Living Dangerously: The Uncertainties of Presidential Succession and Disability

A DISSERTATION

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Living Dangerously: The Uncertainties of Presidential Succession and Disability

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This dissertation examines previous instances of presidential disability and succession, and the historical implications of each case. It also evaluates congressional responses to these crises. Prior to 1967, there were several critical changes to the line of succession, such as the Presidential Succession Act of 1947, moving the line back to Congress. These events are fully evaluated to determine why the glaring problems associated with presidential disability were not addressed.

From there, it examines the 25th Amendment to determine what factors prompted Congress to act after years of ignoring the problem. By exploring the legislative history of the amendment, it highlights the political and constitutional obstacles previous reforms faced, and how such complex issues impacted the process. The issues that prevented previous attempts at reform -- especially, the role of the vice president and the location of the line of succession after it -- were resolved in a relatively short period of time following the Kennedy assassination. This dissertation critically evaluates why such comprehensive reforms were ultimately successful at that time in history.

Finally, this work examines the suitability of disability and succession guidelines in a post-9/11 world. After highlighting the dangerous flaws currently in place, such as an ill-conceived legislative line of succession, it concludes by proposing recommendations to address these flaws. These changes are urgently required in order to ensure stability for our nation’s highest office.
This dissertation by James Ronan fulfills the dissertation requirement for the doctoral degree in Politics approved by John Kenneth White, Ph.D., as Director, and by Phillip Henderson, Ph.D., and Matthew Green, Ph.D., as Readers.

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Introduction
History has a way of repeating itself, and this is never more evident than when it comes to the issue of presidential disability and succession. Imagine the President of the United States is shot by a deranged gunman just a few miles from the White House. Although the president survives the attack, he is seriously wounded and requires immediate medical care. Although no one is quite sure how bad the injuries are, it quickly becomes clear the president is unable to discharge the duties of his office. Since this news would obviously cause panic, the decision is made to conceal the president’s true condition.

This strategy necessitates that misleading information be disseminated to the American people at a time when their president is critically ill. At this point, the role of president is being performed by a team of advisors and Cabinet officials, none of whom were elected to their positions. This scenario occurred following the shooting of President James A. Garfield in 1881. However, it also occurred following the shooting of President Ronald Reagan, a century later.

The Framers did a remarkable job of drafting a broadly worded document that allows for interpretation in several areas. The benefit of this feature is that it enables the Constitution to endure, despite unimaginable changes in society. The downside is that it presents an opportunity for confusion in a time of crisis.

The most infamous example of constitutional confusion occurred following the Election of 1800. The lack of guidance concerning the Electoral College selection of a president and vice president threatened a nation still in its infancy, and was remedied by the creation of the 12th Amendment four years later. While Congress should be praised for responding to a national crisis, a reactive strategy to constitutional uncertainties is inherently flawed. The enormous
danger of this strategy was never more obvious than when it came to the issue of presidential
disability and succession.

The issue was considered by the Framers in the form of a question raised by John
Dickinson of Delaware in 1787. Unfortunately, an answer would not be provided during
Dickinson’s lifetime, or for another two centuries. During this time period, the nation repeatedly
came within a single heartbeat of disaster. Along with providing a fascinating series of “what if”
questions, a larger, more profound mystery emerges: why did no one act? The answer to this
question is a combination of fear, uncertainty and, most prominently, politics.

The first two components of the answer are not surprising given the gravity of the issue.
When dealing with the removal of the elected president from office, careful deliberation is
certainly a beneficial attribute. Unfortunately, political concerns repeatedly dominated the
thinking of members of both the executive and legislative branches, often placing the nation in
great danger. What makes this trend so alarming is that the impact is still being felt in 2013.

Although these decisions can be characterized as political in nature, they were also very
personal. The desire to portray the commander-in-chief as healthy, vigorous, and fully in
command is not a recent phenomenon; in fact, it began with our nation’s first president. And as a
study of subsequent office holders will clearly show, the desire to control public opinion was the
impetus in how the president’s health was conveyed, or more accurately, hidden, from the nation.

