1964 hearings<sup>290</sup> and on other occasions.<sup>291</sup> There

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285. *1964 Senate Hearings*, *supra* note 6, at 163 (statement of Sen. Bayh).

286. *1965 House Hearings*, *supra* note 5, at 253 (statement of former Att’y Gen. Brownell).

287. *See, e.g.*, BAYH, *supra* note 218, at 40–42; *supra* note 22.

288. *Change Doubted in Succession Law*, N.Y. TIMES, Mar. 15, 1964, at 40 (quoting Bayh as planning to drop proposal to change succession law to avoid perceived rebuke to McCormack); *see also 1964 Senate Hearings*, *supra* note 6, at 156 (statement of Feerick, scholar on presidential succession). McCormack favored retaining a legislative line of succession after the Vice President. *See Ike, Truman Differ on Line of Succession*, CHI. TRIB., Jan. 9, 1964, at 17 (quoting McCormack reaffirming his support for the existing presidential succession law placing the Speaker of the House of Representatives after the Vice President); *McCormack For Succession Law But Would Not Obstruct Change*, N.Y. TIMES, Dec. 9, 1963, at 1 (quoting McCormack’s preference for legislative line of succession).

289. BAYH, *supra* note 218, at 40–42 (describing conversation with McCormack).

290. *1964 Senate Hearings*, *supra* note 6, at 2 (praising McCormack).

was no question about McCormack's "capabilit[ies]," Bayh asserted.<sup>292</sup> The issue went beyond "the age or personality of the Speaker."<sup>293</sup> There were problems relating to separation of powers, whether a Speaker would resign his or her seat to act as President if the Chief Executive were disabled, the possibility of shift in party control of the Presidency, and the competing burdens of running the House of Representatives and understudying the President.<sup>294</sup> Finally, Bayh reconciled himself to the fact that the House would not move on an amendment which included a provision to fill a vice presidential vacancy until a new Vice President was inaugurated following the 1964 presidential election.<sup>295</sup>

### 10. Building Momentum

Several events, some serendipitous, some the product of sound strategy, helped Bayh develop a consensus to propel his proposal forward. Bayh's subcommittee reported Senate Joint Resolution 139 unanimously in 1964 with the understanding that Keating and others could seek to replace it with their different proposals on the floor.<sup>296</sup> When the Senate Judiciary Committee met to consider whether to report Senate Joint Resolution 139 to the Senate, some sentiment favored reporting several competing proposals out, a course almost followed. Bayh prevented that result by arguing that such a move would prevent any action and by agreeing that others could offer their proposals as amendments on the floor. Since the committee members knew Congress would not act until the next session, some saw little risk in acceding to Bayh's request.<sup>297</sup>

Bayh had asked majority leader Mike Mansfield to schedule the topic for floor debate during the fall of 1964 even though there was no prospect of the House acting.<sup>298</sup> Since Section 2 pivoted on the Vice Presidency, discussion of it provided a vehicle for Democrats to emphasize the comparative advantage of the Democratic vice presidential candidate, Hubert H. Humphrey, over his Republican rival, Representative William E. Miller (who Barry M. Goldwater admitted he had chosen because "he drives Johnson nuts"<sup>299</sup>). Mansfield ultimately scheduled debate on

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291. 110 CONG. REC. 22,991 (1964); BAYH, *supra* note 218, at 40–42; *see also* 110 CONG. REC. at 22,993 (1964) (statement of Sen. Saltonstall); *id.* at 22,996 (statement of Sen. Bayh); *id.* at 23,000 (statement of Sen. Jacob K. Javits).

292. 1964 Senate Hearings, *supra* note 6, at 2.

293. *Id.*

294. *Id.* at 2, 63 (statement of Sen. Bayh); *id.* at 63–65 (statement of Sen. Moss); *id.* at 167 (statement of Richard Neustadt, Professor of Government, Columbia University) (praising McCormack but criticizing legislative succession).

295. BAYH, *supra* note 218, at 40–42, 95–96; Bayh Interview, *supra* note 262, at 2 (recounting President Johnson's advice that the House would not act until a Vice President was elected).

296. BAYH, *supra* note 218, at 127–28; *see also* *Senators Would Let President Fill Vice-Presidential Vacancy*, *supra* note 252, (quoting Sen. Keating as willing to support Senate Joint Resolution 139 if his proposed modification was rejected).

297. BAYH, *supra* note 218, at 130–35.

298. *Id.* at 137–38.

299. GOLDSTEIN, *supra* note 20, at 81.

September 28, 1964, and much of the discussion, by Democrats and Republicans alike, addressed the importance of the second office. The Senate passed the proposed amendment by a voice vote with relatively few members on the floor.<sup>300</sup>

The following day, to Bayh's chagrin, Senator Stennis objected that the Constitution should not be amended by voice vote.<sup>301</sup> Accordingly, a roll call vote was held at which Bayh's Senate Joint Resolution 139 passed sixty-five to zero.<sup>302</sup> Senators knew the House would not act, which lessened the significance of their votes; some perhaps did not scrutinize the proposal as much as they might have. Still, the revote put sixty-five Senators on record in favor of Bayh's proposal and thereby strengthened his hand in the next Congress.<sup>303</sup> The favorable Senate action in 1964 enabled the Senate to act on the proposal early during the next Congress before other measures crowded its calendar.<sup>304</sup>

The election of Johnson as President and particularly, of Humphrey as Vice President, removed some of the sensitivity from the issue. Celler, the chair of the House Judiciary Committee, agreed to introduce in the House a resolution (House Joint Resolution 1) parallel to that Bayh offered in the Senate (Senate Joint Resolution 1). The White House called for action on presidential continuity in Johnson's State of the Union<sup>305</sup> and Johnson followed with a message to Congress calling for action on presidential inability and vice presidential vacancy and endorsing Bayh's approach.<sup>306</sup> The ultimate votes were almost anticlimactic.<sup>307</sup>

## 11. Conclusion

To be sure the historic context contributed to the ratification of the Twenty-Fifth Amendment. Yet it is a mistake to attribute the Amendment to the temper of those times to the exclusion of all else. On other occasions, continuity crises have not produced action. Events did not make the Twenty-Fifth Amendment inevitable. Rather, the Amendment occurred

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300. BAYH, *supra* note 218, at 156.

301. *Id.* at 157–58.

302. 110 CONG. REC. 23,061 (1964).

303. BAYH, *supra* note 218, at 159.

304. *Id.* at 202.

305. Annual Message to the Congress on the State of the Union, 1 PUB. PAPERS 1, 8 (Jan. 4, 1965) (“I will propose laws to insure the necessary continuity of leadership should the President become disabled or die.”). Johnson's formulation led some to believe he did not support the Bayh-Celler plan but would offer a different proposal. Johnson rebutted that misconception twenty-four days later. *See infra* note 306 and accompanying text.

306. Special Message to the Congress on Presidential Disability and Related Matters, 1 PUB. PAPERS 100, 102 (Jan. 28, 1965).

307. Senate Joint Resolution 1 passed 72–0 in the Senate on February 19, 1965. 111 CONG. REC. 3286 (1965). In amended form, it passed 368–29 in the House on April 13, 1965. *Id.* at 7968–69. After conference, during which contention centered around the timetable for congressional action under Section 4, the House approved the proposed amendment by voice vote. *Id.* at 15,216. The Senate did so in a 68–5 vote on July 6, 1965. *Id.* at 15,596.

because of the manner in which Bayh and others responded to the circumstances they encountered.

Some of the decisions they made may have little bearing on the issues that remain today. Others, however, may provide guidance for those interested in bringing further reform.

### III. THE MODERN CONTEXT

The Twenty-Fifth Amendment represented a major advance in ensuring presidential continuity. Its framers made a necessary strategic choice to focus their efforts on remedying the principal problems rather than to pursue a quixotic quest for a comprehensive fix. Accordingly, proposals to address disability determinations absent a Vice President, the line of succession after the Vice President, and pre-inauguration problems were deferred.

Forty-five years after Congress acted on the Twenty-Fifth Amendment, those gaps remain. They do so, however, in a different context than that in which the framers of the Twenty-Fifth Amendment acted. Two developments since 1967 make the system of ensuring presidential continuity stronger than it was the day the Twenty-Fifth Amendment was ratified. Three other developments add urgency to moving toward further reform.

This part briefly discusses the way in which the enhanced role of the Vice Presidency and precedents under the Twenty-Fifth Amendment contribute to presidential continuity. It then identifies several developments since the ratification of the Twenty-Fifth Amendment that suggest that continuity issues merit further attention and action.

#### A. *Exceeding Expectations: The Vice Presidency Transformed*

The recent transformation of the Vice Presidency has enhanced the ability of the system to respond to presidential continuity problems. The Twenty-Fifth Amendment reflected a new and optimistic vision of the Vice Presidency.<sup>308</sup> The development of the office has, however, as Yogi Berra remarked in an entirely different context,<sup>309</sup> more than exceeded those expectations. That vision had not become reality when the Amendment was proposed or ratified,<sup>310</sup> and the following decade made clear remaining limitations of the office. Johnson mistreated Humphrey, his able Vice President,<sup>311</sup> and Richard Nixon abused Spiro T. Agnew, his not

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308. See Goldstein, *supra* note 140, at 509, 526–40.

309. When asked whether Don Mattingly had exceeded expectations, Yogi Berra replied, “I’d say he’s done more than that.” YOGI BERRA, *THE YOGI BOOK* 98 (1998).

310. Goldstein, *supra* note 140, at 543–44.

311. See HUBERT H. HUMPHREY, *THE EDUCATION OF A PUBLIC MAN: MY LIFE AND POLITICS* 314, 327, 328–30 (1976); Joel K. Goldstein, *More Agony than Ecstasy: Hubert H. Humphrey as Vice President*, in *AT THE PRESIDENT’S SIDE: THE VICE PRESIDENCY IN THE TWENTIETH CENTURY*, *supra* note 67, at 103, 103–23.

particularly able and corrupt Vice President.<sup>312</sup> Gerald Ford liked, but dumped, Nelson Rockefeller from his 1976 ticket; before Ford's term ended, some respected scholars of American government were calling for dumping the office.<sup>313</sup>

The Vice Presidency of Walter F. Mondale constituted the "big bang" which brought the Vice Presidency into line with the vision implicit in the Twenty-Fifth Amendment.<sup>314</sup> Mondale became Jimmy Carter's senior adviser and troubleshooter and gained a range of resources that his successors have retained. Every Vice President, beginning with Mondale, has had one of the principal offices in the West Wing near the Oval Office; has had daily access to the President; has been included on the White House distribution list; and has participated, either personally or through staff, on all significant policy making councils. Vice Presidents and their staffs now are integral parts of White House decision making. In addition, Vice Presidents perform significant troubleshooting. The level of vice presidential influence varies depending on the mix of a number of factors, yet vice presidential significance is now inevitable.<sup>315</sup>

In addition, the quality of Vice Presidents has increased. Virtually all of those who have served as Vice President since Mondale have been among the ablest public figures of their times,<sup>316</sup> and institutional changes provide candidates incentive to choose well. Most questionable choices are made by those far behind in the polls whose options are limited or who need to take some dramatic step to shake up the race.

