

2017

## Foreword: Continuity in the Presidency: Gaps and Solutions

Matthew Diller

*Fordham University School of Law*

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>

---

### Recommended Citation

Matthew Diller, *Foreword: Continuity in the Presidency: Gaps and Solutions*, 86 Fordham L. Rev. 911 (2017).

Available at: <https://ir.lawnet.fordham.edu/flr/vol86/iss3/2>

This Foreword is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

---

## Foreword: Continuity in the Presidency: Gaps and Solutions

### Erratum

Law; Constitutional Law; Law and Politics; Legal History; President/Executive Department; Legislation

## FOREWORD: CONTINUITY IN THE PRESIDENCY: GAPS AND SOLUTIONS

*Matthew Diller\**

This symposium issue featuring a report and articles on the Twenty-Fifth Amendment and the presidential succession system is perfectly timed. Its release comes in the final month of the year that marked the fiftieth anniversary of the Twenty-Fifth Amendment's ratification<sup>1</sup> and at a moment of unprecedented public discussion of the Amendment.<sup>2</sup> Yet, in Fordham Law School's unique history with the Twenty-Fifth Amendment, auspicious timing is not unusual.

On Sunday, November 17, 1963, the *New York Times* published a letter warning of the dangers posed by the gaps and ambiguities in the Constitution's provisions for handling presidential incapacities.<sup>3</sup> The four-sentence letter at the bottom of page eight focused on an issue that had receded from the public consciousness.<sup>4</sup> President Dwight D. Eisenhower had several health issues, but the country had since elected a young and seemingly healthy president.<sup>5</sup> However, the letter's author, John D. Feerick, who had graduated from Fordham Law School two years earlier and would be the school's dean nineteen years later, asserted that it was time for Congress to address the issue.<sup>6</sup> The following Friday, President John F.

---

\* Dean and Paul Fuller Professor of Law, Fordham University School of Law. I would like to thank Dean John Feerick for making Fordham Law School a center of study and analysis of issues relating to presidential succession over the past half century. Dean Feerick has transformed Fordham Law School in many ways that legal education and the Fordham Law community continue to benefit from. Through his work on presidential succession, he has made a lasting mark on the structure of democratic governance in the United States. He is an inspiration to me and so many others.

1. See John Feerick, *When a President Is Unable to Serve: 50 Years Ago, the 25th Amendment Codified the Process for Removing the Chief Executive*, N.Y. DAILY NEWS (Feb. 9, 2017), <http://www.nydailynews.com/opinion/president-unable-serve-article-1.2967643> [<https://perma.cc/ENP9-RYHJ>].

2. See Josh Magness, *What Is the 25th Amendment—and Why Are People Talking About It?*, MCCLATCHY (Oct. 12, 2017, 8:52 AM), <http://www.mcclatchydc.com/news/politics-government/article178423211.html> [<https://perma.cc/R565-Y2D5>].

3. John D. Feerick, Letter to the Editor, *Fixing Presidential Succession*, N.Y. TIMES, Nov. 17, 1963, at E8.

4. See *id.*

5. JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* 54 (3d ed. 2014).

6. See Feerick, *supra* note 3.

Kennedy was assassinated,<sup>7</sup> catapulting issues of presidential succession and inability to the front page and onto Congress's agenda.<sup>8</sup>

Fortunately, John had written more than four sentences on the topic. The *Fordham Law Review* had published his first comprehensive article on the subject a few weeks earlier in its October 1963 issue.<sup>9</sup> And John had sent copies to the nation's top policymakers, which put his proposal for a constitutional amendment on their desks when consensus emerged that it was time for Congress to act.<sup>10</sup>

Over the next four years, John worked through the American Bar Association (ABA) to participate in the Twenty-Fifth Amendment's drafting and to lobby lawmakers across the country during the ratification period.<sup>11</sup> In his article for this issue, John describes those efforts as well as the work of the ABA and lawyers across the country to improve the nation's founding document.<sup>12</sup> The ABA's cosponsorship of the symposium, through its Standing Committee on Election Law, is a fitting continuation of a collaboration that began in 1964.

Other contributions to this issue highlight the influences that made the Twenty-Fifth Amendment possible. Rebecca C. Lubot's revisionist history, "A *Dr. Strangelove* Situation": Nuclear Anxiety, Presidential Fallibility, and the Twenty-Fifth Amendment," postulates that the Kennedy assassination was not the only impetus for Congress to strengthen the procedures for ensuring that the nation has an able president.<sup>13</sup> She describes how anxiety over the Cold War and the rise of the nuclear age focused lawmakers on the dangers posed by disruptions in presidential leadership and spurred them to action.<sup>14</sup>

Joel K. Goldstein's article, "The Bipartisan Bayh Amendment: Republican Contributions to the Twenty-Fifth Amendment," engages in its own form of revisionist history.<sup>15</sup> That Democratic Senator Birch Bayh shepherded the Twenty-Fifth Amendment through Congress might leave some with the impression that credit for the Amendment belongs to Democrats. But Goldstein shines light on the countless contributions that Republicans made to support the Amendment's drafting and approval.<sup>16</sup> What is seen is a testament to members of both parties and the power of lawmakers putting politics aside to solve a pressing national problem.