These repeated instances of concealing the president’s health are not merely historical
tales. They also hindered efforts to address the situation prior to it endangering the nation. For
example, had there been full disclosure in the cases of George Washington and James Madison,
it is likely action would have occurred much sooner. Additionally, if the true health of Woodrow Wilson or Franklin Roosevelt been widely known in the 1950s, guidelines may have already been in place when the problem again arose during the Eisenhower Administration. This strategy of hiding the president’s health did more than simply deceive the public, it endangered the nation.

Despite the culpability of numerous presidents and their advisors, the blame for ignoring the problem cannot be placed solely on the executive branch. The Constitution charges the legislative branch with remedying the disability and succession problem. However, in spite of repeated brushes with disaster, Congress failed to take substantial action on several occasions. And when they did act, the results left a great deal to be desired.

In all, Congress passed three Presidential Succession Acts. The first Act in 1792 established a line of succession, but was heavily influenced by political concerns and ignored the issue of disability altogether. The second Act in 1886 created a logical succession line, but again ignored the disability issue. Unfortunately, the last Succession Act in 1947 not only ignored the disability issue, it reverted to a succession line for which logic is sorely lacking. This succession line is still in place as of this writing.

Occasionally, members of both Houses attempted to draw attention to the issue, only to see their concerns pushed aside in favor of what was deemed more important business. Ultimately, it would take the passage of one-hundred and seventy-four years before Congress approved legislation that addressed all the components of the disability and succession problem. This legislation would ultimately become the Twenty-Fifth Amendment to the Constitution.
Without question, the drafters of this Amendment deserve enormous praise. Their work ensured that by February 1967, guidelines were in place to deal with both a disabled president who acknowledged an ailment, as well as one who refused to admit to any illness. And while the ill-conceived line of succession remained, supporters argued that the provision allowing for the replacement of a vice president rendered such a concern moot. But while this may seem to be the end of a prolonged saga, it was in fact merely the beginning of another chapter, one in which politics would play an even larger role.

The first evidence of political influence occurred with the selections of Gerald Ford and Nelson Rockefeller as vice president under Section Two of the Amendment. While it was assumed partisan considerations would play a role in the process, the evidence clearly shows political concerns dictated the selections of each man. And while the argument can be made that the backdrop of Watergate makes these cases unique, I intend to show how they are actually harbingers for the future.

The second instance was a textbook case of political considerations superseding the nation’s best interest, and occurred following the attempt on President Reagan’s life in March 1981. Although the 25th Amendment provides a mechanism for temporarily transferring power, utilizing such a remedy is still left to the president and those around him. And in this case, as with many of Reagan’s predecessors, personal and political concerns ruled the day. Additionally, even with media coverage far more comprehensive than in previous cases, it is clear the public was misled about Reagan’s condition. This is also a case that could easily be repeated.
Admittedly, the argument could be made that despite the danger of these instances of disability, they are now confined to the pages of history. However, this contention not only ignores what these events can tell us about the future, it also overlooks a number of disturbing flaws in our current guidelines. And as I will show, these flaws represent a serious threat to our nation.

The 25th Amendment was created at a time when an enemy attack against the United States was confined to one plausible scenario: a nuclear exchange with the Soviet Union. Ironically, it was the collapse of the Soviet Union that allowed the current problems to grow, as the idea of a foreign attack on our federal leaders seemed implausible after 1991. Unfortunately, this scenario became very real on September 11, 2001. And while our nation has responded to those attacks with countless changes in strategy and security, these changes have ignored the issue of presidential succession.

Although history indicates that someone attempting to take the life of a president is more likely to be a lone gunman, this mindset ignores one very frightening difference. While a lone gunman seeks to kill one person, terrorist groups seek not only mass casualties, but also mass chaos. Therefore, when attempting to predict the ideal target for a terrorist attack, one needs to search for a location with a centralized population in which an attack would cause the most devastation to the national psyche. Unfortunately, all of our national leaders, and thus everyone who comprises the presidential line of succession, live and work in the most attractive terrorist target our nation has to offer.
While the death or incapacitation of everyone within the line of succession is obviously a worst case scenario, employing the current line is also a dangerous prospect. The inclusion of congressional leaders, a decision based solely on politics, significantly increases the potential for constitutional chaos. Although relatively ignored since the 25th Amendment was ratified, I plan to show how our current succession line is not only ill-conceived, but also a constitutional disaster waiting to happen. Fortunately, the remedies for many of these problems are simple. Unfortunately however, the prospects for proactive change are not good.

