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Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment

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PRESIDENTIAL SUCCESSION AND INABILITY: BEFORE AND AFTER THE TWENTY-FIFTH AMENDMENT

*John D. Feerick**

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INTRODUCTION

Each year in the United States, the Constitution is celebrated in a myriad of ways. It richly deserves such veneration for all it has made possible, not simply in the United States but throughout the world. It is the oldest living written Constitution of its kind, providing a model for many of the written constitutions of the world. Among its many provisions are several on the subject of presidential succession. These provisions have been applied to give the country stability and continuity. They have evolved over time, beginning with the foundational provisions of Article II, Section 1, Clause 6, added to by the Twelfth, Twentieth, and Twenty-Fifth Amendments, and supplemented by acts of Congress establishing a line of succession beyond the Vice Presidency. To the present moment, the resulting legal structure has served the nation well, though imperfectly at times, by anticipating and providing for contingencies involving the highest offices of the United States.

The Framers of the Constitution did not spend a great deal of time on the succession provisions, but just enough to get the nation started. The Twenty-Fifth Amendment answered questions they left open in the area of presidential inability and gave further significance to the Vice Presidency, which had been adopted almost as an afterthought. The absence of discussions by the Framers in the area of presidential succession is not surprising given that it was not until near the end of the Constitutional Convention that they settled on the method of selecting the President and many of the powers of the Office.

As strong as the system of presidential succession may appear, complacency can easily set in, leading to an unwillingness to confront gaps

and defects that reveal themselves along the way. The Twenty-Fifth Amendment, a memorial to a fallen President, was propelled forward by a tragedy that brought into focus the intractable issue of presidential inability and the absence of procedures for filling a vacancy in the Vice Presidency. The terrorist attacks of September 11, 2001, raised modern questions as to the adequacy of the provisions for dealing with presidential inability, continuity in government, and the Electoral College system.

Several gaps in the area of presidential inability are triggered by the absence of any provisions in the Twenty-Fifth Amendment for dealing with the disability of a President when there is either no Vice President or the Vice President has himself become disabled. This was not a drafting oversight but rather reflected a judgment by congressional leaders to accomplish what they could in the politics of that time.¹ This Article examines these gaps and offers approaches for dealing with them. The Article also comments on proposals with respect to the line of succession beyond the Vice Presidency, a line considered by many scholars to be unconstitutional because it includes legislative officers, and for other reasons that will be discussed below.

I. THE CONSTITUTIONAL AND STATUTORY PROVISIONS

A useful starting point is an overview of the current constitutional and statutory provisions on the subject of presidential succession.

Article II, Section 1, Clause 6 brought together two proposals made at the Constitutional Convention. The first provided for a successor to the President in the event of his death, resignation, removal or inability.² The second gave Congress the power to establish a line of succession.³ Joined,

1. This subject was very much present in the 1965 House deliberations on the Amendment, as evidenced by a letter I sent to Representative Richard Poff at his request, stating in part the following:

You asked if I could suggest some language which would cover the case of simultaneous inability of the President and Vice-President. As I see it, you have basically three situations in mind: (1) the inability of a Vice-President at a time when the President is disabled, (2) the inability of an Acting President, and (3) the inability of a President when there is no Vice-President. If it should be determined essential to have provisions covering these cases, I would suggest adding two sections to the basic proposal. These sections might read as follows:

“6. The inability of the Vice-President shall be determined in the same manner as that of the President except that the Vice-President shall have no right to participate in such determination.”

“7. In case of the death, resignation, removal or inability of the Vice-President, the person next in line of succession shall act in lieu of the Vice-President under Sections 4 and 5 with the heads of the Executive Departments or such other body as Congress may by law provide.”

Letter from John D. Feerick to Representative Richard Poff, U.S. House of Representatives (Feb. 7, 1965) (on file with the *Fordham Law Review*). Representative Poff played a critical role in the formulation of the Amendment.

2. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 185–86 (Max Farrand ed., 1911).

3. *Id.* at 535.

the resulting provision⁴ created issues for later generations regarding the status of a Vice President after a succession event and the kind of “Officer” appropriate for the line of succession.⁵

The Twelfth Amendment established separate voting for President and Vice President, giving the U.S. Senate a role where no candidate for Vice President had received a majority of the electoral votes.⁶ It also provided that if an election of President fell to the U.S. House of Representatives, with no candidate having a majority of the electoral votes and no candidate having been selected by the beginning of the President’s term, the Vice President “shall act as President, as in the case of the death or other constitutional disability of the President.”⁷

Later, Section 3 of the Twentieth Amendment, providing that the Vice President elect shall become President if the President-Elect has died before his inauguration, replaced this provision of the Twelfth Amendment.⁸ It further added that if the President has not been chosen, or has failed to qualify, by the beginning of the term, the Vice President-Elect shall act as President until a President has qualified.⁹ It went on to state, “Congress may by law provide for the case wherein neither a President elect nor Vice President elect shall have qualified, declaring who shall then act as President . . . and such person shall act accordingly until a President or Vice President shall have qualified.”¹⁰ Further, Section 4 of the Twentieth Amendment gave Congress the power to provide for the death of any of the persons from whom the House or Senate may choose for President and Vice-President, respectively, when the right to do so devolved on them under the Twelfth Amendment.¹¹

Finally, the Twenty-Fifth Amendment clarified the status of a Vice President in case of a succession event, provided for cases of inability, and established a procedure for filling a vice presidential vacancy.¹²

The current federal succession statute provides for a line of succession after the Vice President, going first to the Speaker of the House of Representatives, then the President pro tempore of the Senate, followed by the individual Cabinet members.¹³ Other provisions relating to presidential succession are found elsewhere in the Constitution, as well as in procedures

4. U.S. CONST. art. II, § 1, cl. 6; *see also infra* Part III.A.

5. *See infra* Parts VII–VIII.

6. U.S. CONST. amend. XII. Originally, the Constitution provided for two electoral votes per elector for the Presidency and awarded the Vice Presidency to the presidential candidate with the second highest number of electoral votes, whether a majority or not. *Id.* art. II, § 1, cl. 3.

7. *Id.* amend. XII.

8. *Id.* amend. XX, § 3.

9. *Id.*

10. *Id.*

11. *Id.* § 4.

12. *Id.* amend. XXV; *see also infra* Part IV.B.

13. Presidential Succession Act of 1947, Pub. L. No. 80-199, 61 Stat. 380 (codified as amended at 3 U.S.C. § 19 (2006)). The 1947 law was the third federal statute codifying the line of succession after the President and Vice President. *See* Act of Jan. 19, 1886, ch. 4, 24 Stat. 1 (repealed 1947); Act of Mar. 1, 1792, ch. 8, 1 Stat. 239 (repealed 1886).

of the national political parties, past precedents, and congressional practices to fill a vice presidential vacancy.

For example, the Democratic Party, at its most recent Convention, provided for the filling of a vacancy on the national ticket in the event of death, resignation, or disability after adjournment of the Convention of the Party's nominee for President or Vice President.¹⁴ It gave such authority to the Democratic National Committee, requiring that it confer with the Party's leadership in Congress and the Democratic Governors Association.¹⁵ Republican Party procedures employ similar provisions.¹⁶ The Republican National Committee is empowered to fill vacancies or reconvene the national convention for that purpose.¹⁷

II. PRESIDENTIAL SUCCESSION AND INABILITY PRIOR TO THE TWENTY-FIFTH AMENDMENT

A. *The United States Constitution's Succession Clause*

Any analysis of presidential succession begins with the United States Constitution, whose Article II Succession Clause reads:

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.¹⁸

As will be discussed in detail below, the Clause has been the subject of much debate. In particular, since the Constitutional Convention of 1787 there has been uncertainty as to both the definition of inability as well as the critical question of who is to be its judge. In addition, prior to the ratification of the Twenty-Fifth Amendment, it was unclear whether a succession event resulted in the Vice President succeeding to the Office of the President itself, or simply assuming the powers and duties of the Office.

1. Meaning of "Inability" Under the Succession Clause

The Constitutional Convention does not indicate to which situations the Framers intended the term "inability" to apply. At the Convention, only delegate John Dickinson of Delaware raised this issue by asking, "What is the extent of the term 'disability[?]'"¹⁹

14. DEMOCRATIC NAT'L COMM., CALL FOR THE 2008 DEMOCRATIC NATIONAL CONVENTION 19 (2007).

15. *Id.*

16. REPUBLICAN NAT'L COMM., THE RULES OF THE REPUBLICAN PARTY 8 (2008).

17. *Id.*

18. U.S. CONST. art. II, § 1, cl. 6.

19. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 427.

During President James Garfield's illness in 1881,²⁰ a number of well-known legal authorities were of the opinion that "inability" in the Succession Clause referred solely to mental incapacity.²¹ For example, Professor Theodore W. Dwight of Columbia Law School, one of the leading constitutional authorities of that time, held this view.²² Similarly, former Senator William Eaton of Connecticut stated, "There can be no disability that the President can be conscious of," and "It must be a disability, as, for example, if he were insane, which is patent to everybody except himself."²³

Others at the time were of the view that "inability" was not restricted solely to mental incapacity. Rather, "a case . . . exists whenever the public interest suffers because the President is unable to exercise his powers"²⁴ Indeed, proponents of this view believed that the inability provision of the Succession Clause should be construed broadly, covering all circumstances that might cause a President to be "unable" to discharge the powers and duties of his Office. For example, it was written at the time in the *New York Herald* that, "The word 'inability' . . . means an inability of any kind . . . of the body or mind . . . temporary or permanent, . . . [which] disables [the President] from discharging the powers and duties of his office."²⁵ Massachusetts Representative Benjamin Butler, when writing of President Garfield's illness, said "inability includes everything in the condition of a President which precludes him from the full discharge of the powers and duties of his office" in which case "the discharge of these powers and duties becomes immediately the duty of the Vice-president."²⁶ Other distinguished authorities reasoned that whether or not an inability exists often depends on the surrounding circumstances.²⁷

2. Who Is To Judge Whether Inability Exists?

In addition to the ambiguity surrounding the type of situations intended to be covered, the Succession Clause also does not specify *who* is to

20. See *infra* Part III.B.3.

21. RUTH C. SILVA, *PRESIDENTIAL SUCCESSION* 88 (1951).

22. See Theodore W. Dwight, *Presidential Inability*, 133 N. AM. REV. 436, 436–39 (1881).

23. JOHN D. FEERICK, *FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION* 133 (1965) (quoting *The Question of Disability*, N.Y. TIMES, Sept. 2, 1881, at 1).

24. See SILVA, *supra* note 21, at 89.

25. FEERICK, *supra* note 23, at 133 (quoting *Does a Case of Constitutional Inability Exist?*, N.Y. HERALD, Sept. 15, 1881, at 6).

26. Benjamin F. Butler, *Presidential Inability*, 133 N. AM. REV. 428, 428–29 (1881).

27. SILVA, *supra* note 21, at 91 ("The determining consideration in each case is not only whether the President is actually unable to exercise his powers but also whether there is any public business which requires his personal attention. It seems to be rather generally agreed that a mere inability, however severe or extended, does not constitute an inability in the constitutional sense unless the urgency of public affairs calls for action. In time of serious national emergency, for example, an illness of a few days may jeopardize the public interest more than an illness of several months at another time."); see also Thomas M. Cooley, *Presidential Inability*, 133 N. AM. REV. 422, 424–25 (1881); Lyman Trumbull, *Presidential Inability*, 133 N. AM. REV. 417, 420 (1881).

determine when an inability exists (and when it ceases). Again, the debates from the Constitutional Convention are mostly silent on this question. Again, only John Dickinson raised this problem when asking, “[W]ho is to be the judge of [disability]?”²⁸ From that time and until the ratification of the Twenty-Fifth Amendment, there were several views relating to the proper method of establishing the existence and termination of presidential inability.²⁹ This debate provides guidance in answering a crucial question should a situation arise beyond the scope of the Twenty-Fifth Amendment.

a. Vice President or Other Officer upon Whom the Presidential Functions Devolve

When President Garfield was shot in 1881, an event that brought focus to issues regarding the Succession Clause, public opinion favored that the successor should determine when a President was disabled.³⁰ While President Garfield was incapacitated, most said that it was the obligation of Vice President Chester A. Arthur to exercise the powers and duties of the President, and “no enabling action by the courts, the Congress, the Cabinet, or the President was necessary.”³¹ Former Illinois Supreme Court Justice Lyman Trumbull wrote at the time that “[i]t is questionable whether any law can be framed placing this question of inability in a better position than the Constitution has left it,” and that whenever there is an obvious case of disability, the Vice President should assume power if important public business required executive action.³²

Professor Ruth C. Silva, a leading scholar on presidential succession, wrote:

[Justice] Trumbull was probably correct in saying that the successor must shoulder the burden of making the decision in the first instance. Since he has the duty of acting as President in certain contingencies, his official discretion extends to the determination of whether or not such a contingency actually exists.³³

She explained further:

In contingent grants of power it is a well-established rule of law that the one to whom the power is granted is to decide when the emergency has arisen. Thus the Vice President, or the “officer” designated by law to act as President, is constituted the judge of a President’s inability in the first instance. . . . The Constitution provides that the power of acting as President belongs to the Vice President or to the “Officer” while a

28. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 427.