The transformation of the office has important implications for ensuring presidential continuity. The enhanced role of the Vice President better prepares that officer to succeed in the event of presidential vacancy by keeping him engaged in decision making. The status of the Vice President as an integral part of the President's team, not an outsider, makes it more

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312. See JULES WITCOVER, *VERY STRANGE BEDFELLOWS: THE SHORT AND UNHAPPY MARRIAGE OF RICHARD NIXON & SPIRO AGNEW* (2007); John Robert Greene, "I'll Continue to Speak Out": *Spiro T. Agnew as Vice President*, in *AT THE PRESIDENT'S SIDE: THE VICE PRESIDENCY IN THE TWENTIETH CENTURY*, *supra* note 67, at 124, 127–28, 130–31.

313. See, e.g., Arthur M. Schlesinger, Jr., *On the Presidential Succession*, 89 *POL. SCI. Q.* 475, 478 (1974); see also ERIC F. GOLDMAN, *THE TRAGEDY OF LYNDON JOHNSON* 240 (1969) (favoring caretaker government followed by special election); Richard Neustadt, *On The Threshold of the White House*, *ATLANTIC MONTHLY*, July 1974, at 63, 72 (agreeing with Schlesinger). See generally ALLAN P. SINDLER, *UNCHOSEN PRESIDENTS: THE VICE-PRESIDENT AND OTHER FRUSTRATIONS OF PRESIDENTIAL SUCCESSION* 49–50, 112–13 (1976) (discussing proposal to abolish vice presidency).

314. See generally Joel K. Goldstein, *The Rising Power of the Modern Vice Presidency*, 38 *PRESIDENTIAL STUD. Q.* 374 (2008).

315. See generally Joel K. Goldstein, *Cheney, Vice Presidential Power, and the War on Terror*, 40 *PRESIDENTIAL STUD. Q.* 102, 104 (2010); Goldstein, *supra* note 314. For additional commentary on vice presidential influence, see also PAUL C. LIGHT, *VICE PRESIDENTIAL POWER: ADVICE AND INFLUENCE IN THE WHITE HOUSE* (1984); Michael Nelson, *Background Paper*, in *A HEARTBEAT AWAY: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON THE VICE PRESIDENCY* 37 (1988) (stating Vice Presidency "came into full flower" under Mondale).

316. Joel K. Goldstein, *Resolved, The Vice Presidency Should Be Abolished: Con, in DEBATING THE PRESIDENCY: CONFLICTING PERSPECTIVES ON THE AMERICAN EXECUTIVE* 179, 182–84 (Richard J. Ellis & Michael Nelson eds., 2d ed. 2010).

likely that Presidents or their associates will use the Twenty-Fifth Amendment to transfer power from an incapacitated President when appropriate. Accordingly, there is reason to believe succession under Section 1 will achieve the Amendment's continuity goals and that Sections 3 and 4 will be implemented more often and more effectively than might have been the case when the Amendment was proposed or ratified.<sup>317</sup>

### *B. Twenty-Fifth Amendment Precedents*

The implementations of the various provisions of the Twenty-Fifth Amendment since 1967 have established some helpful precedents. I will not repeat the earlier discussion other than to underscore several significant features. First, the confirmations of Ford and Rockefeller provided a set of precedents involving presidential decision making and congressional conduct.<sup>318</sup> In each case, a Congress in which Democratic majorities controlled both houses overwhelmingly confirmed a Republican nominee. They helped establish an expectation that a President is entitled to confirmation of a presidential Vice President and that Congress is responsible to make a thorough investigation under the circumstances and to act in a manner generally free of partisanship. Second, Presidents have established the pattern of transferring power when they undergo anesthesia and have developed other protocols for handling unexpected incapacities.<sup>319</sup>

### *C. Wake Up Calls*

These positive changes do not, however, justify complacency or the relative inaction in this area since 1967. Three quite different developments suggest further action is needed.

First, although circumstances have never required anyone other than a Vice President to discharge presidential powers following a presidential vacancy, conditions post 9/11 increase the possibility of a continuity crisis involving multiple vacancies. America narrowly avoided a double vacancy even before the Twenty-Fifth Amendment. The specter of such an event increases in an age of terrorism in which extraordinary weapons are becoming more readily accessible to non-state actors whose ultimate professed ambition is to injure seriously the United States. Government buildings were among the actual and intended targets on 9/11. Vice President Cheney's subsequent practice of working from undisclosed locations reflected the perceived need to disperse the nation's top two officers to upset any plans to create a continuity crisis. The possibility of an attack that would kill or disable multiple leaders cannot be dismissed.

Second, since 1967, presidential health has attracted increased attention. Scholars have produced studies that provide a greater awareness of the variety and complexity of situations that might occasion presidential

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317. Goldstein, *supra* note 110, at 165, 205.

318. *See supra* Part I.D.2.

319. *See supra* Part I.D.3.

inability and the difficulty of addressing it in certain situations.<sup>320</sup> We now know that Franklin Pierce and Calvin Coolidge were depressed for much of their time in office following the death of their sons and that, in Coolidge's case, the trauma transformed his performance,<sup>321</sup> that Franklin Roosevelt's health was failing before he ran for a fourth term,<sup>322</sup> and that John F. Kennedy's medical problems were more severe and his drug abuse more reckless than anyone could have imagined in 1967.<sup>323</sup> Some close aides of Lyndon B. Johnson questioned his sanity,<sup>324</sup> and Richard M. Nixon's mental state in the last weeks of his Presidency was sufficiently precarious to cause some close associates to take extraordinary precautions.<sup>325</sup> Research on presidential health has disclosed that various Presidents suffered from serious ailments, which, to varying degrees, compromised their ability to serve.

Similarly, events have reminded us of the mortality of existing Presidents and Vice Presidents. Ford was the target of two assassination attempts, Reagan was shot, and other efforts to kill various Presidents have been foiled. Reagan was diagnosed with Alzheimer's disease some years after leaving office. Some suspected, both while he was in office and thereafter, that he was impaired to an extent, which questioned his ability to serve.<sup>326</sup> George H.W. Bush had one heart-related episode as President; Cheney had several as Vice President.

Finally, the 2000 presidential election provided a contemporary version of a failure of the presidential electoral system to produce a clear winner. It raised the specter that vote counting issues could impede the ability of the presidential electoral system to produce a victor, educated many to the fact that counting ballots may sometimes become a subjective exercise, and introduced the possibility that presidential elections could become the subject of litigation so that judicial decisions as well as electoral counts could shape the outcome. Moreover, the absence of reform following the Bush election rebutted the common expectation that election of a President without an electoral vote majority would sound the death knell of the Electoral College. In fact, the Bush election, based on a disputed electoral vote majority despite receiving more than 500,000 fewer popular votes than Vice President Al Gore,<sup>327</sup> made reform, which would have been difficult

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320. See, e.g., FEERICK, *supra* note 48, at 197–200. See generally MANAGING CRISIS: PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT, *supra* note 96; MCDERMOTT, *supra* note 21.

321. See ROBERT E. GILBERT, THE TORMENTED PRESIDENT: CALVIN COOLIDGE, DEATH, AND CLINICAL DEPRESSION 250 (2003).

322. See GILBERT, *supra* note 113, at 53–60.

323. MCDERMOTT, *supra* note 21, at 118–56.

324. See GILBERT, *supra* note 113, at 199.

325. See generally MCDERMOTT, *supra* note 21, at 157–96.

326. See Jerrold M. Post, *Behavioral Disorders*, in PRESIDENTIAL DISABILITY: PAPERS, DISCUSSIONS, AND RECOMMENDATIONS ON THE TWENTY-FIFTH AMENDMENT AND ISSUES OF INABILITY AND DISABILITY AMONG PRESIDENTS OF THE UNITED STATES 52, 56–57 (James F. Toole & Robert J. Joynt eds., 2001).

327. David Stout, *The Final Tally: Gore's Lead in the Popular Vote Now Exceeds 500,000*, N.Y. TIMES, Dec. 30, 2000, at A11.

in any event, impossible since it committed the Republican party to preserving the institution so as not to impeach Bush's entitlement to the Presidency.

One would have hoped that the confluence of these events would have produced appropriate reform. It has not. Some private groups have studied these problems,<sup>328</sup> and the Continuity of Government Commission has engaged in a comprehensive review.<sup>329</sup> No legislative progress has resulted.

#### IV. AFTER THE VICE PRESIDENT

##### A. Introduction: Succession After the Vice President

The Vice Presidency does not provide protection against all presidential continuity contingencies. Some line of succession after the Vice President must exist to address a double vacancy which occurs, whether before or after the inauguration. It must address a variety of contingencies—death, resignation, removal, inability, and failure to qualify—which could produce that double vacancy. This list understates the complexity of the challenge since some labels (e.g., inability, failure to qualify) summarize multiple precipitating causes. Moreover, vacancies may present different considerations depending on whether they create the need for a successor on a permanent or temporary basis. Finally, there are no formal procedures for declaring a President disabled absent a functioning Vice President.

A series of gaps mar the system for assuring presidential continuity after the Vice Presidency. Four general points are worth considering at the outset. First, although these gaps involve contingencies that are seemingly remote, they cannot be dismissed, especially in an age of terrorism and proliferating nuclear weapons. In some cases, they would prove very difficult to resolve if they did occur. This could prove especially true regarding the line of succession after the Vice President in a situation where the electoral system fails to produce a President.<sup>330</sup>

Second, these problems are, to a great extent, interrelated. For instance, the identity of the person(s) next in line behind the Vice President will affect the handling of presidential inability absent a functioning Vice President. Although pre-inaugural and post-inaugural contingencies implicate different constitutional provisions, a consideration of who should follow the Vice President must address both time periods.

Third, solving some of these problems may be complicated if, as seems likely, Congress resists changing two overarching features of the existing landscape. In particular, Congress is likely to be disposed to perpetuate the current method, which places legislative leaders atop the line of succession.