These dim prospects are best illustrated by tracing the history of presidential disability and succession from its origins, and this will be the focus of the next two chapters. In Chapter One, I will examine the scholarly attention that has been devoted to the issue, in hopes of understanding why attention has waned in recent years. Chapter Two will offer a thorough account of previous instances of disability and succession, as well as provide an in-depth analysis of how these cases endangered the nation.

The next two chapters will focus on the creation and invocations of the 25th Amendment. Chapter Three will look at the legislative history of the Amendment, including the opposition encountered within the halls of Congress. Next, Chapter Four will scrutinize the six invocations of the Amendment, in order to consider what these cases might be able to tell us about the future.

While the first four chapters focus on the past, the final three deal solely with current dangers. This shift in focus begins with Chapter Five, which details the numerous hazards associated with a legislative line of succession. Although the flaws in a legislative line are nothing new, the wide ranging threat of terrorism represents the newest twist in the complicated
tale of disability and succession. Since these threats represent a significant danger, Chapter Six is devoted entirely to highlighting the current flaws that require immediate repair. Finally, Chapter Seven provides a list of recommendations I believe are necessary to address the grave threats that are ignored by our current succession guidelines.

Much of this work is historical in nature. And while I sincerely hope the reader finds the tales of past presidents intriguing, it is important to remember the overarching trends that quickly emerge. First and foremost, presidents throughout history have acted to conceal their true medical conditions from the public, in an attempt to portray themselves as strong and in control. Although most of the presidents who undertook these actions held office in a different period of time, it is important to ask yourself if, in the age of political consultants and media narratives, such a trend likely to change.

The second theme is the ebb and flow of attention to the issue. When an instance of presidential disability made headlines, the calls for action in Congress were loud. However, as the days and weeks passed, this attention quickly disappeared. This trend is still very prominent, as evidence from the weeks and months after September 11th will show.

The final, and I believe most troubling theme, is the reactive nature of change. Aside from the Succession Act of 1792, any changes occurred only after a national crisis. This trend also includes the 25th Amendment, which occurred after Lyndon Johnson served without a vice president for nearly fourteen months. Given the dangerous threats that currently exist, change is desperately needed quickly. Sadly, the history of the issue makes such a prospect seem highly unlikely.
In spite of the much needed changes enacted by the 25\textsuperscript{th} Amendment, a number of significant dangers still exist. Some of these problems involve complex constitutional questions that are not easily resolved. Others are merely questions of location and common sense solutions in today’s world. What they all have in common is the immense danger they pose to the nation.
Chapter One

Literature Review
Ignoring the Problem

When it comes to the issue of presidential disability and succession, scholarly literature and Congress have observed similar patterns. In the one-hundred-seventy-eight years preceding passage of the 25th Amendment, this problem repeatedly threatened the stability of the nation. However, attention, both academic and public, was dictated by contemporary events. In other words, if the president was healthy, there was no problem. Subsequently, scholarly attention was severely limited.

One early example of academic attention comes from Charles S. Hamlin in a 1905 edition of the Harvard Law Review. His article, titled “The Presidential Succession Act of 1886,” details the constitutional origins of the issue and the problems that confronted both the Framers and Congress. Since the 1886 Act dealt mainly with reforming the Succession Act of 1792, Hamlin compares the two and expresses his concern that neither adequately accounts for certain potentialities, such as presidential disability. Unfortunately, Hamlin’s intriguing article failed to spur academic interest.

Another early work, Leonard Dinnerstein’s The Accession of John Tyler to the Presidency, provides a revealing look into the first instance of presidential death in office. Tyler’s decision to fully occupy the presidency following William Henry Harrison’s death established the model of vice presidential succession, and thus its history is remarkably important. Despite this event, the amount of attention devoted to Tyler’s Presidency has been limited. Therefore, Dinnerstein’s account of Tyler’s actions is invaluable in determining how

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Tyler was able to assume the presidency despite objections from many government officials, including the Cabinet.