29. See *infra* notes 30–64 and accompanying text.

30. SILVA, *supra* note 21, at 100; see also *infra* Part III.B.3.

31. *Id.* at 100–01.

32. Trumbull, *supra* note 27, at 421–22 (“Any Vice-president who should assume those duties in a doubtful case, when the exigency did not unmistakably require it, would be treated as a usurper by all patriotic citizens. Peaceful successions to the Presidency, under our system of government, must always depend on a sound public opinion, supported by the good sense and the intelligence of the people . . .”).

33. SILVA, *supra* note 21, at 101.

President is disabled. Since the Constitution mentions only the successor, he is the judge of the facts.³⁴

In 1961, President John F. Kennedy asked his Attorney General, Robert F. Kennedy, to write an opinion regarding the construction to be given to the presidential inability provisions of the Succession Clause.³⁵ Attorney General Kennedy's opinion noted, "The large majority [wa]s of the view that the Vice President, or other 'officer' designated by law to act as President has the authority under the Constitution to decide when inability exists."³⁶ The opinion cited the conclusion drawn by President Dwight D. Eisenhower's Attorney General, Herbert Brownell, that the Vice President is the sole judge of a President's inability where the President is unable to do so himself:

This is so because the Constitution does not state who should determine the President's inability in the many circumstances in which, as the founders themselves must have foreseen, it cannot be the President himself. The Cabinet could not have been intended to judge the issue, since this body is not referred to in the Constitution. It is not the Congress, except by the negative sanction of impeachment and conviction for a wrongful attempt to exercise power. Nor is it the Supreme Court, because the question of presidential inability is hardly one which fits any type of jurisdiction conferred by the Constitution on that tribunal. But the power to determine the inability of the President rests in the Vice President not simply because the Constitution places it nowhere else.³⁷ By a well-known principle of law, whenever any official by law or person by private contract is designated to perform certain duties on the happening of certain contingencies, unless otherwise specified, that person who bears the responsibility for performing the duties must also determine when the contingency for the exercise of his powers arises. Similarly, under the present Constitution, it is the President who determines when his inability has terminated and he is ready once more to execute his office.³⁸

Similarly, prior to the ratification of the Twenty-Fifth Amendment, I wrote, "As the Constitution is now written, it is the Vice-President's duty to act as President in cases of inability and therefore, by implication, his duty to make the determination of inability,"³⁹ noting that Brownell had persuasively argued this point.

34. *Id.* (citations omitted).

35. *Presidential Inability*, 42 Op. Att'y Gen. 69, 69 (1961).

36. *Id.* at 88.

37. The Twenty-Fifth Amendment formalizes the Vice President's role in determining presidential inability. U.S. CONST. amend. XXV, § 4.

38. *Presidential Inability*, 42 Op. Att'y Gen. at 89 (quoting Herbert Brownell, Jr., *Presidential Disability: The Need for a Constitutional Amendment*, 68 YALE L.J. 189, 204 (1958)).

39. John D. Feerick, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, 32 FORDHAM L. REV. 73, 126 (1963). In this Article I noted that several cases are frequently cited for this proposition. *See, e.g.*, *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 413 (1928) (giving the President authority to fix rate of custom duties on imports); *Field v. Clark*, 143 U.S. 649, 700 (1892) (authorizing the President to suspend provisions of a tariff act); *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 30 (1827) (allowing the President to

b. Congress

Others held the view that Congress had the power to decide the question of a President's incapacitation.⁴⁰ Some of the earliest constitutional scholars proposed that the matter could best be handled by concurrent resolutions, with one resolution declaring the existence of an inability and a subsequent resolution declaring its termination.⁴¹ During President Garfield's inability, Governor Jacob B. Jackson of West Virginia argued that presidential disability is a political question: "the only way now in which the disability contemplated in the constitutional clauses referring to the subject could be announced and the Vice President called to the office of the President, was by act of Congress."⁴² Additionally, some have suggested that the power to remove a disabled President through impeachment proceedings may furnish a method for deciding the inability question.⁴³

Advocates for the view that Congress had the power to determine presidential inability found more support for the proposition in the Constitution's Elastic Clause.⁴⁴ Also known as the Necessary and Proper Clause, it provides that "[t]he Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."⁴⁵ Supporters of this view disagreed with the argument that "the grant of power to Congress to designate a successor in case of double vacancy necessarily excludes congressional power to legislate on the subject of presidential inability," reasoning that "the power to provide for the determination of disability is a power necessary and proper to carry into execution the powers vested in the President," and "providing for the determination of presidential inability is necessary to ensure that the executive power does not fall into abeyance."⁴⁶

call militia into service); *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 388 (1813) (giving the President power to renew trade with certain countries); *see also* Brownell, Jr., *supra* note 38, at 199–201.

40. *See* SILVA, *supra* note 21, at 105 (citing 14 CONG. REC. 1007 (1883) (statement of Sen. Charles W. Jones)). Professor Ruth C. Silva noted that, "The provisional constitution of the Confederate States actually did contain such a provision," and under Article II, Section I, Clause 4 of that document, "[T]he President's inability was to be determined by a two-thirds vote of the Congress . . ." *Id.* at 105 n.76. The permanent constitution of the Confederacy omitted this provision. *Id.*

41. *See, e.g.,* SILVA, *supra* note 21, at 105 (discussing former Columbia University constitutional law Professor John W. Burgess's proposal for Congress to determine inability).

42. *A Question for Congress: Governor Jackson, of West Virginia, on Presidential Disability, Views of Ex-Senator Trumbull, Other Opinions as to a Remedy for the Existing Situation*, N.Y. HERALD, Sept. 9, 1881, at 8.

43. *See, e.g.,* SILVA, *supra* note 21, at 105 (discussing former Virginia Representative and constitutional law Professor John Randolph Tucker's suggestion that Congress may remove a disabled President through such proceedings).

44. *See id.* at 106–07.

45. U.S. CONST. art. I, § 8, cl. 18.

46. *See, e.g.,* SILVA, *supra* note 21, at 106.

Professor Silva noted that “the great weight of opinion . . . support[s] the position that Congress has no such power” to determine inability either specifically or generally.⁴⁷ She pointed out that “[t]he speeches in Congress have nearly all denied congressional power to provide for cases of inability on the ground that the delegation of power to Congress to provide for succession beyond the Vice President excludes all other congressional power to deal with presidential succession.”⁴⁸

Attorney General Brownell agreed that Congress had no such authority if there were an able Vice President in place; however, he left open the possibility of congressional power on the matter in the event of a double vacancy or double disability, writing:

Since the Constitution confers no power upon Congress in connection with presidential inability so long as the Vice President is in office and able to act, congressional action under the ‘necessary and proper’ clause would seem restricted to the uncommon situation in which both the President and the Vice President are incapacitated.⁴⁹

c. The Judiciary

When President Garfield fell ill, Professor Dwight said that the definition of presidential inability is a “judicial question” outside “the sphere of legislation.”⁵⁰ Similarly, John Randolph Tucker, a well-known lawyer and commentator at the time, thought the federal courts could be given jurisdiction to make the determination of inability “as a case arising under the Constitution.”⁵¹ Other noted commentators agreed that the federal judiciary could determine a President’s disability. For example, David K. Watson suggested that the Attorney General could bring a mandamus action against the Vice President, compelling him to exercise the powers and duties of the President.⁵² John W. Burgess added that both the Supreme Court and Congress could decide cases of inability.⁵³ While the issues were primarily “judicial questions,” “[i]f it should be left to . . . Congress . . . to declare when disability happens and when it ceases, I think the solution of

47. *Id.* at 107.

48. *Id.*; see also Ruth C. Silva, *Presidential Inability*, 35 U. DET. L.J. 139, 171 (1957) (“The only power expressly given to Congress to provide for presidential succession is the power to declare what officer shall act as President when there is *neither* a functioning President nor a functioning Vice President. This would seem to deny congressional power to deal with inability, because enumeration in the Constitution of certain powers denies all others unless incident to an expressed power or necessary to its execution . . .”).

49. Brownell, Jr., *supra* note 38, at 206; see also *infra* note 173 and accompanying text.

50. Dwight, *supra* note 22, at 440.

51. 2 JOHN RANDOLPH TUCKER, *THE CONSTITUTION OF THE UNITED STATES: A CRITICAL DISCUSSION OF ITS GENESIS, DEVELOPMENT, AND INTERPRETATION* 713 (1899).

52. 1 DAVID K. WATSON, *THE CONSTITUTION OF THE UNITED STATES: ITS HISTORY APPLICATION AND CONSTRUCTION* 893–95 (1910) (discussing *Attorney-General v. Taggart*, 29 A. 1027 (N.H. 1890), where the New Hampshire Supreme Court held that the existence of an inability may be determined on a petition for mandamus against a governor’s successor to compel him to act as governor).

53. 2 JOHN W. BURGESS, *POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW* 240 (1891).

the question which best comports with the spirit of our institutions will have been reached.”⁵⁴

Professor Silva disagreed about judicial involvement, writing, “It is certain that the Supreme Court could not be given original jurisdiction to make this determination. For the Court has already ruled that its original jurisdiction is limited to that set forth in the Constitution.”⁵⁵ Over the years, many bills had been proposed that would give the Supreme Court original jurisdiction to determine presidential inability.⁵⁶ When the *Marbury* objection was raised during 1920 congressional hearings on such a proposal, Representative John J. Rogers of Massachusetts, the bill’s author, “had no answer.”⁵⁷ At the same hearings, Minnesota Representative Andrew Volstead suggested that the lower federal courts could be given this jurisdiction, to which Ohio Representative Simeon Fess responded that only a constitutional amendment could confer federal jurisdiction, categorizing the issue as “political and not justiciable.”⁵⁸

d. The Cabinet

Some, principally former members of the executive branch, have suggested that the Cabinet might declare a President’s inability.⁵⁹ Former President Herbert Hoover suggested a commission of between seven and fifteen heads of executive departments or agencies, reasoning that “a President’s inability . . . should be determined by the . . . [political] party having the responsibilities determined by the election.”⁶⁰ Indeed, two bills were introduced to allow the Cabinet to declare an inability during President Woodrow Wilson’s illnesses.⁶¹ The main legal question regarding those bills was “whether Congress had power to authorize the Cabinet to determine a President’s inability.”⁶²

Critics of allowing the Cabinet to play a role, including former Attorney General Brownell, pointed out that this would be antithetical to original meaning as the framers could not have intended the Cabinet, a body not referred to in the Constitution, to judge the issue of disability.⁶³ During President Garfield’s illness, West Virginia Governor Jackson answered former President Ulysses S. Grant’s suggestion that the President’s physician certify his inability to the Cabinet by saying, “The Cabinet cannot

54. *Id.*

55. SILVA, *supra* note 21, at 103 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

56. *Id.*

57. *Id.*

58. *Id.* at 103–04.

59. *Id.* at 107; Feerick, *supra* note 39, at 113.

60. *Presidential Inability: Hearing on S.J. Res 100 et al. Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 85th Cong. 11 (1958).

61. SILVA, *supra* note 21, at 107.

62. *Id.* at 107–08.

63. *See, e.g.*, Brownell, Jr., *supra* note 38, at 204; *see also supra* note 49 and accompanying text.

and ought not to decide it, for its members are the creatures of the President, called to and continued in office at his pleasure.”⁶⁴

*B. History of Presidential Disability prior to the Twenty-Fifth Amendment*⁶⁵

1. Madison’s Illness

In 1813, President James Madison suffered an illness that left him unable to conduct the responsibilities of the Office for three weeks, setting off widespread discussion of presidential succession. Word traveled that President Madison was critically ill, and attention focused on the possible succession of Vice President Elbridge Gerry, then almost sixty-nine years old. There was speculation that the President might not survive, and there was concern over the ability of Vice President Gerry if he were to assume the Office.⁶⁶ Both houses of Congress became engrossed with the possibility of Madison’s death and Gerry’s succession.

President Madison slowly began to recover from his illness, and on July 2, First Lady Dolly Madison wrote that the President’s fever had subsided and he was improving. On July 7 it was announced that the President had resumed the most urgent public business, meeting with a Senate committee a week later. Madison spent time in his Montpelier home in August where his health continued to improve, and when he returned to Washington in October of 1813, it was clear his recovery was complete.