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328. See e.g., MILLER CTR. COMM'N NO. 4, *supra* note 85; PRESIDENTIAL DISABILITY: PAPERS, DISCUSSIONS, AND RECOMMENDATIONS ON THE TWENTY-FIFTH AMENDMENT AND ISSUES OF INABILITY AND DISABILITY AMONG PRESIDENTS OF THE UNITED STATES, *supra* note 326.

329. See CONTINUITY OF GOV'T COMM'N, *supra* note 4.

330. See Goldstein, *supra* note 1, at 69–70, 72–73.

Moreover, the existence of the Electoral College system has residual support even though it complicates some pre-inaugural contingencies.

Finally, to the extent Congress has acted in this area, its approach has suffered badly from its tendency to adopt formulaic, one size fits all remedies rather than tailoring solutions to the problems presented. In short, the Presidential Succession Law of 1947, which in some sense addresses these gaps, tries to solve several different problems with responses not well tailored to many, perhaps most, of the situations that might arise.

Although Section 2 substantially reduced the significance of the line of succession after the Vice President by dramatically decreasing the likelihood that such a person would ever be first in line,<sup>331</sup> it did not eliminate the problem. Succession after the Vice President presents two central dilemmas. The conventional problem is simply that a presidential vacancy or disability could still occur when the Vice Presidency is unoccupied (prior to nomination or confirmation of a new Vice President under Section 2) or the President and Vice President could die or be disabled, or the offices could otherwise fall vacant, simultaneously. Who should be number three, after the President and Vice President? Who should be two heartbeats away from the Presidency?

The second problem involves the possibility of a catastrophe, most likely from a nuclear or terrorist attack that eliminates or disables many in the line of presidential succession. The question it raises is not who should be third (or fourth) in line, but how should the line be drawn at its more remote links, what direction should it take, and what points should it connect? Whereas the conventional problem raises the question of who should immediately follow the Vice President, the mass catastrophe problem faces the quite different challenge of constructing a line likely to leave someone left who is equipped to act as President if a common disaster eliminates the heartbeats of a number of presidential successors.

Pursuant to the power conferred in the original Presidential Successors Clause,<sup>332</sup> Congress has passed legislation which has alternated between three approaches—a legislative approach in 1792, a Cabinet line in 1886, and a combined legislative-Cabinet line of succession after the Vice President in 1947.<sup>333</sup> Although the Constitution empowers Congress to designate what “Officer” shall act as President following a double vacancy, Congress has always created a line after the Vice President with anywhere from two to seventeen persons in it. Notwithstanding the text’s use of the singular, no one seems inclined to apply the clause literally in this regard and longstanding practice coupled with pragmatic considerations would seem to make a long line firmly entrenched. The current line begins with the Speaker of the House and then the President pro tempore of the Senate,

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331. See *supra* text accompanying note 82.

332. U.S. CONST. art. II, § 1, cl. 6 (“[T]he 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.”).

333. See *supra* notes 43–45 and accompanying text.

followed by the Cabinet with the departments listed according to when created.<sup>334</sup> The 1947 law provides that a person must resign his or her position to act as President<sup>335</sup> and that the Speaker or President pro tempore can “bump” or supplant a Cabinet officer who is acting as President.<sup>336</sup>

The last two laws, in 1886 and 1947, attempted to address both the conventional and the mass catastrophe problems. They identified an immediate successor, the Secretary of State and Speaker of the House, respectively, and created lines consisting of seven and initially eleven after the Vice President.<sup>337</sup> Although both the two heartbeats away and mass catastrophe problems involve the question of how to provide a legitimate and able presidential successor, they basically raise analytically distinct issues that merit separate treatment.

#### *B. Who Should Be Two (or Three) Heartbeats Away? Some Constitutional Considerations*

The current line places the Speaker of the House and President pro tempore of the Senate two and three heartbeats away. Congress adopted this line in response to Truman’s June 1945 proposal predicated on his belief that it was inappropriate for him, as President, to appoint his successor.<sup>338</sup> Sam Rayburn, himself a vice presidential contender in 1944, was Speaker of the House, and the Speaker had come from the President’s party for forty-three of the last fifty years. Truman pointed out that the House was “[u]sually . . . in agreement politically with the Chief Executive.”<sup>339</sup> By the time Congress acted, however, the Republicans had won control of the House and Senate in the 1946 elections.<sup>340</sup>

Of course, anyone assessing or recommending congressional action must first be satisfied that the Constitution gives Congress power to adopt the measure under consideration. Although no serious argument has been advanced against the constitutionality of Cabinet succession, a number of able scholars have challenged the constitutionality of legislative succession,<sup>341</sup> and their position probably represents the academic

334. See 3 U.S.C. § 19(a), (b), (d)(1) (2006).

335. *Id.* § 19(a), (b), (d)(3).

336. *Id.* § 19(d)(2).

337. See *id.* § 19; Act of Jan. 19, 1886, ch. 4, 24 Stat. 1 (repealed 1947). The 1886 Act named seven Cabinet officers after the Vice President. The 1947 Act initially listed the Speaker of the House, President pro tempore of the Senate, and nine Cabinet officers; as new executive departments were created, the principal officer was added to the list.

338. Special Message to the Congress on the Succession to the Presidency, PUB. PAPERS 128, 129 (June 19, 1945).

339. *Id.*

340. FEERICK, *supra* note 48, at 44–45.

341. See, e.g., AKHIL REED AMAR, AMERICA’S CONSTITUTION 170–73, 452–53 (2005); SILVA, *supra* note 270, at 174–75; Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113 (1995); Fortier & Ornstein, *supra* note 1, at 996; Ruth C. Silva, *The Presidential Succession Act of 1947*, 47 MICH. L. REV. 451, 463–64 (1949) (arguing the Speaker of the House and President pro tempore do not qualify as officers and therefore are constitutionally ineligible for presidential succession); Howard M. Wasserman, *Structural Principles and Presidential*

consensus today. During the last sixty-five years, much of the discussion regarding the merits of legislative versus Cabinet succession has turned on constitutional analysis that has been informed largely by interpretivist arguments based primarily on the constitutional text and the intent of the framers of the original Constitution.

If legislative succession is generally unconstitutional, the menu of options narrows, and the discussion shortens considerably. In my view, however, the case against legislative succession based on these sort of interpretivist arguments is not convincing, nor are the more persuasive arguments against legislative succession based on the structure of the original Constitution decisive.

Article II empowers Congress, in the absence of a functioning President or Vice President, to designate an “Officer” to act as President.<sup>342</sup> The word “Officer,” some argue, is intended to be synonymous with “Officer of the United States.”<sup>343</sup> An earlier draft at the Constitutional Convention had used the longer formulation but a Committee of Style, which had jurisdiction over form but not substance, shortened it to the one word that appears in the Constitution.<sup>344</sup> The term “Officer of the United States” and similar phrases used elsewhere in the Constitution<sup>345</sup> exclude legislative leaders, who are not commissioned, cannot be impeached, and may serve in Congress notwithstanding the Incompatibility Clause.<sup>346</sup>

Further evidence suggests that the drafters of the Constitution intended “Officer” to be a shorthand for “Officer of the United States.” James Madison, the father of the Constitution, argued in 1792 that Congress could

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*Succession*, 90 KY. L.J. 345 (2002) (arguing that legislative succession violates structural principles of the Constitution). *But see* John D. Feerick, Commentary, *A Response to Akhil Reed Amar’s Address on Applications and Implications of the Twenty-Fifth Amendment*, 47 HOUS. L. REV. 41, 61–63 (2010) (stating in part that the issue “is not free from doubt”). Regardless of the propriety of legislative succession generally, the current presidential succession law has a number of problematic features a discussion of which is beyond the scope of this Article. *See, e.g.*, Amar, *supra* note 1, at 27–28, 31–32; William F. Brown & Americo R. Cinquegrana, *The Realities of Presidential Succession: “The Emperor Has No Clones”*, 75 GEO. L.J. 1389, 1435–46 (1987).

342. U.S. CONST. art. II, § 1, cl. 6 (“[T]he 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 . . .”).

343. *See* SILVA, *supra* note 270, at 131; Amar, *supra* note 1, at 12; Amar & Amar, *supra* note 341, at 114–17.

344. *See* Feerick, *supra* note 17, at 85–86.

345. *See, e.g.*, Emoluments Clause, U.S. CONST. art. I, § 6, cl. 2 (“No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time . . . .”); Incompatibility Clause, *id.* art. I, § 6, cl. 2 (“[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”); Commission Clause, *id.* art. II, § 3 (“[The President] shall Commission all the Officers of the United States.”); Impeachment Clause, *id.* art. II, § 4 (“The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”).

346. *See supra* note 345.

not place a legislative leader in the line of succession for this reason,<sup>347</sup> and most of the very few members of the Second Congress who had been delegates to the Constitutional Convention seemed to share that view.<sup>348</sup>

But the arguments based on text and intent of the framers are not unequivocal. There is no evidence that the drafters' apparent intent was known to the ratifiers or to the population at large. The drafters may have equated "Officer" with "Officer of the United States" but the text as ratified empowered Congress to name an "Officer," not an "Officer of the United States." Ratifiers may have interpreted the distinction as significant, particularly since the Speaker and arguably the President pro tempore were referred to elsewhere in the Constitution<sup>349</sup> as "Officers."<sup>350</sup> Moreover, just three years after the Constitution went into effect, the Second Congress adopted the initial succession law that placed the President pro tempore of the Senate and Speaker of the House in the line of succession, two and three heartbeats away. Its members presumably had some understanding of how the term was used. Alexander Hamilton, himself a significant Framers, favored that law and George Washington, President of the Constitutional Convention, signed it as President of the United States.<sup>351</sup> Of course, Hamilton's antipathy to Secretary of State Thomas Jefferson may have dictated his interpretation,<sup>352</sup> but Madison's friendship and political association with Jefferson may have influenced his own view.<sup>353</sup> Washington might have been expected to veto a law that unconstitutionally infringed on the executive branch; he did not, and his motives were, at least according to national myth, pure.

The textual and originalist arguments strike me as inconclusive, particularly when one considers that they did not persuade a contemporary Congress and President (and not just any President, George Washington). *Marbury v. Madison*<sup>354</sup> reminds us, of course, that even an early Congress could be deemed to have acted unconstitutionally.<sup>355</sup> Yet we should be more willing to accept Chief Justice Marshall's view that his coevals misunderstood what the Constitution meant than we should be to credit similar judgments by our contemporaries regarding the original Framers' intent.