Another event that remains largely ignored is the constitutional backdrop of the Lincoln assassination. Although a great deal has been written about the event itself, scholarly literature has overlooked a near brush with constitutional disaster. The plot of John Wilkes Booth and his co-conspirators called for the murder of not only Lincoln, but also Vice President Andrew Johnson and Secretary of State William Seward. Since Congress was not in session at the time, who would have become president had Booth and his accomplices succeeded in their plot remains a mystery. Considering the impact such an event would have produced in the days following the Civil War, this is an immensely rich area for academic research. Unfortunately, nearly all of the attention devoted to the Lincoln assassination has overlooked this area.

The shooting of President James Garfield in 1881, and his nearly three-month incapacitation, also failed to draw attention to the problem. As a result, the issue was overlooked throughout the remainder of the nineteenth and first half of the twentieth century’s. While this can partially be attributed to the state of political science as a discipline at the time, it also reflected the pattern of ignoring the problem until it reoccurred. Thus by the beginning of the 1950s, scholarly attention to the issue was essentially nonexistent.

**Calls for Reform**

The struggle to reverse this trend began in 1951 with Ruth Silva’s *Presidential Succession*. Silva focused on past instances of disability and succession and evaluated how they
could help lawmakers resolve the problem.³ This course of action was adopted not only by subsequent scholars, but by congressional aides who would later be charged with drafting legislation to resolve the issue. In this seminal work, Silva not only produced the framework for addressing the issue, she did so at a time when few realized the problem even existed.

Silva’s work was groundbreaking not merely for its impact on future research, but also due to its remarkable foresight. Written soon after passage of the Presidential Succession Act of 1947, Silva highlighted a problem that lacked relevance in light of recent events. During this time, attention was focused on establishing a functional line of succession, due to the danger of nuclear attack. Contingency planning for the worst of events now overshadowed common sense measures for those more likely to occur, such as the incapacitation of a commander-in-chief. By focusing attention on this potentiality, Silva was at the forefront of an issue that would gain national attention four years later.

Although lacking the prominence of Presidential Succession, Silva’s 1949 article for the Michigan Law Review also warrants attention. Titled “The Presidential Succession Act of 1947,” Silva explores the issue of legislative succession, an event made possible by the Act that placed the Speaker of the House and President Pro Tempore of the Senate next in line behind the Vice President.⁴ Drawing on the thoughts of the Framers and members of the first Congress, Silva presents the argument that legislative members were never envisioned as potential successors to the presidency. This view was in stark contrast to other government officials, specifically President Truman, who proposed the 1947 Act due to uneasiness at being able to

name his own successor, since the Secretary of State was then next in line. Ultimately, the Succession Act of 1947 would provide the framework for the line of succession established in the 25th Amendment.

Although President Truman and Congress may have felt the Succession Act of 1947 resolved the issue, Silva’s work was a desperately needed voice detailing the questions left unanswered. In 1964, once the immediate need for reform was realized, a number of scholars and legislators set to work on evaluating the history of the problem, in hopes of formulating a response. While their work and the proposals they called for varied greatly, the common thread in each study was that it grew from the work of Ruth Silva.

The Impact of the Kennedy Assassination

One of the obstacles to Silva’s earlier work was the hypothetical nature of the problem. This briefly changed between 1955 and 1958, when President Eisenhower suffered a heart attack, underwent surgery for a bowel obstruction, and suffered a stroke, all within a three-year span. Although Eisenhower’s illnesses attracted attention during his term, the election of John F. Kennedy, perceived to be the epitome of health, once again led to complacency. However, the issue again became one of pressing national concern following Kennedy’s assassination in November of 1963. In the wake of tragedy, academic attention to the issue was born.

The most notable of these works came from a man who would ultimately help frame the 25th Amendment to the Constitution, John Feerick. Published in 1965, From Failing Hands: The Story of Presidential Succession provides an in-depth account of presidential disability and
succession that remains unsurpassed nearly half a century later. Along with a compelling look at each case of disability, Feerick also relays the findings of a conference held by the American Bar Association in January of 1964. The ABA suggestions addressed many key components of the problem. Specifically, allowing a president to temporary remove himself from power, arbitrating a dispute concerning the president’s ability to serve, and filling a vacancy in the vice presidency.