2. Tyler Precedent

What became known as the “Tyler Precedent” concerned the question of whether a succeeding Vice President ascended to the Office of the President itself, or merely assumed the powers and duties of the Office upon the President’s death. On April 4, 1841, President William Henry Harrison, then the oldest President at inauguration, died of pneumonia. When news reached Vice President John Tyler, he immediately headed to Washington where he took the presidential oath of office. Tyler made clear his belief that he ascended to the Office of the President itself and was not merely acting as President.

64. *A Question for Congress, Governor Jackson, of West Virginia, on Presidential Disability., Views of Ex-Senator Trumbull, Other Opinions as to a Remedy for the Existing Situation*, N.Y. HERALD, Sept. 9, 1881, at 8.

65. Part III.B is adapted from chapters one and four of JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* (1992).

66. French Minister Louis Serurier wrote on June 21:

The thought of [Madison’s] possible loss strikes everybody with consternation. It is certainly true that his death in the circumstances in which the Republic is placed, would be a veritable national calamity. The President who would succeed him for three and a half years is a respectable old man, but weak and worn out. All good Americans pray for the recovery of Mr. Madison.

Id. at 4.

Tyler's ascendancy to the "Office" of the President was not without dispute, and leaders of the Whig Party referred to him simply as the "Acting President." John Quincy Adams, a former President of the United States and at the time of the Tyler Precedent a member of the House of Representatives, noted in his diary: "[Tyler's assumption of the Office of the President] is a construction in direct violation both of the grammar and context of the Constitution, which confers upon the Vice-President, on the decease of the President, not the office, but the powers and duties of the said office."⁶⁷

Upon the convening of the special session of the Twenty-Seventh Congress on May 31, 1841, Tyler's assumption of the Presidency came under attack. When Virginia Representative Henry A. Wise introduced a resolution calling for the formation of a committee "to wait on the President of the United States," New York Representative John McKeon moved to strike "President" and replace it with "Vice-President, now exercising the office of the President."⁶⁸ Representative McKeon further stated that "a grave constitutional question" had been presented, and this question should be set "at rest for all future time." However, the House of Representatives rejected McKeon's suggestion and passed the Wise resolution.

The Tyler Precedent was formalized upon the ratification of the Twenty-Fifth Amendment, which makes clear that upon a President's death, removal, or resignation, the Vice President succeeds to the Office of the President.⁶⁹

3. Garfield's Inability

On July 2, 1881, the nation was faced with its first prolonged case of presidential inability when President Garfield was shot by an assassin and wavered between life and death for the next eighty days.

During this period, the President's visitors were restricted to family and physicians, with only occasional visits from members of his Cabinet. During President Garfield's inability period, his doctors determined he needed rest to have any chance at recovery and prevented him from discharging his powers and duties. His only official act during this time was the signing of an extradition paper on August 10. The Cabinet tried to keep the wheels of government turning, but there was much the members could not do, such as handling foreign affairs.

In late August, Secretary of State James Blaine prepared a paper on presidential inability, arguing that since the Constitution contained no directions for replacing a disabled President, Vice President Arthur should be called to Washington to take over the Presidency. Only a few members of the Cabinet agreed, with a majority of the view that under the Tyler Precedent, any succession by Vice President Arthur would be to the Office

67. 10 MEMOIRS OF JOHN QUINCY ADAMS: COMPRISING PORTIONS OF HIS DIARY FROM 1795-1848, at 463-64 (Charles Francis Adams ed., 1876).

68. FEERICK, *supra* note 65, at 6.

69. U.S. CONST. amend. XXV, § 1.

of the President for the remainder of the term. Arthur, however, fearful of being labeled a usurper, made it clear that he would not assume presidential responsibility.

Following President Garfield's death on September 19, 1881, the debate over the meaning of the Succession Clause continued in the press, legal journals, and Congress. When Vice President Arthur succeeded to the Presidency, there was no Vice President, no President pro tempore of the Senate, and no Speaker of the House of Representatives—in short, no constitutional successor to the Presidency. Newly-elevated President Arthur recognized this problem, and in several messages to Congress, he expressed concern over the ambiguities of the succession provision.⁷⁰

4. Wilson's Inability

On October 2, 1919, President Wilson suffered a stroke that paralyzed the left side of his body. The President's close friend and physician, Dr. Cary Grayson, released a bulletin stating, "The President is a very sick man." From that time until the inauguration of President Warren G. Harding on March 4, 1921, the country was without the services of an able President.

While President Wilson lay ill and unable to discharge the powers and duties of office, attempts were made to provide executive leadership. Secretary of State Robert Lansing suggested to the President's secretary, Joseph Tumulty, that the Vice President be called upon to act as President. When Secretary Lansing suggested that either Dr. Grayson or Tumulty certify the President disabled, Tumulty declared, "You may rest assured that while Woodrow Wilson is lying in the White House on the broad of his back I will not be a party to ousting him."⁷¹ In the days and weeks following President Wilson's stroke, there were repeated demands for Vice President Thomas Marshall to act as President, but the confusion surrounding the succession provision, coupled with Vice President Marshall's reluctance to appear as a usurper, prevented him from so acting.

70. President Chester A. Arthur wrote:

Is the inability limited in its nature to long-continued intellectual incapacity, or has it a broader import? What must be its extent and duration? How must its existence be established? Has the President whose inability is the subject of inquiry any voice in determining whether or not it exists, or is the decision of that momentous and delicate question confided to the Vice-President, or is it contemplated by the Constitution that Congress should provide by law precisely what should constitute inability and how and by what tribunal or authority it should be ascertained? If the inability proves to be temporary in its nature, and during its continuance the Vice-President lawfully exercises the functions of the Executive, by what tenure does he hold his office? Does he continue as President for the remainder of the four years' term? Or would the elected President, if his inability should cease in the interval, be empowered to resume his office? And if, having such lawful authority, he should exercise it, would the Vice-President be thereupon empowered to resume his powers and duties as such?

FEERICK, *supra* note 65, at 10.

71. JOSEPH P. TUMULTY, *WOODROW WILSON AS I KNOW HIM* 443-44 (1921).

5. Eisenhower's Inabilities

On September 24, 1955, President Eisenhower suffered a heart attack while vacationing in Colorado. That evening, Vice President Richard M. Nixon met with members of the Cabinet to discuss arrangements for operation of the executive branch during President Eisenhower's recovery in Denver. It was decided that the Cabinet and White House should continue the administration of the government. The Cabinet agreed on the following procedure: First, on actions that Cabinet members would normally take without consulting either the Cabinet or the President, there would be no change from the normal. Second, on questions which would normally be brought before the Cabinet for discussion before any decision should continue to be discussed there. Third, decisions requiring consultation with the President should first go to the Cabinet or the National Security Council for thorough discussion and possible recommendation before going to President Eisenhower in Denver for his consideration. Although this system worked without incident, presidential assistant Sherman Adams noted that it left everyone "uncomfortably aware of the Constitution's failure to provide for the direction of the government by an acting President when the President is temporarily disabled and unable to perform his functions."⁷²

The question of inability was revived on two other occasions during the Eisenhower administration. On June 8, 1956, the President had an attack of ileitis and was taken to Walter Reed hospital. The following day, he underwent a two-hour operation for the removal of an obstruction of the small intestine, during which he was unconscious. The President was up and walking by June 10 and deemed "fully recovered" by August 27.

The other incident occurred on November 25, 1957, when the President suffered a stroke affecting his ability to speak. The next day, members of his staff met to discuss President Eisenhower's condition. However, medical bulletins indicated that his health had improved, and by December 2, the President was back at work in the White House.

As Congress pondered the inability problem, President Eisenhower became increasingly concerned about the recurrence of another case of inability. He therefore drafted and presented to Vice President Nixon an informal "letter agreement," which offered an imaginative and practical approach to the inability problem. The agreement was released to the public and provided:

- (1) In the event of inability the President would—if possible—so inform the Vice President, and the Vice President would serve as Acting President, exercising the powers and duties of the office until the inability had ended.
- (2) In the event of an inability which would prevent the President from so communicating with the Vice President, the Vice President, after such consultation as seems to him appropriate under the circumstances, would

72. FEERICK, *supra* note 65, at 20 (internal citation omitted).

decide upon the devolution of the powers and duties of the Office and would serve as Acting President until the inability had ended.

(3) The President, in either event, would determine when the inability had ended and at that time would resume the full exercise of the powers and duties of the Office.⁷³

Later, President Kennedy and Vice President Lyndon Baines Johnson, President Johnson and House Speaker John W. McCormack, and President Johnson and Vice President Hubert H. Humphrey, Jr. adopted similar understandings. However, these letter agreements did not have the force of law behind them and depended entirely on the good will of the incumbent President and Vice President. Nevertheless, they represented the first significant step toward solving the inability problem.

6. Kennedy's Assassination

On November 22, 1963, the nation experienced one of its most shocking tragedies when President Kennedy was assassinated. Efforts made to save the President, though unsuccessful, underscored again the absence of procedures to account for the case in which a President might linger unconscious, either for days or for a more extended period of time.⁷⁴ Succession beyond the Vice Presidency also came into focus as rumors circulated that Vice President Johnson had suffered a heart attack shortly after President Kennedy had been shot. Fortunately, there was no truth to these rumors, and the nation did not have to test the adequacy of succession beyond the Vice Presidency under the 1947 succession law.

III. THE TWENTY-FIFTH AMENDMENT

A. Ratification

The tragic death of President Kennedy revived the conversation on the need to solve the problems of presidential succession and inability. Following President Kennedy's assassination, Vice President Johnson immediately succeeded to the Office of the President, leaving the Vice Presidency vacant.⁷⁵ From November 22, 1963 until January 20, 1965, the United States had no Vice President.⁷⁶ Further, the Speaker of the House of Representatives and the President pro tempore of the Senate, the successors to President Johnson under the succession statute, "were both aged and,

73. *Id.* at 55–56 (internal citation omitted).

74. James Reston of *The New York Times* noted that "[f]or an all too brief hour today, it was not clear again what would have happened if the young President, instead of being mortally wounded, had lingered for a long time between life and death, strong enough to survive but too weak to govern." James Reston, *Why America Weeps*, N.Y. TIMES, Nov. 23, 1963, at 1.

75. Felix Belair Jr., *Kennedy Is Killed by Sniper As He Rides in Car in Dallas; Johnson Sworn in on Plane: Texan Asks Unity, Congressional Chiefs of 2 Parties Give Promise of Aid*, N.Y. TIMES, Nov. 23, 1963, at 1.

76. Richard M. Merelman, *Presidential Disability and Succession: The Proposed 25th Amendment: What Are Its Provisions?*, GRASS ROOTS GUIDES 9 (1965).

even by their own admission, doubtful about their capacities to fill the Presidency, should that eventuality arise.”⁷⁷ It became clear that providing another means for filling the vacancy, like allowing the President to choose a new Vice President, was necessary.⁷⁸

A number of congressional proposals addressing presidential inability and succession followed President Kennedy’s death. Senator Birch Bayh of Indiana, Chairman of the Senate Subcommittee on Constitutional Amendments, and several other senators proposed a constitutional amendment, Senate Joint Resolution 139, “containing provisions on inability, filling a vice presidential vacancy, and succession beyond the vice presidency.”⁷⁹ President Johnson informed the Senate that he unqualifiedly endorsed the proposed amendment.⁸⁰

In conjunction with Senator Bayh’s proposal, the American Bar Association (ABA) formed a conference of twelve lawyers to examine the problems and offer recommendations.⁸¹ At this two-day conference it was decided that agreements between the President and Vice President, such as that between Eisenhower and Nixon, provided only a partial solution to the inability problem. The ABA conference proceeded to recommend that an amendment to the Constitution should be adopted to permanently resolve the problems arising in the event of the inability of the President.

The conference recommended that in the event of presidential inability, the powers and duties of the President, but not the Office, would devolve upon the Vice President, or person next in the line of succession, for the duration of the inability or until expiration of the President’s term. Further, it was suggested that “[t]he amendment should provide that the inability of the President may be established by declaration in writing of the President,”⁸² and “[i]n the event that the President does not make known his inability, it may be established by action of the Vice President or person next in line of succession with concurrence of a majority of the Cabinet”⁸³

The conference also considered the related question of presidential succession, agreeing that the “Constitution should be amended to provide that in the event of the death, resignation or removal of the President, the Vice President or the person next in the line of succession shall succeed to the office for the unexpired term,”⁸⁴ because it “is highly desirable that the

77. *Id.*

78. *Id.* at 10.

79. FEERICK, *supra* note 65, at 59.

80. Interview by Paige E. Mulhollan with Senator Birch Bayh (Feb. 12, 1969), available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/oralhistory.hom/Bayh-B/Bayh.pdf>.