Especially since text and originalist arguments do not settle the matter, as they generally do not, it is appropriate to consider other types of constitutional reasoning to construe a Constitution intended "to endure for

347. AMAR, *supra* note 341, at 170–72; Amar, *supra* note 1, at 23, 27, 31; Amar & Amar, *supra* note 341, at 116.

348. Feerick, *supra* note 122, at 471–74 & nn.90–94.

349. See, e.g., U.S. CONST. art. I, § 2, cl. 5 ("The House of Representatives shall chuse their Speaker and other Officers . . ."); *id.* art. I, § 3, cl. 5 ("The Senate shall chuse their other Officers, and also a President pro tempore . . .").

350. See John F. Manning, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 STAN. L. REV. 141, 144–45 (1995).

351. Goldstein, *supra* note 1, at 86–87.

352. Feerick, *supra* note 122, at 474.

353. Goldstein, *supra* note 1, at 86.

354. 5 U.S. (1 Cranch) 137 (1803).

355. *Id.* at 176.

ages.”<sup>356</sup> Longstanding practice regarding institutional arrangements helps shape constitutional meaning<sup>357</sup> and legislative succession commands substantial support from that interpretive mode. After all, for 157 years of American history since 1792, the line of succession as established by Congress has placed legislative leaders behind the Vice President. Cabinet succession was in place for only sixty-one years, from 1886 to 1947, and was imposed in 1886 to avoid a situation in which no legislative leaders existed.<sup>358</sup>

The most powerful constitutional arguments against legislative succession come from the structure of the Constitution.<sup>359</sup> Legislative succession allows Congress an unlimited right to choose a President. That resembles parliamentary government, which our Constitution emphatically rejected. The creation of the Electoral College to choose the President reflected a commitment that Congress should not choose the Chief Executive and that, unless impeached and convicted, he or she should enjoy a tenure of office independent of its control. That was one aspect of the separation of powers. The Incompatibility Clause reflected another in its prohibition against legislators holding office.<sup>360</sup> If legislative leaders retain their seats and offices in Congress while acting as President, they violate at least the spirit of the Incompatibility Clause. Moreover, they would be subject to removal, and accordingly control, by their constituents and the house in which they serve. That would create a strange situation in which an acting President was politically accountable not to the nation but to a geographic subunit, and to one house of Congress. If they resign those positions, they may not be “officers” as envisioned by the Constitution. Finally, legislative succession presents some perverse incentives. If the leader of the House or Senate is next in line to the Presidency, legislators may have a disincentive to confirm a vice presidential nominee or may have an incentive to impeach a President or Vice President.<sup>361</sup>

These structural arguments, which derive largely from the architecture of the original Constitution, raise more serious objections to legislative succession. Yet a subsequent amendment to the Constitution introduces

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356. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

357. *Id.* at 401; *see also* *Dames & Moore v. Regan*, 453 U.S. 654, 678–79 (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (describing how longstanding practice adds gloss to constitutional meaning).

358. When Vice President Thomas Hendricks died in 1885, Congress was not in session and no Senate President pro tempore or Speaker of the House existed. FEERICK, *supra* note 8, at 141. Accordingly, there was no successor to President Grover Cleveland. Since the House was not a continuing body and did not meet until the winter following a presidential inauguration and since the Senate President pro tempore was not a continuing position in an age when the Vice President generally presided over the Senate, this situation often existed at the beginning of a presidential term.

359. *See* Amar & Amar, *supra* note 341, at 114 (“Our most important reasoning is structural . . .”); Goldstein, *supra* note 1, at 87–88; *see also* Wasserman, *supra* note 341, at 348–52 (discussing structural principles).

360. U.S. CONST. art. I, § 6, cl. 2 (“[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”).

361. Amar & Amar, *supra* note 341, at 124; *see also* Goldstein, *supra* note 1, at 87–89.

additional evidence that merits consideration in assessing the strength of these arguments.<sup>362</sup>

If neither a President-Elect nor Vice President-Elect qualifies, the Twentieth Amendment authorizes Congress to determine what “person” shall act as President or to identify a means to select such a person. Although Section 3 of the Twentieth Amendment<sup>363</sup> is poorly crafted,<sup>364</sup> the legislative history makes it clear that Congress’s power to designate such a “person” or system extends to a situation in which Congress fails to choose a President and Vice President<sup>365</sup> or in which both die or they fail to qualify for any other reason.<sup>366</sup> The designated “person” serves only until a President or Vice President qualifies.

“Person” is, of course, broader than “Officer of the United States” or even “Officer” and accordingly Congress might designate as acting President under a Twentieth Amendment contingency someone who would not fall within those other terms, such as the most recent former President of the United States or the Dean of the Fordham Law School. The use of “person” avoids the textual and originalist arguments that have been made against legislative succession based on the argument that “Officer” means “Officer of the United States” in the Presidential Succession Clause. Yet

362. See generally Goldstein, *supra* note 1, at 89–90 (presenting similar argument).

363. It provides in part:

If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

U.S. CONST. amend. XX.

364. The separate reference in the first clause of Section 3 above to situations in which a President is not chosen or a President-Elect fails to qualify suggests that the former concept (failure of election) is not included in the latter (failure to qualify). Since the Amendment authorizes Congress to designate a “person” to act as President when neither a President nor Vice President qualifies but is silent regarding a failure to elect, one might conclude that there is no constitutional provision for the failure to elect situation.

365. See H.R. REP. NO. 72-633, at 3–4 (1932) (conference report adopting the broader formulation of failure to qualify in the House’s proposed amendment); H.R. REP. NO. 72-345, at 2 (1932) (“Congress is given power to provide for the case where neither a President nor a Vice President has qualified before the time fixed for the beginning of the term, whether the failure of both to qualify is occasioned by the death of both, [by the failure to elect], or by any other cause . . . .”); *id.* at 4 (“Under our present Constitution there is no provision for the case where the House of Representatives fails to choose a President and the Senate fails to choose a Vice President. Section 3 of the proposed amendment authorizes Congress to provide for this situation. Power is given to Congress to provide by law who shall act as President in such case or the manner of selecting a person to act as President . . . .”); S. REP. NO. 72-26, at 5 (1932) (“Section 3 of the proposed amendment gives Congress the power to provide by law who shall act as President in a case where the election of a President has been thrown into the House of Representatives and the House has failed to elect a President . . . .”).

366. See H.R. REP. NO. 72-345, at 2 (“Congress is given power to provide for the case where neither a President nor a Vice President has qualified before the time fixed for the beginning of the term, whether the failure of both to qualify is occasioned by the death of both, [by the failure to elect], or by any other cause . . . .”).

the “person” designated would be subject to other constitutional qualifications—age, residency, natural born citizen<sup>367</sup>—and the arrangement would be subject to considerations based on constitutional structure, too. In other words, the structural principles that would impeach legislative succession could also be deployed against legislative succession in the failure to qualify context.

In fact, the Presidential Succession Law of 1947 identifies the Speaker, then the President pro tempore, as the “person(s)” who act as President in failure to qualify situations.<sup>368</sup> Yet many of the structural arguments that seemed forceful when discussed in the post-inauguration context<sup>369</sup> would, if valid, undermine the Speaker’s succession here, too. Congress would be electing the acting President, thereby resembling parliamentary government, and, at least when the failure to qualify was due to the failure of the House and Senate to elect a President and Vice President, respectively, either house could abbreviate his or her tenure by electing a President or Vice President. The Incompatibility Clause arguments would also apply. If a legislative leader acted as President, his or her presence at both ends of Pennsylvania Avenue would seem to violate the clause. And the houses of Congress might have less incentive to elect a President or Vice President in the contingency election since it could instead have the Speaker act as Chief Executive. The Speaker would owe her status as acting President to the House, or at least the majority who elected her. The House (or the Senate) would be able to remove her for actions of which it disapproved by electing a President or Vice President.<sup>370</sup>

Yet some form of legislative succession seems virtually inevitable in a Twentieth Amendment scenario. There are no other dependable options. Succession of Cabinet officers here is generally not a feasible choice. The only Cabinet is likely to be that which served with the prior President. Its members may have been appointed eight years earlier by a President whose positions might have become widely unpopular. Absent the remote case in which a President and Vice President were re-elected and then died before the inauguration, succession of a Cabinet member would defy many of the principles implicit in the Twenty-Fifth Amendment—continuity, accountability, and democratic pedigree. If the electoral system failed to produce a President, elevating someone from the prior Cabinet would make little sense for all of these reasons. If the President-Elect died after defeating the incumbent President, succession from the outgoing Cabinet would turn the executive branch over to the team that had just been ousted, an even more outrageous result! Continuing the outgoing President would

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367. See U.S. CONST. art. II, § 1, cl. 4 (“No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.”).

368. See 3 U.S.C. § 19 (a)(1), (d)(1) (2006).

369. See *supra* text at notes 359–61.

370. See Goldstein, *supra* note 1, at 91.

seem even more anomalous, especially if he or she had just been defeated by a President-Elect who had then died.

If these structural arguments from the original Constitution are deal breakers as against the Speaker it is hard to imagine who might be a plausible President in a double “failure to qualify” situation.<sup>371</sup> But that cannot be the proper resolution. The Constitution, Chief Justice Marshall said in *McCulloch v. Maryland*,<sup>372</sup> was designed to succeed, not fail, and, where possible, it should be interpreted in a manner to facilitate that goal.<sup>373</sup> That recognition might lead one to conclude that these structural considerations must yield in the failure to qualify situation. Yet it would seem anomalous to conclude that the structural arguments preclude legislative succession when a double vacancy occurs post-inauguration but can be brushed aside in the event of a double failure to qualify.<sup>374</sup>

Alternatively, one might conclude that these structural considerations reflect important, but not absolute, constitutional values which sometimes must be weighed against, and even yield to, other considerations. The double failure to qualify scenario presents one such situation but a post-inaugural double vacancy may present another. This approach does not mean that these structural arguments should be disregarded but simply that they should be considered as part of a mix of arguments in reaching an acceptable resolution in the post- and pre-inaugural settings.<sup>375</sup>

Moreover, the constitutional arguments regarding the merits of legislative and Cabinet succession need not rely simply on conventional implications from the structure of the original Constitution. The Twenty-Fifth Amendment presents additional structural considerations with reference to the double vacancy situation. The values implicit in the Twenty-Fifth Amendment included the need for a smooth succession of a new leader who was conversant with the activities of the executive branch. Succession of the Speaker or President pro tempore would be disruptive even when it

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371. Other possibilities (e.g., a former President, the Chief Justice of the Supreme Court, the most senior governor, etc.) present self-evident problems. Instead of designating a “person” to act as President, Section 3 of the Twentieth Amendment allows Congress to designate “the manner in which one who is to act shall be selected.” U.S. CONST. amend. XX. Congress could, for instance, empower itself (or one of its chambers) to elect an acting President from all of those who would be constitutionally eligible. This procedure might facilitate the selection of a presidential stand-in but would not escape some of the other problems of legislative election, and, in a failure to elect situation, would add yet another contingent election to the burden on Congress.