The overall work of the American Bar Association deserves a great deal of praise, as they provided a non-partisan voice for an issue where personal and political ambitions were always a relevant factor. Additionally, the remarkable time frame in which the proposals emerged, just two months after Kennedy died, harnessed the national attention devoted to the issue. Finally, when other issues threatened to take precedence as time passed, Feerick and the Bar Association continued their vigilance, and thus should be recognized for their significant role in addressing a national problem.

Feerick’s strategy involved combining recent attention to the issue and its significant history in order to highlight the urgent need for reform. In Failing Hands, Feerick devotes particular attention to the incapacitations of Presidents Garfield in 1881, Woodrow Wilson in 1919 and Eisenhower in 1956 and 1957. By employing this method, Feerick was able to educate an audience that was well aware of the dangers posed by the Eisenhower and Kennedy examples, but largely unaware of how the problem was a recurring one. This helped strengthen the

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argument of the proponents of reform who could now cite varying examples of disability throughout history.

Just as Feerick worked relentlessly outside of Congress to raise awareness of the issue, Indiana Senator Birch Bayh was the lawmaker most responsible for its success inside the Capitol. Although the *Congressional Record* contains official accounts of drafting the 25th Amendment, Bayh’s 1968 book *One Heartbeat Away* best explains the differing viewpoints of lawmakers. Bayh’s story provides a detailed study into both the efforts that yielded the Amendment, and how such a problem was ignored by Congress for so long.\(^7\) As illustrated through Bayh’s experiences, the real dangers were not opposition to resolving the problem, but rather a deluge of proposals containing various lawmakers’ suggestions for reform.

Bayh’s work provides a blueprint for how the Senator was able to juggle the myriad of proposals from lawmakers, the ABA, scholars, and even former members of the executive branch. Although many suggestions were left out of the final legislation, some were combined or reworked to form the components of the 25th Amendment. Additionally, fears expressed by lawmakers that both the president and vice president would not be popularly elected, or that a president may be reluctant to admit to his own disability, would prove to be valid concerns in the future. This information remains particularly insightful to those attempting to analyze the Amendment and its potential shortcomings, many of which were raised during this time.

The most remarkable aspect of Bayh’s account is the impact of personal feelings on the process, particularly those of House Speaker John McCormack. Since the absence of a vice

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\(^7\) Birch Bayh, *One Heartbeat Away: Presidential Disability and Succession* (Indianapolis: Bobbs-Merrill, 1968).
president after Lyndon Johnson’s ascension placed McCormack next in line for the presidency, there were concerns that any reform may be seen as a vote of no confidence in the Speaker’s abilities. This is confirmed in Bayh’s account of a meeting with McCormack, in which the Speaker confirmed no reform legislation would pass the House until after the election of a new vice president in 1964. Remarkably, this mindset was also held by President Johnson, prompting Bayh to realize any reforms would have to wait.

Bayh’s account of uneasiness on the part of House members is not merely anecdotal, as he revealed later that fear of offending Speaker McCormack was the main reason the line of succession was left unchanged. Despite suggestions from many, including former Vice President Richard Nixon, that the line be altered to run through the Cabinet, a Senate proposal for such a change was ultimately removed in the House. Bayh attributes this decision to fears by House members rather than suitability. And since the congressional line of succession endures today, these accounts are just as important to fully understanding the 25th Amendment as any found within the Congressional Record.

Invocations

The ratification of the 25th Amendment in February of 1967 marked the end of not only ignoring the problem, but also a shift in the theme of academic research. While both Silva and Feerick presented historical examples as a way of calling for change, the attitude now shifted towards a wait and see approach. As a result, scholarly attention to the problem was again

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8 Bayh, One Heartbeat Away, 40.
dominated by complacency, though this time due to the erroneous belief that the problem had been resolved.

Ironically, the three invocations of the 25th Amendment during the mid-1970s went largely according to plan, despite the turbulent times in which they occurred. The selection of Gerald Ford as Vice President in October 1973, the first official invocation of the 25th Amendment, failed to present any issues for opponents of the legislation. Since Ford was nominated, vetted and ultimately confirmed by Congress in a relatively brief and uncontroversial manner, there was no surge in attention, thanks also to the attention directed towards Watergate. Additionally, when Ford ascended to the presidency in August of 1974, the first succession ordained by law and not merely the Tyler Precedent, the 25th Amendment was again invoked in a calm and orderly manner.