81. The following discussion of the ABA conference and the ratification of the Twenty-Fifth Amendment is adapted from chapters five and six of FEERICK, *supra* note 65. For a detailed description of the work of the ABA conference, see FEERICK, *supra* note 23, at 246–54; see also John D. Feerick, *Presidential Inability: The Problem and a Solution*, 50 A.B.A. J. 321, 323–24 (1964); James C. Kirby, Jr., *A Breakthrough on Presidential Inability: The ABA Conference Consensus*, 17 VAND. L. REV. 463, 475–78 (1964).

82. FEERICK, *supra* note 65, at 60 (internal citation omitted).

83. *Id.* (internal citation omitted).

84. *Id.* (internal citation omitted).

office of the Vice President be filled at all times.”⁸⁵ The ABA endorsed the conference consensus on February 17, 1964, and it was formally presented to the Subcommittee on Congressional Amendments on February 24.

At the hearings of the Subcommittee on Constitutional Amendments in 1964, a majority of the witnesses expressed support for the inability provisions proposed by the ABA. As a national consensus on the inability problem gradually began to take shape along the lines of the ABA approach, widespread agreement arose at the hearings on the need for having a Vice President at all times. The Vice President would provide for an orderly transfer of executive authority in the event of the death of a President.

While there was general agreement regarding the need for a Vice President, the measures and recommendations presented to Senator Bayh’s Subcommittee differed on the means of filling such a vacancy.⁸⁶ Eventually it was decided that whenever there is a vacancy in the Vice Presidency, the President would nominate a Vice President, who would take office after confirmation by both houses of Congress.⁸⁷

As Congress debated the proposed amendment, many of the ABA’s recommendations were adopted, while others were amended or eliminated from the final legislation. For example, the recommendation that the Vice President, *or person next in the line of succession*, with concurrence of a majority of the Cabinet (or other body provided for by Congress), would establish presidential inability was not fully adopted in the final legislation. The final version of the Amendment provides only for the Vice President to declare the President disabled with concurrence by the Cabinet (or other body provided by Congress), remaining silent on the ability of the person next in line to do so, as suggested by the ABA proposal.⁸⁸

After numerous Congressional hearings, the final version of the Twenty-Fifth Amendment passed the House and the Senate in 1965, was ratified by the necessary state legislatures on February 10, 1967, and was formally proclaimed the Twenty-Fifth Amendment to the Constitution at a White House ceremony held on February 23, 1967.

B. An Analysis of the Twenty-Fifth Amendment

The Twenty-Fifth Amendment of the Constitution establishes procedures for filling a vacancy in the Office of the Vice President and for responding to presidential disabilities. There are four sections of the Amendment, each providing different procedures depending on the specific circumstance.

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.”⁸⁹

85. *Id.* at 61 (internal citation omitted).

86. Proposals for filling a vice presidential vacancy included presidential nomination, congressional selection, the election of two Vice Presidents every four years, the reconvening of the last electoral college to select a new Vice President, and a new election.

87. *See* U.S. CONST. amend. XXV, § 2.

88. *See id.* § 4.

89. *Id.* § 1.

This Section formalizes the precedent set when Vice President Tyler claimed the title of “President” after the death of President Harrison.

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.”⁹⁰ The use of “whenever” and “shall” clarifies that the President must nominate a person for Vice President in the event of a vacancy. The history of Section 2 manifests the intention that there be both a President and a Vice President at all times, and whenever a vacancy occurs in the office of the Vice President, both the President and Congress must act with “reasonable dispatch” to fill it.⁹¹ Thus, Section 2 reflects the increased significance and role the Vice President plays in the government.⁹²

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.⁹³

This section affords the President discretion in declaring his own inability and makes clear that in such a case, the Vice President is to discharge the powers and duties of the Presidency. In a disability situation under Section 3, the Vice President does not assume the Office or title of “President.”

Section 4 of the Amendment provides a mechanism for 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” to declare the President unable to discharge the powers and duties of his office, in the event the President does not do so himself.⁹⁴ This section covers the most difficult cases of inability—when the President cannot or refuses to declare his own inability.

The terms “unable” and “inability” are undefined in either Section 3 or 4 of the Amendment, not as the result of an oversight, but rather “a judgment that a rigid constitutional definition was undesirable, since cases of inability could take various forms not neatly fitting into such a definition.”⁹⁵

90. *Id.* § 2.

91. See *Presidential Inability and Vacancies in the Office of the Vice President: Hearing on S.J. Res. 1 et al. Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 89th Cong. 63–67 (1965); *Presidential Inability: Hearing on H.R. 836 et al. Before the H. Comm. on the Judiciary*, 89th Cong. 66 (1965) [hereinafter 1965 House Hearing]; AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON ELECTION REFORM, REPORT AND RECOMMENDATION TO THE HOUSE OF DELEGATES (1974) (on file with the *Fordham Law Review*).

92. For a detailed description of the Vice Presidency, see JOEL K. GOLDSTEIN, *THE MODERN AMERICAN VICE PRESIDENCY: THE TRANSFORMATION OF A POLITICAL INSTITUTION* (1982).

93. U.S. CONST. amend. XXV, § 3.

94. *Id.* § 4.

95. FEERICK, *supra* note 65, at 197.

Circumstances commonly thought to fall under these Sections include cases of mental inability, as well as situations where the President might be kidnapped or captured, under an oxygen tent at a time of enemy attack, or bereft of speech or sight.⁹⁶ The debates of 1964 and 1965 made clear that unpopularity, incompetence, impeachable conduct, poor judgment, and laziness do not constitute an “inability” within the meaning of the Amendment.⁹⁷

C. History Post-Ratification

1. Reagan’s Assassination Attempt

On March 30, 1981, John W. Hinkley, Jr. shot President Ronald Reagan as he exited the Washington Hilton Hotel after delivering a speech.⁹⁸ At first it was unclear whether President Reagan had been struck by one of the bullets in his left side, or if he had instead only broken a rib when Secret Service agents shoved him into his limousine after hearing the shots fired.⁹⁹ In fact, a bullet had bounced off the President’s limousine and hit the President.¹⁰⁰ The bullet, a “Devastator” bullet designed to explode on impact, never exploded.¹⁰¹ The prognosis the doctors gave for President Reagan’s recovery was incredibly positive, and because the bullet had not struck the heart, Dr. Dennis O’Leary, a spokesperson for the George Washington Hospital where Reagan was treated, said the President “was never in any serious danger.”¹⁰²

As the President underwent surgery to remove the bullet, events at the White House took on historical significance.¹⁰³ When President Reagan was shot, Vice President George H.W. Bush was en route from Fort Worth to Austin, Texas, for a speech.¹⁰⁴ Upon hearing the news, Vice President Bush headed back to Washington, D.C. immediately.¹⁰⁵ There, members of the Cabinet and staff gathered in the White House Situation Room.¹⁰⁶ President Reagan’s Secretary of State, Alexander M. Haig, Jr., noted in his memoirs that the officials handling the crisis were “an ad hoc group; no

96. *Id.* at 198.

97. See 111 CONG. REC. 3282–83 (1965) (statement of Senator Birch Bayh) (explaining that the Amendment does not cover a decision that might render the President unpopular but rather situations where the President is unable to perform the powers and duties of his office); see also *Presidential Inability and Vacancies in the Office of the Vice President: Hearing on S.J. Res. 13 et al. Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 88th Cong. 25 (1964).

98. See HERBERT L. ABRAMS, “THE PRESIDENT HAS BEEN SHOT”: CONFUSION, DISABILITY, AND THE 25TH AMENDMENT IN THE AFTERMATH OF THE ATTEMPTED ASSASSINATION OF RONALD REAGAN 48–54 (1992).

99. See *id.* at 54–56.

100. *Id.* at 54.

101. Philip Taubman, *Explosive Bullet Struck Reagan, F.B.I. Discovers: Policemen Has One Taken from Neck in Operation*, N.Y. TIMES, Apr. 3, 1981, at A1.

102. FEERICK, *supra* note 65, at xi.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

plan existed, we possessed no list of guidelines, no chart that established rank or function. Our work was a matter of calling on experience and exercising judgment.”¹⁰⁷

Less than two hours after the shooting, Deputy Press Secretary Larry Speakes held a press briefing where he was unable to answer many questions about the President’s status and about the administration’s crisis management plan.¹⁰⁸ When asked, “Is the President in surgery?,” Speakes replied, “I can’t say.”¹⁰⁹ When asked, “Who’s running the government right now?,” he responded, “I cannot answer that question at this time.”¹¹⁰ Finally, when asked, “[W]ho’ll be determining the status of the President and whether the Vice President should, in fact, become the acting President?,” he replied, “I don’t know the details on that.”¹¹¹ A concerned Secretary Haig dashed from the Situation Room to the White House press room where he infamously declared, “I am in control here” to the question, “Who is making the decisions for the government right now?”¹¹²

The Reagan administration did not invoke the Twenty-Fifth Amendment during the crisis surrounding the attempted assassination of the President. Accounts vary, but “it seems clear that the issue was resolved by a handful of officials without the kind of formal action by the Cabinet and Vice President that the Amendment contemplated” under Section 4.¹¹³

Fred F. Fielding, White House Counsel for President Reagan at the time, described in detail his eyewitness account of these events at the *Fordham Law Review*’s April 2010 symposium:

Upon word of the shooting and that the President had actually been hit, I called the National Security Adviser and we started to assemble people in the Situation Room, which is, of course, the secure facility within the White House complex. . . .

The group that gathered in the Situation Room that day consisted of ten or more individuals, people leaving and coming at various points. It wasn’t a full Cabinet meeting, but rather an ad hoc assembly of people. . . .

. . . .

The scene in the Situation Room, if I could try to describe it, was obviously apprehensive, but it wasn’t harried or frantic. Again, go back

107. ALEXANDER M. HAIG, JR., *CAVEAT: REALISM, REAGAN, AND FOREIGN POLICY* 153 (1984).

108. FEERICK, *supra* note 65, at xii.

109. HAIG, JR., *supra* note 107, at 158.

110. *Id.* at 159.

111. *Id.*

112. *Id.* at 160. The full text of Secretary Alexander M. Haig, Jr.’s response is:

Constitutionally, gentlemen, you have the President, the Vice President, and the Secretary of State, in that order, and should the President decide he wants to transfer the helm, he will do so. He has not done that. As of now, I am in control here, in the White House, pending return of the Vice President and in close touch with him. If something came up, I would check with him, of course.

Id.

113. FEERICK, *supra* note 65, at xiii.

to context. The people that were in the room were professionals. The Cabinet had only recently been assembled. These were people that had come from different backgrounds. Some people came from the President's California retinue and his governor's team. Others were former Nixon Administration officials. Some were brand new to the whole thing. In all fairness, this was a roomful of strangers who really operated fairly well together under these circumstances.

While no one approached me or the Attorney General with any requests for papers sufficient to exercise Section 3 or 4 of the Twenty-Fifth Amendment during the time I was there, I had earlier prepared such papers. I had them with me in draft, for both Section 3 and Section 4 coverage.

....

As we all know, the Twenty-Fifth Amendment was not invoked on March 30. I have read that during that tense afternoon the draft Sections 3 and 4 letters were pulled from my hands and sealed in a safe. It's not so. But think how silly that sounds. It wasn't a great secret that the Twenty-Fifth Amendment was in play, if you will. To say that suddenly things were pulled and put in a safe sounds very silly.

It is true that we were informed that the bullet had been removed from the President's lung after surgery, and an hour later, we were informed that doctors were very confident of a full recovery. That news quelled any further thoughts or discussion about invoking the Twenty-Fifth Amendment until the Vice President returned. He was en route back. Of course, once he got back, he met with us, in an expanded group in the Situation Room. The group of us—the Attorney General, I, the Chief of Staff, and Secretary [of Defense] Weinberger, but not the Secretary of State, went into the Vice President's office. There we discussed whether Section 4 should be invoked, at that point. The decision was made that it should not be. The next morning the President was alert. He was joking, writing notes to people. He met and conducted some very minor official tasks, with the cameras being there to show that the President was working. The Vice President met with the senior staff and oversaw routine business.

Some have contended that the Twenty-Fifth Amendment should still have been under consideration in the course of the ensuing days. The President recovered gradually and underwent additional procedures. People presumably were talking about Section 4, or a prompting by the President to engage in Section 3. But if the amendment hadn't been triggered on the day of the shooting, hadn't been triggered that evening, it certainly was not going to be willingly engaged, absent a change in the President's health, by the mere virtue of his understandably reduced schedule. The world had been told he was recovering, and, thankfully, that's what turned out to be the case.¹¹⁴

114. Fred Fielding, Keynote Speaker at the Fordham Law Review Symposium: The Adequacy of the Presidential Succession System in the 21st Century: Filling the Gaps and Clarifying the Ambiguities in Constitutional and Extraconstitutional Arrangements (Apr. 16, 2010), *in* 79 FORDHAM L. REV. 823, 827–29 (2010).