372. 17 U.S. (4 Wheat.) 316 (1819).

373. *See id.* at 415.

374. Of course, legislative succession does not need to overcome the textual and originalist arguments related to “Officer” in the failure to qualify situation since the Twentieth Amendment allows Congress to designate a “person.” Yet unless one views these arguments as dispositive, and many of those who advance them do not, *see, e.g.*, Amar & Amar, *supra* note 341, at 114 (describing structural arguments as most significant); Feerick, *supra* note 341, at 61–64 (describing controversy regarding textual and originalist arguments but expressing willingness to accept “legal risks” of legislative succession but for “compelling policy reasons” against legislative succession), ultimately the constitutionality of legislative succession turns on structural constitutional arguments.

375. *See* Goldstein, *supra* note 1, at 91–92.

would not change the party control of the executive branch. For different reasons, either would be hard-pressed to play the understudy role envisioned by the Twenty-Fifth Amendment. If the double (or triple vacancy) happened simultaneously or in rapid sequence, there would be no time for a legislative leader to become conversant with deliberations on matters of concern.

Disability determinations would be complicated, especially regarding short-term situations. The Twenty-Fifth Amendment was premised on the belief that, when an unexpected injury or illness mandates a transfer of presidential power, it must occur immediately without any hiatus or uncertainty. The 1947 law, however, requires resignation of the legislative leader, and some conclude that the Incompatibility Clause or other considerations mandate that a legislative leader, though not a Cabinet officer, relinquish his or her prior office to act as President.<sup>376</sup> This requirement could create a situation in which a Speaker or President pro tempore might wish to collect information regarding the expected length of the incapacity and the risks the country faces to decide whether to act as President or let the responsibility pass to the next in line.

Moreover, enthusiasm for the Vice President as successor was premised in part on the close relationship she would have with the President. That frequent contact would provide information regarding the President's condition, which a Speaker, particularly one from the opposite party, would lack. Sections 3 and 4 assumed that the President and Vice President would have a largely shared political destiny, a circumstance that would facilitate inability transfers. That would not be true of the President and a Speaker, especially a President and a cross party Speaker.

Sections 3 and 4 of the Twenty-Fifth Amendment were predicated on the belief that the executive branch should initiate disability determinations. Even if Congress replaced the Cabinet with some other body, the Vice President, a close presidential associate, would remain a necessary actor and hold an effective veto over such proceedings. Legislative succession would jeopardize, and perhaps undermine that basic premise. In the absence of a Vice President, it would deny the executive branch the power to control the initiation of a transfer of power.

Although legislative succession in general runs afoul of some principles implicit in the Twenty-Fifth Amendment, Cabinet succession does as well, although in less severe ways. The earlier discussion showed why Cabinet succession is not a feasible approach in most failure to qualify situations.

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376. The general view of scholars is that the Presidential Succession Clause intended the "Officer" who acts as President to retain her current office. *See, e.g.*, FEERICK, *supra* note 8, at 268; Amar & Amar, *supra* note 341, at 119–21. This presents problems for a legislative leader, based upon the Incompatibility Clause and the doctrine of separation of powers. I am not convinced that the Constitution requires that an acting President retain their prior office. The use of the word "Officer" may simply designate the status of those who are eligible to serve as acting President when they assume the discharge of presidential powers and duties without requiring that they retain that position. Indeed, if a Secretary of State were called upon to act as President for an extended period of time, she might well wish to relinquish that position in order to enlist a full time Secretary of State.

Moreover, a Cabinet member may lack the democratic pedigree that the Twenty-Fifth Amendment envisions for a presidential successor. Although he or she may, in a sense, reflect the outcome of the presidential election and would have attained office based on the advice and consent of the Senate, a Cabinet member would not have undergone the more rigorous Section 2 process and perhaps would never have run for office. A legislative leader does not stand on the same sort of national electoral foundation as a President, but he or she has at least been elected multiple times by constituents and by party members in the House or Senate who have recognized his or her political leadership.<sup>377</sup>

Further, a Cabinet member could encounter one difficulty in disability determinations that a legislative leader would not experience. A President might be able to prevent an adverse decision under Section 4 by removing the Cabinet member who was first in line after the Vice President if that member expressed concerns regarding the President's capacity. He or she could not do so with a legislative leader.

Structural arguments that are implicit in the Twentieth and Twenty-Fifth Amendments, as well as those from the original Constitution, expose some of the obstacles to legislative succession. Cabinet succession encounters problems, too, although to a lesser degree. Although I would not be prepared to conclude that either is always unconstitutional, both, in their generic versions, present constitutional challenges. Legislative succession as currently constructed poses two additional problems that violate basic principles implicit in the Twenty-Fifth Amendment. These deserve further discussion.

### 1. The Perils of Cross-Party Succession

Legislative succession could work a shift in party control of the White House, a situation that would cause unique upheavals in the system of government. The current system of legislative succession runs a significant risk of cross-party transfer of power. Since 1969, the President and Speaker of the House have come from opposite parties, twenty-eight of the forty-two years or two-thirds of the time.<sup>378</sup> Six of the eight Presidents during this time (i.e., all but Carter and Barack Obama) served all or part of their Presidency with a Speaker from the opposite party.<sup>379</sup>

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377. See Goldstein, *supra* note 1, at 93 (discussing political pedigree of legislative leaders).

378. See *infra* tbl. 1. These calculations run through January 2011 or the first two years of the Obama term.

379. See *infra* tbl. 1.

Table 1: *Presidents and Speakers of the House, 1969–2011*<sup>380</sup>

| <i>Years</i> | <i>President (Party)</i> | <i>Speaker (Party)</i>       |
|--------------|--------------------------|------------------------------|
| 1969–1974    | Nixon (R)                | McCormack (D),<br>Albert (D) |
| 1974–1977    | Ford (R)                 | Albert (D)                   |
| 1977–1981    | Carter (D)               | O’Neill (D)                  |
| 1981–1989    | Reagan (R)               | O’Neill (D),<br>Wright (D)   |
| 1989–1993    | Bush (R)                 | Wright (D),<br>Foley(D)      |
| 1993–1995    | Clinton (D)              | Foley (D)                    |
| 1995–2001    | Clinton (D)              | Gingrich (R),<br>Hastert (R) |
| 2001–2007    | Bush (R)                 | Hastert (R)                  |
| 2007–2009    | Bush (R)                 | Pelosi (D)                   |
| 2009–2011    | Obama (D)                | Pelosi (D)                   |

A cross-party succession of a Speaker would present unprecedented challenges, which would violate any number of the principles that animated the Twenty-Fifth Amendment. Any succession of a Speaker would be an anomalous event that would almost certainly occur in a time of significant national trauma. The dislocation associated with a presidential succession that shifted party control of the executive branch would increase exponentially. Some would question the legitimacy of such a turnover of party control, which, in contemporary times, would produce a dramatic change in the ideological orientation as well as partisan composition of the executive branch. Such legitimacy concerns would be particularly acute in those cases where party control shifted after a presidential election that was won decisively, as would have been true following the presidential elections of 1972, 1980, 1984, 1988, and 1996.<sup>381</sup>

Although a time of national trauma might cushion partisan impulses, the change in the party and policy orientation of the person discharging presidential powers would likely work an upheaval of executive personnel. One exercising presidential powers and duties would wish to surround himself with subordinates whose judgment he trusted, whose loyalty to him was clear, and whose worldview was compatible. It is hard to imagine acting President Tip O’Neill retaining Reagan’s associates or Tom Foley

380. The information in this Table was compiled from publicly available sources. *See Speakers of the House*, OFFICE OF THE CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, [http://clerk.house.gov/art\\_history/house\\_history/speakers.html](http://clerk.house.gov/art_history/house_history/speakers.html) (last visited Nov. 11, 2010); *The Presidents*, THE WHITE HOUSE, <http://www.whitehouse.gov/about/presidents> (last visited Nov. 11, 2010).

381. *See Presidential Elections*, THE AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/elections.php> (last visited Nov. 11, 2010) (providing election results).

keeping George H.W. Bush's appointees in place or Nancy Pelosi governing with those George W. Bush had chosen. Nor could one envision Newt Gingrich or Denny Hastert retaining the Clinton Cabinet and White House personnel. The lack of any built-in transition period would exacerbate the problem. Whereas most new Presidents have ten weeks between election and inauguration (and a longer period in which transition planning occurs), a Speaker who replaces a President of the opposing party would have no advance time to plan for such a turnover.

It is unlikely that a cross-party Speaker would have had a desirable level of preparation. Even if she received briefings, it is hard to imagine the prior administration bringing an opposing party's Speaker into deliberations on sensitive policy matters.

Finally, a cross-party situation would introduce new complications into a disability situation. One would expect a President or those around the President to be more hesitant to transfer powers to a Speaker from the other party.

The prospect of a cross-party succession accordingly presents complications that offend a number of values that are implicit in the Twenty-Fifth Amendment. Rather than achieving governmental continuity by elevating the President's chosen successor, it installs the legislative leader of the opposing party. Rather than elevating a successor whose relationship with the President was likely to foster benefits flowing from intimate involvement in the pursuit of governmental policies, it dispenses with those advantages by promoting a leading opponent. Rather than facilitating disability determinations, it exacerbates them. In all of these ways, cross-party succession conflicts with principles inherent in the Twenty-Fifth Amendment.

## 2. Succession of the President Pro Tempore: An Unpresidential Acting President

Placement of the President pro tempore of the Senate in the line of succession is even more offensive to ideas implicit in the Twenty-Fifth Amendment. It presents the same risks of succession of a Speaker, especially a cross-party Speaker. Cross-party control of the Senate has been a less common, but still frequent, recent condition, having existed twenty-three and a half of the last forty-two years, or fifty-six percent of the time.<sup>382</sup>

Succession of the President pro tempore of the Senate violates a second basic principle of the Twenty-Fifth Amendment—the idea that a successor should be presidential. That requirement which the Amendment imposed for a Vice President would also seem to be applicable to a President pro

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382. Since 1969, the Presidency and Senate have been controlled by different parties from 1969–77, 1987–93, 1995–2001, June 6, 2001–November 12, 2002, 2007–2009. *See Party Division in the Senate, 1789–Present*, U.S. SENATE, [http://www.senate.gov/pagelayout/history/one\\_item\\_and\\_teasers/partydiv.htm](http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm) (last visited Nov. 11, 2010); *supra* tbl. 1 (providing dates of presidential service).

tempore who would necessarily act as President under unprecedented circumstances.