---

7. JOHN D. FEERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION 3 (1965).

8. See FEERICK, *supra* note 5, at 56.

9. See John D. Feerick, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, 32 FORDHAM L. REV. 73, 73 (1963).

10. See generally John D. Feerick, *The Twenty-Fifth Amendment: A Personal Remembrance*, 86 FORDHAM L. REV. 1075 (2017).

11. See *id.*

12. See *id.*

13. Rebecca C. Lubot, "A *Dr. Strangelove Situation*": *Nuclear Anxiety, Presidential Fallibility, and the Twenty-Fifth Amendment*, 86 FORDHAM L. REV. 1175, 1176–78 (2017).

14. See *id.*

15. Joel K. Goldstein, *The Bipartisan Bayh Amendment: Republican Contributions to the Twenty-Fifth Amendment*, 86 FORDHAM L. REV. 1137, 1193–40 (2017).

16. See *id.*

The product of Congress's bipartisan effort has served the country well over the past half century. The Twenty-Fifth Amendment twice filled vacancies in the vice presidency, thus enabling an appointed Vice President to become President on the resignation of an elected President and facilitating the transfer of presidential power to the Vice President as Acting President on three occasions when Presidents underwent general anesthesia.<sup>17</sup>

Fordham Law School has continued its engagement with the topic of presidential succession since the Twenty-Fifth Amendment's ratification. The school hosted a symposium in 1976 on the selection of Vice Presidents<sup>18</sup> and another symposium in 2010 on the adequacy of the presidential succession system.<sup>19</sup> And, in the 2010 to 2011 academic year, Fordham Law students in the first Presidential Succession Clinic studied the succession system to arrive at a wide range of reform recommendations.<sup>20</sup> The articles and proceedings of both symposia, as well as the Clinic's Report, were published in the *Fordham Law Review*.

This year, Fordham Law School marked the Twenty-Fifth Amendment's fiftieth anniversary with this symposium and two other programs: a public discussion between Dean Feerick and Professor Goldstein a week before the February 10th anniversary<sup>21</sup> and a conference at the Bipartisan Policy Center in Washington, D.C., which the school cosponsored with the ABA's Standing Committee on Election Law and the Bipartisan Policy Center.<sup>22</sup>

Improving the succession system has been a consistent theme of Fordham Law School's history with the Twenty-Fifth Amendment, and this issue adds many more pages to that history. Roy E. Brownell's article proposes an approach for the Cabinet and congressional leaders to follow if the President and Vice President became simultaneously disabled.<sup>23</sup> The Twenty-Fifth

---

17. See John D. Feerick, *Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment*, 79 FORDHAM L. REV. 907, 930–32 (2010).

18. See generally *Symposium on the Vice Presidency: American Bar Association Special Committee on Election Reform*, 45 FORDHAM L. REV. 707 (1977).

19. See generally *Symposium, The Adequacy of the Presidential Succession System in the 21st Century: Filling the Gaps and Clarifying the Ambiguities in Constitutional and Extraconstitutional Arrangements*, 79 FORDHAM L. REV. 775 (2010).

20. Fordham Univ. Sch. of Law's Clinic on Presidential Succession, Report, *Ensuring the Stability of Presidential Succession in the Modern Era*, 81 FORDHAM L. REV. 1, 7 (2012) [hereinafter *First Clinic Report*].

21. John D. Feerick et al., *Presidential Succession and Disability: Marking the 50th Anniversary of the 25th Amendment*, FORDHAM L. ARCHIVE SCHOLARSHIP & HIST. (Feb. 3, 2017), [http://ir.lawnet.fordham.edu/twentyfifth\\_amendment\\_photos/5/](http://ir.lawnet.fordham.edu/twentyfifth_amendment_photos/5/) [https://perma.cc/C868-3B64].

22. *The First 50 Years of the 25th Amendment, Part 1*, FORDHAM L. ARCHIVE SCHOLARSHIP & HIST. (May 10, 2017), [http://ir.lawnet.fordham.edu/twentyfifth\\_amendment\\_photos/6/](http://ir.lawnet.fordham.edu/twentyfifth_amendment_photos/6/) [https://perma.cc/2ZG6-TRXV] (providing a video recording of the symposium); *The First 50 Years of the 25th Amendment, Part 2*, FORDHAM L. ARCHIVE SCHOLARSHIP & HIST. (May 10, 2017), [http://ir.lawnet.fordham.edu/twentyfifth\\_amendment\\_photos/8/](http://ir.lawnet.fordham.edu/twentyfifth_amendment_photos/8/) [https://perma.cc/EXN4-3ERH] (same); *The First 50 Years of the 25th Amendment, Part 3*, FORDHAM L. ARCHIVE SCHOLARSHIP & HIST. (May 10, 2017), [http://ir.lawnet.fordham.edu/twentyfifth\\_amendment\\_photos/6/](http://ir.lawnet.fordham.edu/twentyfifth_amendment_photos/6/) [https://perma.cc/TXN9-LSAN] (same).