2. Reagan's Cancer Surgery

The Twenty-Fifth Amendment was implicated for a second time during the Reagan Administration on July 12, 1985, when the President entered Bethesda Naval Hospital for a surgical procedure to remove a polyp from his colon.¹¹⁵ Before undergoing anesthesia, President Reagan signed a document addressed to the Speaker of the House of Representatives and the President pro tempore of the Senate transferring power to Vice President Bush as Acting President, while also disclaiming any formal use of the Twenty-Fifth Amendment.¹¹⁶ The document read, in relevant part:

After consultation with my counsel and the Attorney General, I am mindful of the provisions of Section 3 of the 25th Amendment to the Constitution and of the uncertainties of its application to such brief and temporary periods of incapacity. I do not believe that the drafters of this amendment intended its application to situations such as the instant one.

Nevertheless, consistent with my longstanding arrangement with Vice President George Bush, and not intending to set a precedent binding anyone privileged to hold the office in the future, I have determined and it is my intention and direction, that Vice President George Bush shall discharge those powers and duties in my stead commencing with the administration of anesthesia to me in this instance.¹¹⁷

Five hours after surgery, Fielding and Chief of Staff Donald Regan informally tested President Reagan to determine his readiness to resume the Presidency by handing him a two-sentence letter addressed to the congressional leaders.¹¹⁸ The letter read:

Following up on my letter to you of this date, please be advised I am able to resume the discharge of the constitutional powers and duties of the office of the President of the United States. I have informed the Vice President of my determination and my resumption of those powers and duties.¹¹⁹

Upon receiving this letter from Fielding and Regan, Reagan quickly replied, "Gimme a pen" and signed the letter.¹²⁰

Although President Reagan's initial letter disclaimed any use of the Twenty-Fifth Amendment, he followed all the guidelines and procedures specified in Section 3.¹²¹ Further, no constitutional provision except the

115. FEERICK, *supra* note 65, at xv.

116. *Id.*

117. *Texts of Reagan's Letters*, N.Y. TIMES, July 14, 1985, at 20; *see also* 131 CONG. REC. 19,008-09 (1985) (containing the text of President Reagan's letter to Hon. Strom Thurmond, President pro tempore of the Senate).

118. FEERICK, *supra* note 65, at xv-xvi.

119. *Texts of Reagan's Letters*, N.Y. TIMES, July 14, 1985, at 20; *see also* 131 CONG. REC. 19,009 (1985) (containing the text of President Reagan's letter to Hon. Strom Thurmond, President pro tempore of the Senate).

120. FEERICK, *supra* note 65, at xvi.

121. Section 3 of the Amendment states:

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

Twenty-Fifth Amendment would have allowed President Reagan to designate the Vice President as the Acting President.¹²² President Reagan's disclaimer was likely made for two reasons: "fear of the reaction of the country and the world to a 'President' who admitted to being disabled, and concern that admitting to the Amendment's invocation would set a harmful precedent for the presidency."¹²³

President Reagan's later account of the event even mentioned invoking the Amendment:

Before they wheeled me into the operating room, I signed a letter invoking the Twenty-fifth Amendment, making George Bush acting president during the time I was incapacitated under anesthesia. They gave me a shot of Pentathol and I awoke several hours later feeling groggy and confused

. . . .

Later, when I was fully alert, I signed a letter reclaiming the presidency from George¹²⁴

Nancy Reagan's account mirrored that of the President:

The operation began at eleven o'clock that Saturday morning. Half an hour earlier, Ronnie had signed the papers authorizing George Bush to be acting president for the next eight hours. This was the first time the provisions of the Twenty-fifth Amendment had ever been put into effect. . . . Fred Fielding, the White House counsel, came in with the documents, which were then delivered to Speaker Tip O'Neill, and to Strom Thurmond, president pro tempore of the Senate.¹²⁵

3. Appointment of Gerald Ford as Vice President

Section 2 of the Twenty-Fifth Amendment was first invoked in 1973, following Spiro T. Agnew's resignation as Vice President on October 10.¹²⁶ Two days later, President Richard M. Nixon nominated Representative Gerald R. Ford of Michigan to replace Agnew.¹²⁷

At *Fordham Law Review's* presidential succession symposium, Benton Becker, counsel to Ford during his vice presidential confirmation hearings, discussed the incredible scope of the vetting process. Becker noted that the inquiry into Ford's life was "far far more detailed, because there were many people in Washington in September of 1973 who believed that this nominee

them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.
U.S. CONST. amend. XXV, § 3.

122. FEERICK, *supra* note 65, at xvi.

123. *Id.*

124. RONALD REAGAN, AN AMERICAN LIFE 500 (1990).

125. NANCY REAGAN, MY TURN: THE MEMOIRS OF NANCY REAGAN 274 (1989).

126. See FEERICK, *supra* note 65, at 124–26.

127. Richard L. Madden, *Gerald Ford Named by Nixon As the Successor to Agnew: Choice Is Praised by Both Parties, Widespread Enthusiasm Is Expressed in Congress—Fast Confirmation Seen*, N.Y. TIMES, Oct. 13, 1973, at 1. For a detailed discussion of the appointment of Gerald R. Ford, see chapter nine of FEERICK, *supra* note 65.

was going to be President, one way or another. Sooner or later, Richard Nixon was going to resign or be impeached.”¹²⁸ The background check into Ford included an immediate designation of seventy-two FBI agents working full-time on the matter. In fact, it was so extensive that it even included questioning a halfback from Ohio State University who had played college football against Ford, who was asked to give details of an unnecessary roughness penalty called against the future President.¹²⁹

The United States Senate voted 92–3 to confirm Ford on November 27, 1973,¹³⁰ and the House of Representatives did the same, voting 387–35.¹³¹ Immediately following his confirmation as the Vice President, Ford was administered the vice presidential oath by Chief Justice Warren E. Burger before a joint meeting of the Congress held in the chamber of the House of Representatives.¹³²

4. Succession of Gerald Ford to the Presidency and Appointment of Nelson Rockefeller as Vice President

Section 1 of the Twenty-Fifth Amendment was first invoked on August 9, 1974, when President Nixon resigned from office, triggering Vice President Ford’s succession to the Office of the President for the rest of the term and leaving a vacancy in the Vice Presidency.¹³³ On August 20, 1974, acting under Section 2 of the Twenty-Fifth Amendment, President Ford nominated former New York Governor Nelson A. Rockefeller to replace him,¹³⁴ who was confirmed by Congress and sworn into office four months later.¹³⁵

5. George W. Bush’s Invocations

On both June 29, 2002, and July 21, 2007, President George W. Bush invoked Section 3 of the Twenty-Fifth Amendment when undergoing medical procedures requiring sedation, thereby temporarily transferring his powers and duties to Vice President Dick Cheney as the Acting

128. Benton Becker, *The Adequacy of Current Succession Law in Light of the Constitution and Policy Considerations*, 79 FORDHAM L. REV. 897, 898 (2010).

129. *Id.*

130. Marjorie Hunter, *Ford Is Approved by Senate, 92–3; House Set To Act*, N.Y. TIMES, Nov. 28, 1973, at 1.

131. Marjorie Hunter, *Ford Sworn as Vice President After House Approves, 387–35; He Vows Equal Justice for All: Loyalty to Nixon, 1,500 Hear Ford Give His Full Support to President*, N.Y. TIMES, Dec. 7, 1973, at 1.

132. *Id.*

133. For a detailed discussion on the resignation of President Richard M. Nixon, the succession of Ford to the Presidency, and the installation of Nelson A. Rockefeller as Vice President, see chapter ten of FEERICK, *supra* note 65.

134. John Herbers, *Rockefeller Is Nominated by Ford As His Successor in Vice-Presidency; Choice Wins Praise in Both Parties: Optimism Voiced, Ex-Governor Declares Hope Is Reawakened by New President*, N.Y. TIMES, Aug. 21, 1974, at 1.

135. Linda Charlton, *Rockefeller Sworn in As Vice President After Confirmation by House, 287 to 128: Senate Ceremony, He Tells of “Gratitude for the Privilege of Serving Country,”* N.Y. TIMES, Dec. 20, 1974, at 1.

President.¹³⁶ In contrast to President Reagan's letters, President Bush's letters to congressional leaders specifically cited Section 3 of the Amendment, marking the first time this Section was invoked explicitly.¹³⁷

*D. An Appraisal*¹³⁸

The extraordinary occurrence of the resignations of an elected President and Vice President within the same four-year term (Nixon and Agnew) and their replacement by a President and a Vice President selected under Section 2 drew considerable attention to the Twenty-Fifth Amendment. At that time, Journalist James Reston wrote, "On the brief record of the 25th Amendment, it has served the nation well under extraordinary and unforeseen circumstances."¹³⁹

When charges of criminal wrongdoing were leveled against Vice President Agnew, the option of resignation was viable partly because of the procedures of the Twenty-Fifth Amendment. Without it, it is possible that significant pressure against resignation would have developed because a resignation would have placed a member of the opposition party at the head of the line of succession. However, with the Amendment in place, the administration was able to consider whether a resignation was in the national interest without having to worry about a lack of party continuity in the executive branch should something happen to the President.

136. Letter from George W. Bush, President of the U.S., to Speaker of the House of Representatives and President Pro Tempore of the Senate (July 21, 2007) (temporarily transferring power to the Vice President in 2007), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2007/07/20070721-5.html>; Letter from George W. Bush, President of the U.S., to Speaker of the House of Representatives and President Pro Tempore of the Senate (July 21, 2007) (resuming power), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2007/07/20070721-8.html>; Letter from George W. Bush, President of the U.S., to President Pro Tempore of the Senate (June 29, 2002) (temporarily transferring power to the Vice President in 2002), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020629-4.html>; Letter from George W. Bush, President of the U.S., to Speaker of the House of Representatives (June 29, 2002) (temporarily transferring power to the Vice President in 2002), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020629-5.html>; Letter from George W. Bush, President of the U.S., to President Pro Tempore of the Senate (resuming power), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020629-2.html>; Letter from George W. Bush, President of the U.S., to Speaker of the House of Representatives (resuming power), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020629-3.html>; see also Associated Press, *Bush Has Five Polyps Removed During Colonoscopy*, MSNBC.COM, July 21, 2007, <http://www.msnbc.msn.com/id/19872260/>; Edwin Chen, *Bush To Undergo Medical Procedure, Yield Power*, L.A. TIMES, June 29, 2002, <http://articles.latimes.com/2002/jun/29/nation/na-bush29>.

137. See, e.g., Letter from George W. Bush, President of the U.S., to President Pro Tempore of the U.S. Senate (June 29, 2002), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020629-4.html> ("[I]n accordance with the provisions of Section 3 of the Twenty-Fifth Amendment to the United States Constitution, this letter shall constitute my written declaration that I am unable to discharge the Constitutional powers and duties of the office of President of the United States.") (emphasis added).

138. Part IV.D is adapted from chapter thirteen of FEERICK, *supra* note 65.

139. James Reston, *Fiddling with the 25th*, N.Y. TIMES, Nov. 1, 1974, at 39.

The Amendment also assisted the country during the difficult impeachment proceedings against President Nixon. Since the Amendment had operated to replace a Republican Vice President with a Vice President from the same party, Congress was able to conduct the impeachment in the months that followed with the knowledge that it could not be charged with attempting to turn over control of the executive to the Democrats by installing the House Speaker as President. Because of the Amendment, President Nixon was able to resign in 1974 without having to surrender his party's control of the White House.

At the 1975 review hearings on the Twenty-Fifth Amendment before the Senate Subcommittee on Constitutional Amendments, New Jersey Representative Peter Rodino discussed the Amendment:

I think it is unquestionable that without section 2 of the 25th amendment, this Nation might not have endured nearly so well the ordeal of its recent constitutional crisis.

. . . .

Had there been no amendment, not only would the Nixon and Agnew resignations still have left the Nation without a nationally elected executive, but the uncertainty and partisan divisions which would have been inherent in the operation of the succession statutes might have threatened the very constitutional process which ultimately preserved our institutions. Or, barring that, they might have rendered any "new administration" wholly unable to govern.¹⁴⁰

Invocations of Section 3, occurring twice under President George W. Bush, proceeded smoothly and without confusion or delay, providing for a continuous operation of the executive branch with the President temporarily sedated. Section 4 of the Amendment, perhaps the strongest test the inability provisions might face, has yet to be tested.

IV. A BRIEF HISTORY OF VICE PRESIDENTIAL VACANCIES

The Twenty-Fifth Amendment has been effective in promoting stability in the government; however, troubling scenarios are still imaginable, in particular if a succession event were to occur with the Vice Presidency vacant. As our history indicates, such a circumstance is not uncommon.

The first vacancy in the Vice Presidency occurred in 1812 upon the death of George Clinton.¹⁴¹ Since that time, six other Vice Presidents have died in office: Elbridge Gerry (1814), William R. King (1853), Henry Wilson (1875), Thomas A. Hendricks (1885), Garrett A. Hobart (1899), and James

140. *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. 34–35 (1975) [hereinafter 1975 Senate Hearing]. For a detailed appraisal of the Twenty-Fifth Amendment, see FEERICK, *supra* note 65, at 213–30.