Two criteria govern selection as President pro tempore of the Senate—membership in the Senate majority party and seniority. Whereas the Speaker has been chosen to lead the House of Representatives and its majority party, the President pro tempore is an honorific position. Since Nixon's inauguration, ten men have served as President pro tempore. Their names, dates of service, and age at the beginning of each stint, are presented in Table 2.

Table 2: *Ages of Senate President Pro Tempores, 1969–2011*<sup>383</sup>

| <i>President pro tempore</i> | <i>Dates of Service</i> | <i>Age at Beginning of Term</i> |
|------------------------------|-------------------------|---------------------------------|
| Richard B. Russell           | 1/3/1969–1/21/1971      | 71                              |
| Allen J. Ellender            | 1/22/1971–7/27/1972     | 80                              |
| James O. Eastland            | 7/28/1972–12/27/1978    | 67                              |
| Warren G. Magnuson           | 1/15/1979–12/4/1980     | 73                              |
|                              | 12/6/1980–1/4/1981      | 75                              |
| Milton R. Young              | 12/5/1980               | 82                              |
| Strom Thurmond               | 1/5/1981–1/6/1987       | 78                              |
|                              | 1/4/1995–1/3/2001       | 92                              |
|                              | 1/20/2001–6/6/2001      | 98                              |
| John C. Stennis              | 1/6/1987–1/2/1989       | 85                              |
| Robert C. Byrd               | 1/3/1989–1/3/1995       | 71                              |
|                              | 1/3/2001–1/20/2001      | 83                              |
|                              | 6/6/2001–1/3/2003       | 83                              |
|                              | 1/4/2007–6/28/2010      | 89                              |
| Ted Stevens                  | 1/3/2003–1/4/2007       | 79                              |
| Daniel K. Inouye             | 6/28/2010–1/2011        | 85                              |

It is hard to imagine that many Senators who voted to elect these ten men as President pro tempore would have wanted them to serve as President, especially during a time of crisis. Of the group, only Russell and Thurmond had ever run for President,<sup>384</sup> Russell more than sixteen years before he became President pro tempore, and Thurmond, as a third-party candidate, thirty-two years before he first became President pro tempore. Indeed,

383. The information in this Table was compiled from publicly available sources. See *Complete List of Presidents Pro Tempore*, U.S. SENATE, [http://www.senate.gov/artandhistory/history/common/briefing/President\\_Pro\\_Tempore.htm#5](http://www.senate.gov/artandhistory/history/common/briefing/President_Pro_Tempore.htm#5) (last visited Nov. 11, 2010); *Congressional Biographical Directory*, U.S. CONGRESS, <http://bioguide.congress.gov/biosearch/biosearch.asp> (last visited Nov. 11, 2010) (providing biographies, including dates of birth, of members of Congress).

384. See Paul P. Kennedy, *Russell of Georgia to Run Regardless of Truman Decision*, N.Y. TIMES, Feb. 29, 1952, at 1; *1948 Presidential Election*, THE AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/showelection.php?year=1948> (last visited Nov. 11, 2010).

Thurmond was still serving as President pro tempore more than one half century after he ran for the Presidency! None of the ten, in their prime or when they served as President pro tempore, ever had any chance to win his party's presidential nomination.<sup>385</sup>

Inasmuch as seniority is the crucial credential to become President pro tempore, not surprisingly virtually all of those who have held the office since 1969 were from non-competitive states not known for producing presidential or even vice presidential candidates.<sup>386</sup> Virtually all were beyond the age at which Presidents have been elected; Thurmond served at ninety-eight, Byrd at ninety-two, and five others served in their eighties.<sup>387</sup> Russell, Ellender, and Byrd died in office, and Thurmond and Byrd had significant health problems. Magnuson was defeated for re-election. Eastland, Young, and Stennis retired as, or within a month of serving as, President pro tempore. Stennis could not hear and had lost a leg to cancer.

The placement of the President pro tempore of the Senate after the Vice President and Speaker of the House puts three heartbeats from the Presidency someone who is inherently unpresidential. Such an arrangement is simply unconscionable if one takes seriously the possibility of the simultaneous deaths or inability of higher ranking officials.<sup>388</sup>

### *C. Mass Catastrophe Problems: The Need for and Perils of a Long Line*

Although the Constitution empowers Congress to designate an "Officer" to act as President in case of a double vacancy,<sup>389</sup> Congress has always designated multiple successors. The current line, eighteen persons long beginning with the Vice President, places the members of the Cabinet after the Speaker and Senate President pro tempore based upon the date of creation of the various Cabinet offices. Prudence, of course, dictates a long line especially in an age of nuclear weapons and terrorism.

The logic of an eighteen person line is to guard against a mass catastrophe. Yet a long line does not assure presidential continuity, especially if all of those in line live or work near each other. Everyone in the current line works in Washington, D.C. within a few miles of each other. It is not difficult to imagine a disaster that would eliminate all or most of them.<sup>390</sup> The current line, long though it is, does not serve its basic mission in part due to its geographic concentration.

385. Russell, however, might have been a plausible running mate for Adlai Stevenson in 1952; Byrd had been elected majority leader and Stevens, minority whip.

386. The nine states that produced the ten Presidents pro tempore since 1969 have provided one President (Jimmy Carter, 1976) and two unsuccessful vice presidential candidates (Henry Davis, 1904; and Sarah Palin, 2008) since the twentieth century began.

387. See *supra* tbl. 2.

388. See CONTINUITY OF GOV'T COMM'N, *supra* note 4, at 40; Feerick, *supra* note 341, at 63–64; Goldstein, *supra* note 1, at 94.

389. A strict constructionist might complain that Congress has exceeded its powers by designating multiple people when the Constitution empowers it to name a single "officer." Any such challenge seems frivolous.

390. See CONTINUITY OF GOV'T COMM'N, *supra* note 4, at 39; FEERICK, *supra* note 8, at 275 ("It is conceivable that, since all of those persons who are presently in the line of

In addition, the current arrangement also presents a “what’s my line?” problem. A premise of the Twenty-Fifth Amendment was that not any successor would do. Although it would be unduly optimistic to expect those in remote positions in the line of succession (or even those near its top) to have the attributes of a Vice President, it is not unreasonable to think that some of the principles implicit in the Twenty-Fifth Amendment would be reflected in constructing the line. Yet the current line includes many offices that are filled with able public servants who are ill-suited to act as President, particularly under the circumstances in which such service might be required. Would the typical Secretary of Housing and Urban Development or of Transportation or of countless other departments really be equipped to make the sort of immediate national security judgments that a down-line successor would almost inevitably be called on to make? The lack of expertise and unfamiliarity with basic concepts and vocabulary in that area would make such a successor largely dependent on whatever bureaucratic and military advisers remained.

Moreover, most Americans probably would not recognize, and could not name, those manning most positions in the line of succession. Would such figures have the credibility to command public support under the sort of unprecedented circumstances that would occasion their succession? And would they have the political experience and skills?

The current long line was drafted in a formulaic manner that was not sensitive to its fundamental mission, to produce an able acting President following some mass catastrophe. The current line owes its length and composition to the simplistic practice of including the head of every Cabinet-level department.<sup>391</sup> This formal approach to decision making ignores basic points like the common vulnerability of those in the line to an attack on Washington or the lack of suitability to be President of most in line, particularly under the extenuating circumstances under which such a person might be called upon to act as President.

#### D. *The Disability Gap*

Since Sections 3 and 4 of the Twenty-Fifth Amendment refer specifically to the Vice President as the recipient of presidential powers and duties and, under Section 4, co-decider of presidential inability, the absence or

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succession spend much time in Washington, D.C., the whole line could be wiped out in a nuclear attack on that city. Hence, in view of this possibility, it would be advisable for Congress to give some consideration to extending the line of succession to persons in widely separated parts of the country.”); MCDERMOTT, *supra* note 21, at 218 (calling for arrangements which recognize the possibility of attack on Washington, D.C.).

391. Some have suggested that the Presidential Succession Act of 1947, 3 U.S.C. § 19 (2006), would allow an acting Secretary to claim a place in line after the secretary leaves office. It lists the Cabinet positions chronologically, *see id.* § 19(d)(1), and provides that it “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.” *Id.* § 19(e). The Continuity of Government Commission has concluded that “the language clearly permits acting secretaries to be placed in the line of succession.” *See* CONTINUITY OF GOV’T COMM’N, *supra* note 4, at 34.

incapacity of that officer would compromise those provisions. There is no stated procedure to declare a Vice President disabled or to declare a President disabled absent a functioning Vice President. Although the Vice President now performs important duties in the executive branch, the purpose of declaring him or her disabled is not to transfer those ongoing duties to someone else, something the President could, to some extent, accomplish by formal or informal order.<sup>392</sup> It is rather to allow a President to be declared disabled without transferring the powers to the disabled Vice President and without his or her participation.

Congress has power to provide by statute for a double vacancy due to some combination of presidential and vice presidential death, resignation, removal, and inability.<sup>393</sup> It could legislate procedures, like those in Sections 3 and 4, to handle a presidential disability when the Vice Presidency was vacant. Absent such legislation, the President and the person next in line, currently the Speaker, could enter into a letter agreement regarding a voluntary or involuntary transfer of power when the second office was vacant. The Tyler Precedent should not complicate this matter since Tyler made a claim on behalf of a Vice President in a situation in which the Constitution was ambiguous. The Constitution clearly states that any officer after the Vice President simply acts as President, but does not assume the office, and that the President resumes power when the disability ends. The agreement between President Johnson and Speaker McCormack would provide some precedent for this arrangement.<sup>394</sup>

A disabled Vice President could present a greater predicament. Since the point of declaring the Vice President disabled is to facilitate a transfer of power from a disabled President or to direct presidential powers and duties to someone other than the disabled Vice President, Congress would seem to have power under Article II, Section I, Clause 6 to construct a means to declare the Vice President disabled. Sections 3 and 4 might serve as a general guide even though the relationships between a Vice President and the person next in line, and between the Vice President and Cabinet, differ in some material ways from the relationships between the President and the officials those provisions empower. As suggested previously, the placement of the Speaker next in line introduces difficulties. Moreover, the complications regarding disability determinations proliferate in a mass disaster event.<sup>395</sup>

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392. Even so, the Vice President would remain the President of the Senate and thereby entitled to preside over the Senate and break any tie votes. The specter of a deranged Vice President insisting on performing these tasks, which all Vice Presidents routinely ignore, seems somewhat far-fetched. The Constitution provides for a Senate President pro tempore to preside in the Vice President's absence and perhaps the Senate could, by rule, govern a Vice President's ability to preside in such situations, a question beyond the scope of this discussion.