23. Roy E. Brownell II, *What to Do If Simultaneous Presidential and Vice Presidential Inability Struck Today*, 86 FORDHAM L. REV. 1027, 1056 (2017).

Amendment's framers did not include a provision for addressing "dual inabilities" out of concern that a more complex amendment would encounter opposition.<sup>24</sup> Some have argued that Congress has the power to legislate a solution,<sup>25</sup> but, because it has not done so, Brownell proposes an innovative process in the absence of clear constitutional or statutory procedures.<sup>26</sup>

Robert E. Gilbert's article, "The Twenty-Fifth Amendment and the Establishment of Medical Impairment Panels: Are The Two Safely Compatible?," considers two proposals for creating panels to evaluate the President's health.<sup>27</sup> Both proposed panels would be comprised of physicians who would report their findings to the Vice President and Cabinet.<sup>28</sup> Although these panels might help inform those officials, Gilbert urges consideration of the challenges the panels present, including the impact of partisanship and concerns about the President's right to privacy.<sup>29</sup>

Finally, the report of the second Presidential Succession Clinic advances recommendations on an array of topics related to the Twenty-Fifth Amendment.<sup>30</sup> Fourteen Fordham Law students developed the report over the course of the past academic year under Dean Feerick's guidance. They conducted extensive research and interviewed over twenty-five leading scholars and experts, many with experience serving at the highest levels of the government.<sup>31</sup>

The students recommend that Congress pass laws reforming the current line of presidential succession<sup>32</sup> and creating procedures for addressing the "gaps" in the succession system caused by the absence of provisions for handling vice presidential and dual inabilities.<sup>33</sup> The report also outlines a procedure for Congress to follow if it were required to decide a dispute over the President's capacity under Section 4 of the Twenty-Fifth Amendment.<sup>34</sup>

The recommendations are not limited to steps Congress can take. The Clinic suggests that the President and Vice President create an arrangement for transferring the powers and duties of the presidency during emergencies when there is not enough time to invoke Section 4.<sup>35</sup> Pointing to some past presidents' psychological ailments, the students recommend the addition of

---

24. See First Clinic Report, *supra* note 20, at 23–25.

25. See *id.* at 27–30.

26. See Brownell, *supra* note 23, at 1036.

27. Robert E. Gilbert, *The Twenty-Fifth Amendment and the Establishment of Medical Impairment Panels: Are The Two Safely Compatible?*, 86 FORDHAM L. REV. 1111, 1115 (2017).

28. See *id.* at 1116, 1126.

29. See *id.* at 1135–36.

30. Second Fordham Univ. Sch. of Law Clinic on Presidential Succession, Report, *Fifty Years After the Twenty-Fifth Amendment: Recommendations for Improving the Presidential Succession System*, 86 FORDHAM L. REV. 917, 922 (2017).

31. See *id.*

32. See *id.* at 945.

33. See *id.* at 953.

34. See *id.* at 975.

35. See *id.* at 929.

a mental health professional to the unit of doctors and nurses who care for the President and White House staff.<sup>36</sup>

The report even covers issues of health and succession before the President reaches the White House. It recommends new political party rules for replacing presidential candidates and a commission for determining what medical information presidential candidates should release about themselves.<sup>37</sup>

These creative, informed, and judicious recommendations received their first public airing at the symposium on September 27, 2017, when the clinic students, most now recent graduates, made impressive presentations summarizing them.<sup>38</sup> The students are carrying on Fordham Law School's legacy as the presidential succession law school, which is rooted in the school's unparalleled tie to part of the Constitution.

That legacy began with Dean Feerick's October 1963 *Fordham Law Review* article. Its title asked a question: "The Problem of Presidential Inability—Will Congress Ever Solve It?"<sup>39</sup> The answer came much sooner than Dean Feerick seemed to expect it would. And it was not simply due to fortuitous timing. The Twenty-Fifth Amendment would not be part of the Constitution without the countless lawmakers, citizens, and lawyers who asked what they could do for their country and committed themselves to improving our democracy by taking on the immensely ambitious mission of amending its founding document. At a time when many are questioning the government's capacity to solve problems, the Twenty-Fifth Amendment's story, as illuminated in this issue, provides hope. I could not be prouder of Fordham Law School's role in this history, which is celebrated and carried on in the following pages.

---

36. *See id.* at 938.

37. *See id.* at 1005, 1009.

38. *See The First 50 Years of the 25th Amendment, Part 1, supra* note 22.

39. *See generally* Feerick, *supra* note 9.