141. FEERICK, *supra* note 23, app. A.II.

S. Sherman (1912).¹⁴² In addition, there have been several other instances when the Office has been vacant:¹⁴³

1832–33: Vice President John C. Calhoun resigned from office

1841–45: Vice President John Tyler became President upon the death of President William Henry Harrison

1850–53: Vice President Millard Fillmore became President upon the death of President Zachary Taylor

1865–69: Vice President Andrew Johnson became President upon the death of President Abraham Lincoln

1881–85: Vice President Chester A. Arthur became President upon the death of President James Garfield

1901–05: Vice President Theodore Roosevelt became President upon the death of President William McKinley, Jr.

1923–25: Vice President Calvin Coolidge became President upon the death of President Warren G. Harding

1945–49: Vice President Harry S. Truman became President upon the death of President Franklin D. Roosevelt

1963–65: Vice President Lyndon B. Johnson became President upon the death of President John F. Kennedy

1973: Vice President Spiro Agnew resigned from office¹⁴⁴

1974: Vice President Gerald Ford became President upon the resignation of President Richard Nixon¹⁴⁵

Potential gaps in current succession law are mainly attributable to scenarios where there is no functioning Vice President.¹⁴⁶

V. GAPS IN THE CURRENT SUCCESSION LAW

The Twenty-Fifth Amendment provides valuable safeguards for ensuring continuity of government by requiring the President to nominate a Vice President in the event of a vacancy as well as providing procedures for responding to disabilities. However, the Amendment does not provide for every possible disability scenario, leaving certain succession contingencies unaddressed.¹⁴⁷ In addition, the Twenty-Fifth Amendment does not address

142. *Id.*

143. *Id.* apps. A.I, A.II.

144. Gerald Ford filled this vacancy under Section 2 of the Twenty-Fifth Amendment. *See supra* Part IV.C.3.

145. Nelson Rockefeller filled this vacancy under Section 2 of the Twenty-Fifth Amendment. *See supra* Part IV.C.4.

146. *See infra* Part VI.

147. The drafters of the Twenty-Fifth Amendment intentionally declined to provide for every conceivable succession contingency that could arise, primarily to ensure that the Amendment would pass both houses of Congress and be ratified by the necessary three-fourths of the state legislatures. It was believed at the time that an amendment providing for every possible contingency would be too complex and therefore unlikely to survive the difficult ratification process. Included were solutions to the problems identified by history.

Election Day scenarios relevant to the succession discussion.¹⁴⁸ Professor Akhil Reed Amar has written several articles detailing gaps in current succession law.¹⁴⁹

Most potential problems result from the Twenty-Fifth Amendment's emphasis on presidential, not vice presidential, succession. If the Vice President suffers an inability, current law offers no framework for determining that he is disabled. Further, if the Vice Presidency is vacant, or if the Vice President is disabled, the Section 4 procedures used to declare the President disabled are unavailable. Section 4 requires that 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" must declare the President disabled in the event the President does not do so himself.¹⁵⁰ Succession events occurring absent a functioning Vice President could create difficult scenarios, as outlined in Professor Amar's articles and explained below.¹⁵¹

A. Vice Presidential Disability Followed by Presidential Death

In this example, the Vice President is disabled before the President dies.¹⁵² Under current law, the disabled Vice President would become the new President.¹⁵³ After succession, no statutory or constitutional provision provides a mechanism by which to declare the new President disabled if he is unable to do so himself.¹⁵⁴ Under Section 4, the Vice President and the Cabinet, together, trigger the inability determination in the event the President fails to do so voluntarily under Section 3.¹⁵⁵ After the disabled Vice President automatically succeeds to the Presidency under Section 1, it is impossible to declare him disabled under the Twenty-Fifth Amendment because there is no Vice President to trigger the Amendment.

B. Concurrent Vice Presidential and Presidential Disability

In this example, the Vice President is comatose, and the President becomes disabled, but does not die, as the result of either a terrorist attack

See supra notes 1, 95–97 and accompanying text; *infra* note 166 and accompanying text; *see also supra* Part IV.A.

148. For example, under current law the result is unclear if a presidential candidate were to die or become disabled either on the eve of Election Day, or after Election Day but before the Electoral College meets, or after it meets and before Congress declares the electoral votes. *See* John D. Feerick, *The Electoral College—Why It Ought to Be Abolished*, 37 *FORDHAM L. REV.* 1, 23–24 (1968); *see also* Akhil Reed Amar, *Applications and Implications of the Twenty-Fifth Amendment*, 47 *HOUS. L. REV.* 1, 7–12 (2010).

149. *See, e.g.*, Amar, *supra* note 148; Akhil Reed Amar & Vikram David Amar, *Constitutional Accidents Waiting to Happen—Again: How We Can Address Tragedies Such as Political Assassinations and Electoral Terrorism*, *FINDLAW* (Sept. 6, 2002), <http://writ.lp.findlaw.com/amar/20020906.html>.

150. U.S. CONST. amend. XXV, § 4.

151. *See, e.g.*, Amar, *supra* note 148, at 21–23; Amar & Amar, *supra* note 149.

152. Amar & Amar, *supra* note 149.

153. U.S. CONST. amend. XXV, § 1.

154. Amar & Amar, *supra* note 149.

155. *Id.*

or natural causes.¹⁵⁶ Again, current law requires that, unless the President voluntarily steps down under Section 3, the Vice President and the Cabinet together determine presidential disability under Section 4 of the Twenty-Fifth Amendment. Therefore, if the Vice President himself is disabled and unable to initiate Section 4, the provisions of the Twenty-Fifth Amendment “freeze[] up, and there is no clearly established legal framework for determining presidential disability.”¹⁵⁷

C. Disabled President Followed by Disabled Acting President

Suppose a President becomes disabled and a fit Vice President assumes the role of Acting President, under either Section 3 or Section 4 of the Twenty-Fifth Amendment.¹⁵⁸ Then, if the Acting President later becomes disabled, there is no Vice President in place to initiate the disability determination process.¹⁵⁹

D. Vice Presidential Vacancy Scenarios

If the Vice President has died and has yet to be replaced under Section 2 of the Twenty-Fifth Amendment, or if the President has died and the former Vice President becomes President but has yet to install a new Vice President, there is once again no Vice President in either case to trigger the Twenty-Fifth Amendment disability determination process in the event the President is disabled.¹⁶⁰

E. A Response

Professor Amar is certainly correct in his assertion that the Twenty-Fifth Amendment does not address every conceivable succession contingency. However, as previously noted, the drafters of the Amendment declined to provide for every such contingency to ensure that the Amendment would pass both houses of Congress and proceed to ratification by the necessary three-fourths of state legislatures. It was believed at the time that an amendment providing for every possible scenario would be too complex and therefore unlikely to survive the difficult congressional and state ratification processes and that a perfect solution would probably never be found.¹⁶¹

Professor Amar is also correct in his observation that these continuity gaps result mainly from situations in which the nation lacks a functioning Vice President. The Amendment’s drafters understood this problem, and Section 2 of the Twenty-Fifth Amendment reflects the idea that the country should have a Vice President at all times. However, the confirmation

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *See supra* notes 1, 95–97 and accompanying text; *infra* note 166 and accompanying text; *see also supra* Part IV.A.

process required to fill a vice presidential vacancy takes time, and during this process there will inevitably be a period where the office is indeed vacant. For example, Congress took two months to confirm Vice President Ford, nominated by President Nixon after the resignation of Vice President Agnew.¹⁶² Following Nixon's resignation, Congress took four months to confirm President Ford's vice presidential nominee, Nelson Rockefeller, under Section 2 of the Amendment.¹⁶³

To shorten the length of any vice presidential vacancy, the ABA recommended in 1974 the use of joint hearings by both houses of Congress to fill a vacancy under Section 2.¹⁶⁴ This recommendation was an attempt to ensure that any vacancy in the Vice Presidency would be short lived and reflected the ABA's opinion that it is critical that the nation have a Vice President at all times.

VI. ADDRESSING THESE GAPS: A VACANT VICE PRESIDENCY OR DISABLED OCCUPANT

The Twenty-Fifth Amendment did no more than (i) address serious issues of presidential inability created by the wording and implementation of the original succession provision and (ii) add a method for filling a vacancy in the Vice Presidency. The framers of the Amendment considered, but ultimately chose not to address, a number of additional succession areas—the likes of which continue to be the subject of lively debate among distinguished scholars.¹⁶⁵ These include such subjects as how to determine either a President's inability in the absence of an able Vice President or a Vice President's inability in general. As Lewis Powell, then President of the ABA, testified before the House Judiciary Committee in 1965: "It is not necessary . . . that we find a solution which is free from all reasonable objection. It is unlikely that such a solution will ever be found, as the problems are inherently complex and difficult."¹⁶⁶

Assuming a vacancy in the Vice Presidency at a time of presidential inability, I suggest that the President should not be impeded in turning over

162. See *supra* notes 127, 130–32 and accompanying text.

163. See *supra* notes 133–35 and accompanying text.

164. AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON ELECTION REFORM, REPORT AND RECOMMENDATION TO THE HOUSE OF DELEGATES (1974) (on file with the *Fordham Law Review*).

165. See, e.g., 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) (containing articles by William F. Baker, James E. Fleming, Edward Foley, Robert Gilbert, Joel K. Goldstein, and Rose McDermott as well the participation of other preeminent scholars like Akhil Reed Amar and historical figures such as Senator Birch Bayh, Fred Fielding, and Benton Becker).

166. 1965 House Hearing, *supra* note 91, at 225. The American Bar Association working group did, however, advance in its recommendations that in the event of a vacancy in the Vice Presidency, the person next in line of succession should act with the Cabinet in considering the inability of a President under Section 4 of the Amendment. This recommendation did not work its way into the Amendment. As written, the inability provisions of the Amendment are not available when there is no Vice President. See *supra* Part IV.A.

his powers and duties to the person next in line of succession, since it is clear from Article II that such an Officer only serves for the period of the inability. But with a legislative line of succession, it is hard to believe, but certainly possible, that a President of one political party would voluntarily turn over his powers and duties to a Speaker or President pro tempore of the other major party.¹⁶⁷ The more troublesome case occurs if the President refuses to step aside voluntarily when a substantial issue exists as to his inability. The procedures of Section 4, requiring a Vice President, are not available here.

The question then arises as to the role of the person next in line of succession, since the law contemplates his service as Acting President when the President is disabled, failing a Vice President.¹⁶⁸ It may be argued that the person who has the statutory duty to serve as President has the discretion to make the decision whether the circumstances justify his exercise of the powers of the Office of President. This officer acts under Congress' Article II power to establish a line of succession for the "Case of Removal, Death, Resignation or Inability, both of the President and Vice President," until the removal of the disability or the election of a new President.¹⁶⁹ The Twenty-Fifth Amendment did not change this power, except that by establishing a procedure for filling a vacancy in the Vice Presidency, it limited the circumstances under which the succession statute might be used.¹⁷⁰

The suggestion I advance as to the powers and duties of the potential successor is in line with the well-established legal principle concerning contingent grants of power. Indeed, this principle undergirded the adoption

167. This very issue was the subject of at least two episodes of the television program "The West Wing." See *The West Wing: The Dogs of War* (NBC television broadcast Oct. 1, 2003); *The West Wing: 7A WF 83429* (NBC television broadcast Sept. 24, 2003).

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

169. U.S. CONST. art. II, § 1, cl. 6.

170. This subject was part of a telephone conversation I had, as a representative of the ABA, with Representative Charles M. Mathias, another member of the House Judiciary Committee, on April 9, 1965, concerning the relationship between the Vice Presidential Vacancy provision of the Amendment and Congress's power under Article II, which prompted a follow up letter stating as follows:

As I indicated, I do not believe that there is any conflict between this provision and that part of the succession provision now in the Constitution which gives Congress the power to appoint a successor in the case where there is neither a President nor Vice-President. The latter provision would remain intact should the Judiciary Committee's proposal pass the Congress. Section 2 is operative only when there is a vacancy in Vice-President. The last part of Article II, Section 1, clause 6, is operative only when there is a vacancy in *both* the presidency and vice-presidency, in which case Congress can declare who shall act as president. Under Section 2 of the proposal such person would have the power to fill the vacancy in the vice-presidency. Since the Committee's proposal does not deal with simultaneous vacancies in the offices of President and Vice-President, there is no need to include in the proposal the existing provision which gives Congress the power to establish a line of succession.