393. U.S. CONST. art. II, § 1, cl. 6.

394. See Goldstein, *supra* note 1, at 71–72.

395. A mass catastrophe could leave some members of the line de facto disabled. That contingency could present problems in identifying the acting President (a problem which could also exist if many were killed). Moreover, the death or disability of many in the line of succession would make it difficult to declare a President disabled or, assuming Section 4

*E. Failure To Qualify*

“Failure to qualify” covers several contingencies, each of which poses a distinct problem. A double failure to qualify<sup>396</sup> would include the death of the President-Elect and Vice President-Elect, the failure to elect someone to either office, or any other failure of a President-Elect and Vice President-Elect to meet the qualifications that are prerequisites for taking office. Each presents a remote risk,<sup>397</sup> yet they raise contingencies that are more susceptible to resolution before the immediate partisan consequences of different solutions become apparent.<sup>398</sup>

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were extended to disability of the Vice President or others who might act as President, to declare those officers disabled. *See* CONTINUITY OF GOV'T COMM'N, *supra* note 4, at 17–24, 41. If the catastrophe affected Congress, as it very well might, Sections 3 and especially 4 might also be impacted. Although most states allow governors to make temporary appointments to fill Senate vacancies, vacancies in the House of Representatives can only be filled by election. *See generally* CONTINUITY OF GOV'T COMM'N, *supra* note 7.

396. Failure to qualify only of the President-Elect would produce the succession of the Vice President-Elect. U.S. CONST. amend. XX, § 3.

397. A double failure to elect would seem unlikely. Although the contingent election in the House is structured so that deadlock is conceivable—voting is by states (with each state casting a single vote) among the three highest Electoral College finishers with a majority required, *see id.* amend. XII (“[A]nd if no person have such majority [of electoral votes], then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice.”)—the Senate is likely to elect a Vice President since each Senator casts an individual vote for one of the highest two vice presidential electoral vote recipients. *See id.* (“[I]f no person have a majority [of electoral votes], then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice.”). The double failure to elect would require no presidential or vice presidential candidate to receive an Electoral College majority followed by failure of the House and Senate to elect a President and Vice President, respectively. Yet a double death or some combination of death and failure to elect could occur.

398. There is a range of continuity problems that could arise during the pre-inauguration period which are beyond the scope of this paper. These include acts or events (terrorism, natural disasters, etc.) which might disrupt the presidential campaign or deaths or disabilities of presidential or vice presidential candidates. The existence of the Electoral College introduces other complications in part because it postpones identification of the President-Elect and Vice President-Elect. The death of a President-Elect-to-be between election day and the meeting of the Electors may produce a different result than the death of the President-Elect after the Electors meet or the votes are counted. Finally, although the Constitution empowers Congress to provide for the death of one of the candidates in a contingent election for President or Vice President, *see* U.S. CONST. amend. XX, § 4 (“The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.”), Congress has not done so. For a discussion of some of these issues, see Amar, *supra* note 1, at 12–16, 24–26; Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution's Succession Gap*, 48 ARK. L. REV. 215 (1995); Goldstein, *supra* note 1, at 72–77.

Although, as previously discussed, a legislative line of successors seems virtually inevitable in these situations,<sup>399</sup> the double failure to elect and double death contingencies still raise some quite different concerns. In a double death situation, the current regime of legislative succession presents a serious risk that the successor would not be viewed as a legitimate head of the executive branch if a Speaker from the party that had just lost the presidential election was installed for a four-year term.<sup>400</sup> Elevation of a cross-party Speaker would infringe the party continuity principle of the Twenty-Fifth Amendment. That basic objective would not be offended if a Speaker from the prevailing party were designated.

In a failure to elect situation, party continuity diminishes or vanishes as a concern since, by definition, no party has prevailed in the election. This contingency presents different problems. Any acting President will serve only until a President or Vice President qualifies. Accordingly, the tenure of the acting President could depend upon his or her willingness to accommodate congressional preferences; failure to do so might cause the acting President to be “bumped” from the Presidency. Congressmen would bargain with the acting President (and candidates for President and Vice President) with the Presidency itself part of the political currency. Members of the House from deadlocked or closely divided states and Senators would have leverage and could barter their vote in the contingent election for concessions. The corrupting stench of rampant political pork would not be the only negative consequence. This situation would introduce features of parliamentary government that are at odds with the principles of separation of powers that generally influence the structure of government. Whereas normally Congress can remove a President only through impeachment, which requires action by each house (with a supermajority needed in the Senate) based on a violation of a constitutional norm, here either house could unilaterally terminate an acting President. The situation would resemble a parliamentary system except the acting President would be even more at risk since members of the House or Senate could replace the acting President without putting their own positions in immediate jeopardy.

This vulnerability to “bumping,” and the associated pressures, is not unique to legislative successors. It is part of the constitutional design to which any acting President would be subject in a failure to elect situation. Under the Twentieth Amendment, the term of an acting President, pending election of a President or Vice President, ends when a President-Elect or Vice President-Elect qualifies.<sup>401</sup> Nonetheless, legislative succession raises distinctive concerns in the failure to elect situation. It allows the House and

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399. The current law which governs succession generally applies also to failure to qualify situations. *See* 3 U.S.C. § 19 (2006).

400. Decisive presidential victories in 1972, 1980, 1984, 1988, and 1996 each were accompanied by the other party (the Democrats in the first four elections, the Republicans in the fifth) maintaining control of the House and Speakership. Accordingly, in those instances, death of the President-Elect and Vice President-Elect would have installed an acting President from the party just rejected in the presidential balloting.

401. U.S. CONST. amend. XX, § 3.

Senate respectively to determine unilaterally the identity of the person who provides the alternative to the candidates for President and Vice President that the Electoral College provides. Moreover, elevation of the Speaker would create some perverse incentives. It would diminish the interest of the House to elect a President from the three who had received the most electoral votes.

Public opinion would presumably remain as a check in this situation. Political figures who misbehaved would be politically vulnerable. At some point, the framers of the Twenty-Fifth Amendment reasoned, public officials must be trusted to act in a proper, rather than wholly partisan, fashion in order for any set of procedures to succeed.<sup>402</sup> In these situations, the sense of “constitutional morality” and the political sanction of the outrage of an engaged citizenry might afford the most efficacious restraints.

Bumping problems would not exist in the double death situation. The legislative leader designated to act as President would not be vulnerable to being supplanted since the two figures higher on the ladder, the President-Elect and Vice President-Elect, were deceased. There would be some question regarding the wisdom of having someone act as President for four years without being able to trace his or her position directly to a national election.<sup>403</sup> The case for a special presidential election seems strongest in the pre-inaugural double death situation.<sup>404</sup>

#### F. *Changing the Line*

The foregoing discussion suggests several conclusions regarding the system for ensuring presidential continuity after the Vice Presidency. First, the current regime contains any number of accidents waiting to happen. Although the contingencies are each relatively remote, many could present formidable challenges if they did occur.

Second, the current system to handle succession after the Vice President offers simplistic solutions to complicated problems. It offers blunt instruments to address a range of entirely different contingencies with little regard to whether those remedies are designed to handle the assignment given. The various problems do not lend themselves to a single fix. The current system rests on three fallacies: the single solution fallacy, the idea that the same legislative (or Cabinet) line of succession should apply to each of the quite different contingencies that could create a double vacancy; the symmetry fallacy, the idea that if the presiding officer of one house is included in the line of succession that of the other house should be, and that if some Cabinet members are included, all should be; and the strength in numbers fallacy, the idea that if a line is long enough it does not matter that it never leaves Washington, D.C. The formulaic nature of the current approach—the Speaker succeeds in all contingencies, the line gets its length

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402. See *supra* Part II.A.10.

403. See Fortier & Ornstein, *supra* note 1, at 1009–10.

404. The failure to elect situation is somewhat similar, except one might wonder about the wisdom of trying to resolve an inconclusive election with another nationwide vote.

by adding each Cabinet member—is easy to conceive and apply but produces bad solutions in many instances. In so doing, it conflicts with the approach of the Twenty-Fifth Amendment, which reflected a strong preference for flexibility and for tailored responses to specific problems based on deliberation and data assessment. Unlike those who drew the current line of successors after the Vice President, the framers of the Twenty-Fifth Amendment thought that presidential continuity was not a function of simply providing a successor but one who was knowledgeable regarding the central challenges he or she would face, presidential, in harmony with the President, and possessed with some legitimacy.<sup>405</sup>

Third, neither legislative nor Cabinet succession yields an entirely satisfactory solution. Legislative succession offends the separation of powers concerns and often, the party continuity principle of the Twenty-Fifth Amendment; Cabinet succession may advance someone lacking in democratic sensibility.

Fourth, many of the problems are interrelated and solutions must go beyond simply creating a legislative or Cabinet line. The ability of the system to address the disability of a Vice President or presidential inability absent a Vice President, depends in part on the identity of those in the line of succession. Disability and death cannot entirely be separated because the former may lead to the latter. Similarly, pre-inaugural and post-inaugural approaches must be synchronized and must account for timing issues. Whereas legislative leaders can be identified when Congress convenes in early January, Cabinet members must be nominated by the President and confirmed by the Senate and accordingly do not take office until after the inauguration.

On balance, Congress would meet many of the goals of the Twenty-Fifth Amendment by replacing the current legislative-Cabinet line of succession with a modified Cabinet line except in the failure to qualify context where, for reasons stated earlier, Cabinet succession is impractical. The continuity and separation of powers objectives more likely would be achieved in a system of Cabinet succession. Part of the logic behind involving the Cabinet in the disability determination was the perceived identification of its members with the President and their knowledge of, and commitment to, his or her goals and programs. That rationale also speaks to their credentials to be in the line of succession. Presidents might be more likely to choose presidential persons with a democratic pedigree for senior Cabinet positions if such a line were adopted although there are no guarantees.<sup>406</sup>

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405. *See supra* Part II.A.1–2.

406. A Cabinet line would be preferable to creating an Assistant Vice President to follow the constitutional Vice President. The framers of the Twenty-Fifth Amendment wisely rejected a two Vice Presidents solution, in part because they did not want to arrest the development of the existing office by creating a competitor and in part because they feared that the second Vice Presidency would attract lesser figures. Inasmuch as the Vice Presidency is now one of the success stories of American political institutions, it would be ill-advised to threaten its trajectory by creating by statute an Assistant Vice President.

A shift to Cabinet succession would, of course, require congressional approval. History suggests that such a change is unlikely. Congress has generally favored legislative succession. Indeed, it only passed the 1886 Succession Law to avoid the risk a legislative line posed that a presidential or vice presidential death while Congress was not in session could leave the nation without any presidential successor. That precarious situation had occurred twice in five years during the 1880s and those crises forced Congress's hand.<sup>407</sup> Nor did Cabinet succession gain traction when Bayh proposed it in the mid-1960s. Far from it. If the past is prologue, Congress is likely to prefer legislative succession, either based on the principled position that its leaders have a democratic pedigree, stature, and political skill or simply because it does not wish to abandon the successor role for its leaders. If Congress's past behavior anticipates its future disposition, an insistence on a Cabinet line of succession might preclude any reform.

That would be unfortunate. It would leave in place two indefensible features of the current regime: the threat it often poses to party continuity of the executive branch and the risk of succession of an unpresidential successor in the Senate President pro tempore. Those glaring defects offend principles implicit in the Twenty-Fifth Amendment. Remedying them should be matters of absolute priority.

Here, the strategic teachings from the Twenty-Fifth Amendment offer lessons worth learning. The Amendment succeeded in part because its proponents were committed to the proposition that achieving partial, but significant, reform better served the nation than pursuing a more comprehensive, but politically unpalatable, package. First they trimmed their goals, postponing some objectives (e.g., addressing the electoral problems and the line of succession after the Vice President) to remedy the most glaring defects. Then, they were willing to strike compromises to reach agreement. Those steps were crucial in transforming Bayh and his colleagues from advocates of Senate Joint Resolution 139 (or Senate Joint Resolution 1 or House Joint Resolution 1) to framers of a constitutional amendment.

Consistent with that example, modern reformers might focus on these two paramount problems even at the cost of leaving some system of legislative succession in place. An alternative approach to Cabinet succession would maintain a legislative-Cabinet line but modify it by placing the leader of the president's party in the House atop the line of successors, not necessarily the Speaker when from the opposite party. Such an approach would address some of the central objectives implicit in the Twenty-Fifth Amendment. In particular, the continuity objective would be better served by eliminating the possibility that succession would change party control of the executive branch.<sup>408</sup> Replacing the Senate President

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407. See FEERICK, *supra* note 8, at 130–32, 141–43 (discussing circumstances which twice produced no successor under the legislative succession system when the Vice Presidency was vacant).

408. See e.g., H.R. 3816, 107th Cong. (2002) (allowing the President to designate party's leader in the House and Senate instead of a cross-party Speaker or President pro tempore of

pro tempore with the leader of the president's party in the Senate would advance continuity objectives as well as the goal of providing a successor more likely to be presidential.

Such changes would, of course, require that those congressional leaders be viewed as "officers" under Article II. As a practical matter, Congress might enhance their standing by so designating them.<sup>409</sup> This approach would still encounter some of the structural constitutional issues as does the current line, yet for the reasons stated earlier, these objections are not dispositive. It seems likely that the Court would view a constitutional challenge based on them as presenting a political question<sup>410</sup> although the Court's resolution of *Bush v. Gore*<sup>411</sup> reduces somewhat confidence in that prediction. A bipartisan commitment to the merits of this compromise approach at a time when no crisis loomed would enhance its prospects of succeeding if it ever was tested.

This resolution of the two (and three) heartbeats question is not as consistent with the principles behind the Twenty-Fifth Amendment as a system of Cabinet succession would be. Yet it would represent a substantial improvement on the status quo, which offends the party continuity and presidential successor objectives of the Twenty-Fifth Amendment as well as its other defects.

If it makes sense to have a line of successors to guard against a mass catastrophe (and of course it does), it also makes sense to draw that line in a rational fashion. Most foreseeable contingencies that would implicate more remote successors would present national and homeland security issues. The line of successors should be redrawn in two respects. It should include those Cabinet members with those sorts of expertise and involvement most likely to pertain to the circumstances that would occasion their succession—state, treasury, defense, justice, and homeland security—and it should include some "Officers" outside of Washington.<sup>412</sup> Congress might designate certain officers whose work address is outside of Washington, D.C.—the Ambassador to the United Nations and perhaps certain foreign Ambassadors<sup>413</sup>—or it might create a number of new "Officers" and place them after those Cabinet members who would be retained in the line.<sup>414</sup>

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the Senate); see also Joel K. Goldstein, *Succession Depression: If Anything Should Happen, Guess Who's in Charge*, CHI. TRIB., Feb. 1, 1995, at 15 (recommending succession by legislative leaders of president's party).

409. As previously argued, the Twentieth Amendment which refers to "person" would be even more hospitable to this approach as applied to the failure to qualify of a President-Elect and Vice President-Elect.

410. See, e.g., Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155 (1995).

411. 531 U.S. 98 (2000) (per curiam) (rejecting the argument that the contest over Florida's electoral votes in the 2000 presidential election was a political question).

412. See CONTINUITY OF GOV'T COMM'N, *supra* note 4, at 45.

413. See, e.g., H.R. 540, 110th Cong. (2007) (proposing the addition of ambassadors to the United Nations, Great Britain, Russia, China, and France at the end of the succession line). Further consideration, however, should be given to the wisdom of placing in the line of succession officers stationed abroad.

414. See CONTINUITY OF GOV'T COMM'N, *supra* note 4, at 45.

Those figures might simply serve as wise men and women who would be briefed, who would be available to advise the President and serve as contingent successors. If some of those designated lived outside Washington, such a change would address the continuity concern from a catastrophe, as well as providing a more presidential acting President following such an event.

Failure to qualify contingencies also require tailored approaches. Succession of the Speaker may be as good a solution as any in the failure to elect scenario. Yet when the failure to qualify is due to a double death, the legislative leader who succeeds should be from the same party as the President-Elect (or person who would have been President-Elect based on the election outcome). That contingency may provide a compelling case for a special election.

#### CONCLUSION: THE TEACHINGS OF THE TWENTY-FIFTH AMENDMENT

The Twenty-Fifth Amendment represented a substantial contribution to addressing long-standing and significant gaps in America's system for ensuring presidential continuity. The provisions it added to the Constitution represented prudent accommodations of often competing principles. It has worked well and there is no reason why it should not continue to do so.

Nonetheless, problems remain in existing arrangements. The persistence of defects does not represent an oversight on the part of the framers of the Twenty-Fifth Amendment or an indictment of it. They did not overlook the gaps they left untouched but were constrained by the incremental nature of the legislative process. They recognized that an attempt to address all problems would solve none. They wisely elected to improve on the status quo by addressing the most glaring issues while deferring action on others.

Although the line of succession after the Vice President remains troubling in a number of respects discussed above, Congress has not returned to the matter in any serious way during the more than forty-three years since the Twenty-Fifth Amendment was ratified. It should do so.

In taking the next steps, Congress should draw from the Twenty-Fifth Amendment. Like other parts of the Constitution, the Twenty-Fifth Amendment reflects constitutional principles and purposes that transcend its specific provisions. Many of those principles provide structural constitutional arguments that should guide further action. Ratification of the Twenty-Fifth Amendment also furnishes a case study with respect to certain legislative strategies that proved effective. It became part of the Constitution only after a lengthy period of intense consideration regarding relevant principles relating to presidential continuity. Inasmuch as the Amendment represents the most recent and most successful experience in enhancing provisions to ensure presidential continuity, it is worth considering those constitutional principles and legislative strategies in assessing further measures.

There are, of course, limits to the value of this exercise. The context in 2010 differs from that in the mid-1960s. Public perceptions of our institutions, including the Presidency, differ in at least some respects from

the more generous views of the mid-1960s. The specific continuity problems being addressed now differ somewhat from the paramount challenges of that period, in part because the Twenty-Fifth Amendment is now part of the constitutional architecture and some experience exists regarding its operation. Nonetheless, the principles from, and story of, the Twenty-Fifth Amendment should inform efforts to address remaining continuity problems.

Remediating the remaining gaps presents an exercise in identifying problems, imagining solutions, and considering how those fixes might be accomplished. But the lessons of the Twenty-Fifth Amendment show that the problem is much more difficult than these three steps suggest. Given the general indifference to these matters, reformers face a formidable challenge in attracting interest to address contingencies that seem to pose only remote dangers, chronologically and in terms of their likelihood of occurring. The Twenty-Fifth Amendment succeeded in part because it followed discussion for a decade in some circles of many of the problems it addressed. Education, of the public and of political elites, must precede any chance of meaningful reform.

Imagining a menu of solutions is easier when each gap is viewed as a discrete problem. In fact, ensuring continuity requires systemic thought. The issues interrelate and solutions in one area may cause unanticipated problems if care is not taken (and perhaps even if it is). For instance, as previously discussed, moving away from a legislative line of succession has appeal in order to promote the continuity objectives of the Twenty-Fifth Amendment. Yet such a move would need to be carefully choreographed to avoid introducing problems into the system for addressing pre-inaugural continuity issues. The current succession law prescribes the same legislative line for all events. Since Cabinet succession is not a feasible solution for pre-inaugural problems, this approach to post-inaugural double vacancies would require asymmetrical lines of succession after the Vice President. Even if legislative succession is retained in the pre-inaugural context, the Speaker as acting President may be more palatable in the failure to elect scenario than in the double death situation after her party loses the presidential election. These instances simply illustrate a more pervasive problem of synchronizing reforms.

Although the issue of presidential continuity requires systemic thought, legislative realities may dictate an incremental approach that addresses some problems while postponing action on others. Moreover, reform will depend upon proponents being willing to forego preferred solutions to strike compromises. That can only occur in a culture of compromise in which advocates measure success not in achieving a perfect solution but in improving on the troubling status quo. The complexity of the mission is suggested by the fact that, although the gaps have long been apparent and although responses are easily imaginable, Congress has failed to exercise power it has long had or has acted in problematic ways.

Reform will require constructing a package of measures to assure presidential continuity that are acceptable to Congress and other decision

makers, identifying leaders willing to pursue those objectives, mobilizing broad-based interest in addressing a problem of contingent rather than immediate consequence, and making the compromises and tactical choices necessary to make progress. Those were among the accomplishments, and teachings of, the Twenty-Fifth Amendment. Further reform efforts should draw from its legacy and lessons to take the necessary next steps to help ensure presidential continuity.