Letter from John D. Feerick to Representative Charles Mathias, U.S. House of Representatives (Apr. 9, 1965) (on file with the *Fordham Law Review*).

by three presidential administrations of the four letter agreements between Presidents and Vice Presidents discussed earlier.¹⁷¹ Of course, the Twenty-Fifth Amendment superseded these agreements and limited the discretion of the Vice President by requiring concurrence in any disability decision by a majority of the Cabinet or “such other body as Congress may by law provide.”¹⁷² It did not address the role of the person next in the line of succession, however.

Without a Vice President, some of the procedures of the Twenty-Fifth Amendment are unavailable, opening the possibility of using the contingent grant of power theory as legal support for allowing the person next in the line of succession to declare a President’s disability. I recognize that if he acted alone, he would have a power greater than that of the Vice President in similar circumstances, leading to the question of whether Congress might be able to restrain that power by requiring consultation with and concurrence by the President’s Cabinet, as would have had to be done by the Vice President.

This question involves an analysis of the reach of the Article II power given to Congress to declare what Officer shall act as President in a case of death, removal, resignation, or inability. Does Article II enable Congress to provide guidance to the successor it designates for service as Acting President in an inability situation? Does the Necessary and Proper Clause of Article I, Section 8 offer additional help? It states that Congress may make “all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”¹⁷³ It would be quite compatible with the Twenty-Fifth Amendment were Congress to legislate that the person next in line of succession must seek the concurrence of the Cabinet as well in a presidential inability scenario.

As to the application of the above proposal, how might it deal with an issue of double inability? The same process of allowing the next in line of succession to make the vice presidential determination could be appropriate as a necessary precondition to the decision of presidential inability in such a circumstance. The presidential successor would be Acting President after having resigned another office, as, for instance, the Speakership under the 1947 law. While these contingencies may appear remote, nonetheless the unforeseeable does occur, as in the 1970s when the country’s two highest officers resigned. These subjects are deserving of thorough examination by Congress, as Professor Amar and others have quite appropriately urged. A review of the law supporting the proposals advanced here follows.

171. *See supra* Part III.B.5.

172. U.S. CONST. amend. XXV, § 4.

173. *Id.* art. I, § 8, cl. 18.

A. *Contingent Grants of Power*

*Martin v. Mott*¹⁷⁴ held that the grantee of a contingent power determines whether the contingency has arisen.¹⁷⁵ Pursuant to statutory authority, President James Madison ordered several of the states to protect against the imminent danger of a British invasion during the War of 1812.¹⁷⁶ In compliance with the President's directive, Governor Daniel D. Tompkins of New York ordered militia companies to assemble in New York City.¹⁷⁷ Jacob Mott, a private in one of those companies, refused to obey the order, calling into question whether the President had the authority to judge and decide the existence of the exigency of an invasion.¹⁷⁸

The Supreme Court unanimously decided “that the authority to decide whether the exigency has arisen . . . belongs exclusively to the President, and that his decision is conclusive upon all other persons,” urging that “this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress.”¹⁷⁹ Writing for the Court, Justice Joseph Story explained that since the President had acted pursuant to a valid exercise of Congress's power, the President—in his role as Commander in Chief—had the sole authority to determine whether the exigency that necessitated his use of statutory authority actually existed.¹⁸⁰

The Court's holding in *Yamataya v. Fisher*¹⁸¹ could be analogized to support the contention that under the current legal framework, where there

174. 25 U.S. (12 Wheat.) 19 (1827).

175. *Id.* at 31–32 (“Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts.”).

176. *Id.* at 20. President Madison acted pursuant to the Enforcement Act of 1795, which provided:

“That whenever the United States shall be invaded, or be in imminent danger of invasion . . . it shall be lawful for the President of the United States to call forth such number of the militia of the state, or states, most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion, and to issue his orders for that purpose, to such officer or officers of the militia, as he shall think proper.”

Id. at 29 (quoting Militia Act of 1795, ch. 36, § 1, 1 Stat. 424).

177. *Id.* at 20.

178. *Id.* at 20–23, 28–29.

179. *Id.* at 30; *see also* *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928) (“Congress has found it frequently necessary to use officers of the Executive Branch, within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution”); *Prideaux v. Frohmiller*, 56 P.2d 628, 631 (Ariz. 1936) (“Whether an emergency or contingency exists authorizing the Governor to incur debts against the emergency fund under section 2620 is a question of fact, the ascertainment of which naturally devolves upon the Governor. The exercise of his discretion upon the facts should not be disturbed by the courts unless for a lack of power or an abuse of discretion.”); *Scotfield v. Perkerson*, 46 Ga. 325, 343 (1872) (“Where a duty is imposed upon an officer to be performed upon the happening of a contingency, and no mode is pointed out whereby he is to be officially informed that the contingency has happened, it necessarily is a part of the duty required of him to ascertain the happening of the contingency for himself.”).

180. *See Martin*, 25 U.S. (12 Wheat.) at 30–31.

181. 189 U.S. 86 (1903).

is a succession event not provided for by the Twenty-Fifth Amendment,¹⁸² the next person in line of succession under the 1947 law would be the sole judge of disability, and his judgment would not be subject to judicial review.¹⁸³ There, an immigration inspector ordered Yamataya deported under an immigration statute providing that aliens who are “paupers or persons likely to become a public charge” “shall be excluded from admission into the United States.”¹⁸⁴ Yamataya contested her deportation order, contending she was deprived of her liberty without due process of law because she had not been given any notice or opportunity to be heard in the proceeding in which her right to liberty was tried.¹⁸⁵

The Court held that decisions of administrative or executive officers acting under their delegated powers constituted due process of law and were not subject to judicial review, stating where a “statute gives discretionary power to an officer . . . he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or controvert the sufficiency of the evidence on which he acted.”¹⁸⁶

Recent case law supports the same principles. *Utah Ass’n of Counties v. Bush*¹⁸⁷ concerned the designation of 1.7 million acres of federal land as a national monument pursuant to the Antiquities Act of 1906.¹⁸⁸ The Act gave the President the authority, “in his discretion, to establish as national monuments ‘objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States.’”¹⁸⁹ The action against the President alleged that his designations violated the Act by not pertaining to “objects of scientific or historic value.”¹⁹⁰ The Court noted that the plaintiffs sought an interpretation of the Act requiring the kind of extensive judicial review long foreclosed by precedent.¹⁹¹ The Court cited *Martin* for the principle that the grantee of a contingent power decides when the contingency has arisen, adding that “[a] grant of discretion to the President to make particular judgments forecloses judicial review of the substance of those judgments altogether.”¹⁹²

Article II’s Succession Clause, of course, does not explicitly grant the next in line a discretionary power to decide inability. However, as suggested by the case law, a person granted power in certain contingencies is implicitly given the discretionary power to decide whether or not the contingency has arisen.¹⁹³ Further, as the 1947 Act mentions no person or

182. For example, if there is an issue regarding the President’s inability and there is no functioning Vice President to initiate Section 4.

183. *See id.* at 98; *see also infra* note 192 and accompanying text.

184. *Id.* at 94–95 (quoting Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084).

185. *Id.* at 88–89.

186. *Id.* at 98.

187. 316 F. Supp. 2d 1172 (D. Utah 2004).

188. *Id.* at 1176.

189. *Id.* at 1177–78 (quoting Antiquities Act of 1906, 16 U.S.C. § 431 (2006)).

190. *Id.* at 1185.

191. *Id.*

192. *Id.*

193. SILVA, *supra* note 21, at 101; *see also supra* notes 174–80 and accompanying text.

entity, either explicitly or implicitly, other than the successor as holding the succession power, then in circumstances where procedures of the Twenty-Fifth Amendment are unavailable, the “officer” designated by law to act as President under the 1947 Act is granted the sole discretion to determine whether an inability exists.

B. The Ability of Congress To Legislate

The landmark decision of *McCulloch v. Maryland*¹⁹⁴ analyzed the extent of Congress’ power under the Constitution’s Necessary and Proper Clause.¹⁹⁵ There, the Court decided whether Congress had the power to charter a bank, and central to this issue was the Court’s interpretation of the Clause.¹⁹⁶ The Court held that Congress could use the Necessary and Proper Clause to create a bank, even though the Constitution did not explicitly grant the power to Congress, reasoning that the word “necessary” does not refer to the only way of doing something, and does not mean “absolutely necessary,” but rather applies to various procedures for implementing all constitutionally established powers.¹⁹⁷ Chief Justice John Marshall further explained, “The clause is placed among the powers of Congress, not among the limitations on those powers.”¹⁹⁸ Later in *Kansas v. Colorado*,¹⁹⁹ the Supreme Court was careful to note that the Clause “is not the delegation of a new and independent power, but simply provision for making effective the powers theretofore mentioned.”²⁰⁰

The Constitution provides that Congress has the power to declare what officer shall act as President in the event of a double vacancy or double disability.²⁰¹ A federal statute providing for procedures to determine disability in the event of a double vacancy arguably would be within the scope of the power granted to Congress under this provision. Such a statute would be a necessary and proper means of exercising the power given to Congress under Article II to provide a line of succession in the case of a double vacancy or disability. It would not appear to grant a new and independent power to Congress, only a measure to ensure the legitimate end of providing for a successor beyond the Vice President in circumstances where additional process is deemed necessary as an effective use of the power.

194. 17 U.S. (4 Wheat.) 316 (1819).

195. *Id.* at 411–22.

196. *Id.* at 400–01.

197. *Id.* at 421 (“We admit . . . that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”).

198. *Id.* at 419.

199. 206 U.S. 46 (1907).

200. *Id.* at 88; *see also* Brownell, Jr., *supra* note 38, at 206.

201. U.S. CONST. art. II, § 1, cl. 6.

Further support that Congress may have the ability to legislate beyond simply declaring who may act as President in the event of a double vacancy or inability can be found in the 1947 succession statute itself. The current succession statute does more than merely state a line of succession beyond the Vice President, additionally instructing that: (i) if a Cabinet member becomes Acting President, he only serves until a qualified and prior-entitled House Speaker or President pro tempore “bumps” him, becoming the new Acting President;²⁰² (ii) either the House Speaker or President pro tempore must resign from his respective post before becoming Acting President;²⁰³ (iii) any officers under “impeachment by the House of Representatives at the time the powers and duties of the office of the President [would] devolve upon them” are ineligible to act as President.²⁰⁴ By providing these guidelines, the 1947 Act supports an expansive view of Congress’s power in double vacancy scenarios. Also to be noted is the provision of federal law requiring a presidential or vice presidential resignation to be in writing and filed with the Secretary of State.²⁰⁵

VII. BEYOND THE VICE PRESIDENCY: LEGISLATIVE OFFICERS IN THE LINE OF SUCCESSION AND SPECIAL ELECTIONS

One of the few certainties regarding the scope of Congress’s power in dealing with presidential succession is its ability to provide for cases of a double vacancy or inability, “declaring what Officer shall then act as President.”²⁰⁶ However, even this seemingly simple provision has not been free from controversy.

The current succession statute provides that the Speaker of the House and the President pro tempore of the Senate are in the line of succession following the Vice President.²⁰⁷ The designation of these legislative officers in the line has come under attack, both from legal and policy standpoints.

In my earlier writings I made suggestions with respect to the line of succession, expressing a preference for a Cabinet line, as in the law of 1886,²⁰⁸ based on these legal and policy considerations. In addition, I proposed that the Cabinet line of succession be extended to include persons in widely separated parts of the country, “since all of those persons who are presently in the line of succession spend much time in Washington, D.C., the whole line could be wiped out in a nuclear attack on that city.”²⁰⁹ Similarly, I offered reflections with respect to the period extending from the conclusion of the nominating conventions to Inauguration Day, believing that the existence of political party procedures minimized some of these

202. 3 U.S.C. § 19(d)(2) (2006).

203. *Id.* § 19(d)(3).

204. *Id.* § 19(e).

205. *Id.* § 20.

206. U.S. CONST. art. II, § 1, cl. 6.

207. 3 U.S.C. § 19(a), (b).

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

209. FEERICK, *supra* note 23, at 275.

threat areas and that Congress had the power to change the date of the election.²¹⁰

From a legal standpoint, many believe that the present law is unconstitutional on several grounds.²¹¹ First, there is a serious question as to whether the House Speaker and President pro tempore are “Officers” of the United States as defined by the Constitution. Professor Silva argued that “the Constitution does not contemplate the presiding legislative officers as officers of the United States”, and that this view is “supported by all the commentators.”²¹² Professor Amar writes, “[T]here are compelling reasons to think that the current succession statute is itself unconstitutional,” and “Congress in 1947 unconstitutionally and unwisely switched away from Cabinet succession by putting congressional barons—the Speaker of the House and the President pro tempore of the Senate—first in line, ahead of the Secretaries of State and Defense.”²¹³ Professor Amar also questions the constitutionality of the Act’s “bumping” provision:

[T]he Act’s bumping provision, Section 19 (d)(2), constitutes an independent violation of the Succession Clause, which says that the “Officer” named by Congress shall “act as President . . . until the [presidential or vice presidential] Disability be removed, or a President shall be elected.” Section 19 (d)(2) instead says, in effect, that the successor officer shall act as President *until some other suitor wants the job*. Bumping weakens the Presidency itself and increases instability and uncertainty at the very moment when the nation is most in need of tranquility.²¹⁴

Additionally, in his article for this publication, Professor Joel K. Goldstein discusses in detail an analysis as to whether or not legislative officers in the line of succession would be unconstitutional, arguing that textual and originalist arguments have proven inconclusive as to this question.²¹⁵

A serious question undoubtedly exists regarding whether legislative leaders are “Officers” as intended by the Constitution. Still, the Constitution is not without its ambiguities in this area. In analyzing these legal considerations it may be helpful to examine the succession provisions of the original thirteen colonies and states to understand potentially the intentions of the Constitution’s drafters.²¹⁶

Colonial provisions, as well as those of early state constitutions, indicate that legislative succession was sometimes considered in filling a vacancy in the office of the executive. New York, for example, ran the line of

210. *See id.* at 270–75.

211. For a detailed discussion of whether the Speaker and President pro tempore are “officers” in a constitutional sense, see Amar, *supra* note 148, at 9, 22–24, 27–29; Ruth C. Silva, *The Presidential Succession Act of 1947*, 47 MICH. L. REV. 451, 457–75 (1949).

212. Silva, *supra* note 211, at 463–64.

213. Amar, *supra* note 148, at 9.

214. *Id.* at 31.

215. Joel K. Goldstein, *Taking from the 25th Amendment: Lessons in Ensuring Presidential Continuity*, 79 FORDHAM L. REV. 959, 1022 (2010).

216. FEERICK, *supra* note 23, at 37.

succession first to a lieutenant governor, followed by the President pro tempore of the Senate;²¹⁷ while Delaware and North Carolina's line of succession included the speaker of the lower house.²¹⁸ These states' succession provisions, drafted not long before the United States Constitution, could support an argument that legislative succession was in fact within the contemplation and experience of the Constitution's Framers.

While the question of whether the Constitution contemplated legislative leaders as "Officers" is a difficult one, I would accept these legal risks if I thought the policy reasons for excluding legislators from the line of succession were not compelling. First, the experience of House Speakers and Presidents pro tempore are almost strictly legislative in nature, and these congressional leaders may lack the executive skill required for the nation's chief executive.²¹⁹ As Professor Bruce A. Ackerman adds, while the Speaker of the House is typically a seasoned politician, this is not true of the President pro tempore of the Senate, which is "an honorific position that, for example, was held by Strom Thurmond into his nineties."²²⁰ The central figures in today's Senate are the majority and minority leaders, but it is the President pro tempore, rather than these individuals, who is in the line of succession under the current statute.²²¹

Professor Silva advanced a second policy consideration for removing legislative officers from the succession statute, noting that members of Congress are elected locally. Therefore, they are not chosen for their knowledge of national issues or their conception of a national vision.²²² Professor Silva argued for an executive line of succession, reasoning that "a Cabinet member can better be depended on to continue the policy" of the administration and is more likely to lead in "harmony with popular government" than a succeeding legislative officer.²²³

I believe the principal reason for removing legislative officers from the line of succession is to ensure continuity of policy and administration at a time of crisis—an objective that cannot be ensured with legislative officers in the line. Our history demonstrates it is by no means remote to have a

217. N.Y. CONST. of 1777, art XXI, reprinted in 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2623, 2633 (Francis Newton Thorpe ed., 1909) ("[W]henver the government shall be administered by the lieutenant-governor, or he shall be unable to attend as president of the senate, the senators shall have the power to elect one of their own members to the office of president of the senate, which he shall exercise *pro hac vice*. And if, during such vacancy of the office of governor, the lieutenant-governor shall be impeached, displaced, resign, die, or be absent from the State, the president of the senate shall, in like manner as the lieutenant-governor, administer the government, until others shall be elected by the suffrage of the people, at the succeeding election.").

218. FEERICK, *supra* note 23, at 37–38. For a more detailed discussion on succession provisions in the colonies and early state constitutions, see chapter three of *id.*

219. *Id.* at 266.

220. BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM 157 (2006).

221. *Id.*

222. SILVA, *supra* note 21, at 158.

223. *Id.*

President and Vice President of one party and a Congress dominated by another.²²⁴ As Professor Goldstein points out, “Since 1969, the President and Speaker of the House have come from opposite parties [in] twenty-eight of the forty-two years.”²²⁵ A quick shift in party control in the event of a double vacancy will not provide the necessary stability in what would, in all likelihood, be a time of crisis, if not trauma. Appointed Cabinet members are more likely to see eye to eye with the President on issues of national policy, and therefore Cabinet succession will better maintain policy continuity should an emergency arise creating the need for succession beyond the Vice President.

The Continuity of Government Commission advanced proposals for succession beyond the Vice Presidency in a recent report.²²⁶ The Commission made the following recommendations:

A reordering of the Presidential line of succession to: Vice President, Secretary of State, Secretary of the Treasury, Secretary of Defense, Attorney General, followed by four or five newly appointed individuals residing outside of Washington, D.C. A dual vacancy in the presidency and vice presidency during the first two years of a term should trigger a special election within five months. The winner of the election would serve the remainder of the term and would displace the temporary successor.²²⁷

Additionally, the Commission suggested “removing Congressional leaders and acting secretaries from the line . . . to limit confusion over who can assume power.”²²⁸ The report also proposed “reducing the time between the casting and counting of electoral votes” and clarification by Congress of “procedures for incapacitation and . . . guidelines for continuity in the event of an attack at the presidential inauguration or during the time period before the inauguration.”²²⁹ It added: “If possible, the outgoing president should appoint some or all of the incoming president’s cabinet nominees prior to the inauguration to ensure individuals will remain in the line of succession.”²³⁰

Two aspects of these proposals on which I have written and offered views relate to the Electoral College system, whose abolition I favor,²³¹ and a special election for a new President and Vice President in the event of a double vacancy, which I do not favor.

224. See, e.g., FEERICK, *supra* note 23, app. E (listing numerous occasions during which either the Speaker of the House of Representatives or President pro tempore of the Senate, or both, were from a different party than the President). Most recently, Democratic Speaker Nancy Pelosi served under Republican President George W. Bush.

225. Goldstein, *supra* note 215, at [+65].

226. CONTINUITY OF GOV’T COMM’N, PRESERVING OUR INSTITUTIONS: THE CONTINUITY OF THE PRESIDENCY (Second Report 2009), available at http://www.brookings.edu/~media/Files/rc/reports/2009/06_continuity_of_government/06_continuity_of_government.pdf.

227. *Id.* at 68.

228. *Id.*

229. *Id.*

230. *Id.*

231. For a detailed discussion of the electoral college, see Feerick, *supra* note 148.

A special election in the event of a double vacancy was part of the 1792 Succession Law,²³² and words to permit it were included in the law of 1886.²³³ As I have written previously, “It seems to have been assumed during the debates that if there were such an election, the new President would have to serve for a full four-year term on the theory that this is the only term referred to in the Constitution for a President.”²³⁴

The subject of a special election was considered but rejected in the debates leading to the adoption of the 1947 succession statute. In particular, one of the main architects of the law expressed “strong reservations about the constitutionality of a special election law.”²³⁵ The resignations of President Nixon and Vice President Agnew led to a flurry of proposals for a special election in the event of a double vacancy or a single vacancy in the office of Vice President.²³⁶ These proposals were considered in the review of the first implementations of Section 2 of the Twenty-Fifth Amendment.²³⁷ The congressional review at the time found that the Amendment, in providing for a replacement Vice President, had functioned well in the most difficult of circumstances.²³⁸ The best feature of Section 2, in my opinion, is its assurance of stability and continuity in what otherwise might be a double vacancy were the Vice Presidency left vacant after the death, resignation, or removal of a President or of a Vice President.

Turning to the viability of a special election in the event of double vacancies in the offices of President and Vice President, it is an interesting idea clouded by uncertainty and controversy. The practice would raise serious questions after simultaneous vacancies regarding the legitimacy of such a means of transferring presidential power. One issue involves the nature of the specially-elected President and Vice President’s term. While the Constitution only provides for a four-year term for an elected President and Vice President commencing January 20, it is not entirely free from doubt whether a special election would be for four years or for the duration of the existing term, which was the basis of the proposal made and rejected in 1947. While there is appeal to the notion of a special election in the

232. Act of Mar. 1, 1792, ch. 8, § 10, 1 Stat. 239, 240 (repealed 1886) (“That whenever the offices of President and Vice President shall both become vacant, the Secretary of State shall forthwith . . . specify[] that electors of the President of the United States shall be appointed or chosen in the several states . . .”).

233. Act of Jan. 19, 1886, ch. 4, § 1, 24 Stat. 1 (repealed 1947) (listing officers who could act as President in a double vacancy until “the disability of the President or Vice-President is removed or a President shall be elected”).

234. FEERICK, *supra* note 23, at 146; *see also* Charles S. Hamlin, *The Presidential Succession Act of 1886*, 18 HARV. L. REV. 182, 183 (1905).

235. FEERICK, *supra* note 65, at 225–26.

236. *See, e.g., id.* at 216–17 (describing Senator John O. Pastore’s 1973 proposed constitutional amendment regarding special elections).

237. *See generally* 1975 Senate Hearing, *supra* note 140.

238. *See id.* at 15, 34–35.

event of a double vacancy, I suggest that succession stability is better served by the present system.²³⁹

Finally, I note that I supervised a special clinical seminar on presidential succession at the Fordham University School of Law in the fall of 2010, along with my esteemed colleagues Dora Galacatos and Nicole Gordon. The students in the seminar advanced proposals to fill gaps or make improvements in the current scheme for presidential succession. Recognizing the practical difficulties of removing legislative officers entirely from the line of succession, the students studied whether there should be a different line of succession only in the case of temporary presidential inability (and the Office of the Vice President is vacant), preserving the current line of succession for filling vacancies caused by death, resignation, or removal. The students also noted the difficulties, practical and otherwise, of having governors, ambassadors, or former presidents in the line of succession. They considered whether keeping acting secretaries in the line of succession gives the country greater protection, from a rule of law perspective, by including these fifteen individuals in an extended line in case of mass tragedy. Among other topics, they also explored the practical alternatives available to the Executive Branch in the absence of legislation to correct existing gaps.

CONCLUSION

The ambiguities of the Succession Clause have created complex questions during difficult moments in the nation's history. The Twenty-Fifth Amendment has been successful in answering many of these uncertainties. It is now clear that in cases of removal, resignation, or death of the President, the Vice President succeeds to the Office of the Presidency for the remainder of the term. In cases of inability, the Vice President does not succeed to the Office of the Presidency, but rather acts as President for the duration of the President's inability. When there is a functioning Vice President in place, the Amendment answers with certainty the question of who is to determine when presidential inability exists and establishes procedures for doing so. Further, the Amendment requires the President to fill a vice presidential vacancy in the event one arises, creating further stability in the presidential succession process by helping to ensure that a Vice President will be in place to initiate Sections 3 and 4 of the Amendment should the need surface.

The Amendment, however, does not address and provide for every conceivable succession scenario, as was understood at the time of its adoption. In particular, in situations where the Vice Presidency is vacant (or the Vice President is disabled) and the President is disabled but has not declared himself to be under Section 3, what happens is not entirely clear.

I agree with a number of well-known scholars that the person granted certain powers should an emergency arise is the one to decide whether or

239. For a more detailed discussion on this subject, see FEERICK, *supra* note 65, at 220–27.

not the emergency has arisen. Therefore, the Speaker of the House would be the person to make the disability determination in the event no Vice President could do so. However, there is no current law in place to provide procedures and safeguards to ensure that the Speaker (or next in line) does not abuse this power (such as the Twenty-Fifth Amendment's requirement that the Vice President has supporting opinion from a majority of the Cabinet). I believe a good case can be made that Congress has the power to create such a law.

Prior to the Twenty-Fifth Amendment, Congress probably had no power to legislate on presidential inability so long as there was a functioning Vice President in place. The Amendment now makes clear the procedure for determining inability when there is a functioning Vice President. However, Congress may have lawmaking power in the event of a double vacancy or double disability. If so, Congress should consider legislation establishing procedures for assisting the person next in line to reach a determination of a President's inability. Any statute should provide safeguards to promote public confidence and to ensure that the next in line does not abuse his power in declaring a presidential disability, such as a requirement that a majority of the Cabinet (or other body provided for by Congress by law) agree with the next in line's assessment. Further, any future statutes dealing with succession should consider the constitutional issues and potential policy consequences of including legislative officers in the line of succession. Finally, while a special election in the event of a double vacancy raises appealing prospects, such an election would be clouded by difficult questions, both from legal and policy standpoints.