When President Ford selected Governor Nelson Rockefeller as his Vice President in September 1974, the process was again largely free from constitutional problems. While the fears that an unelected president and vice president could hold office now came to fruition, ironically, during the nation’s bicentennial, the manner in which these men were chosen had not produced cause for concern. Thus after a decade in existence and three invocations, the 25th Amendment offered little in terms of controversy.

However, the assassination attempt against President Reagan on March 30, 1981, marked another significant shift in scholarly attention. While the first three invocations of the 25th Amendment had been orderly, the aftermath of the Reagan shooting illustrated that no amount of planning can ensure calm in a time of crisis. The best account of these events in
relation to the 25th Amendment is Herbert Abrams 1992 work, "The President Has Been Shot": Confusion, Disability, and the 25th Amendment. As Abrams concludes, Section Three of the 25th Amendment should have been invoked, transferring power to Vice President George H.W. Bush, but was not due to a combination of factors. Among these was the desire to conceal Reagan’s health, a fear of appearing weak or disorganized to the world, and, most notably, a lack of knowledge concerning the guidelines of the 25th Amendment.9

Abrams’ work is not merely reflective, but meant to serve as a warning for future administrations. He reinforced this message in his 1993 article “Shielding the President from the Constitution: Disability and the 25th Amendment.” The article, along with “The President Has Been Shot,” offers proposals to avoid confusion in future instances of incapacitation. Specifically, Abrams recommends potential roles for the vice president, White House physicians, the Cabinet, and even the president’s family. Many of these recommendations resulted from admissions by those around Reagan that they were largely unaware of the components of the 25th Amendment and had not held any discussions of a potential invocation prior to the shooting.10

**Attempting to Predict the Future**

In spite of Abrams’ first rate account of the constitutional and political forces at play during the Reagan shooting, it should be noted that the author’s primary field is medicine. This is important to note since Abrams’ suggestions of including White House physicians in any

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determination of presidential disability introduced a new component. Presumably, the opinions of a medical professional would be extremely beneficial in any crisis, since these opinions would be without the unwanted influence of political factors. Also, unlike presidential advisors or Cabinet officials, physicians possess both experience and training that is intended to help them remain calm in a crisis. However, as even the best physician would admit, diagnosing and predicting a recovery time for any patient can be difficult, and thus the inclusion of a medical opinion may not always be a remedy for confusion.

Also in 1992, John Feerick published *The Twenty-Fifth Amendment: Its Complete History and Applications*. Here, Feerick responds to criticisms concerning the selection of a vice presidential replacement, the majority of which were predicated on the fact that neither Ford nor Rockefeller had been elected. He effectively rebuts these criticisms by arguing that even in the worst of circumstances, the Watergate scandal, the Amendment functioned properly.\(^\text{11}\) Additionally, Feerick confronts arguments for holding a special election in the case of a dual vacancy by pointing out that an election conducted in great haste presents the danger of a candidate not being properly vetted by the electorate. However, by utilizing the provisions of the 25\(^{\text{th}}\) Amendment, any vice presidential nominee would be vetted by both Congress and the press over a period of weeks or even months.

Feerick’s conclusion that the 25\(^{\text{th}}\) Amendment should remain unchanged is not surprising, yet his final argument is not merely based on a desire to validate his own efforts. His desire to leave the Amendment unchanged is based on the realization that it is not perfect, but that any

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alterations also possess dangers. Essentially, Feerick admits the guidelines he helped design are not flawless, but that there is no ideal remedy to a situation that encompasses unforeseen events and national emergencies. Thus Feerick concludes the 25th Amendment remains the best solution to a problem for which there is no ideal solution.

A Focus on Health

As the Twentieth Century neared its conclusion, the focus of what scant attention remained for the issue had again shifted. Following the end of the Cold War and the decline in fear of a nuclear attack, the notion of a foreign power removing the head of government drifted towards the unimaginable. Also, following President Reagan’s surgery for the removal of a cancerous polyp, no provisions of the 25th Amendment had been invoked since 1985. There was speculation a transfer of power may take place during surgical procedures performed on Presidents George H.W. Bush in 1989 and Bill Clinton in 1997, yet neither required anesthesia and thus no transfer was employed.

A monumental step towards focusing attention on the provisions of the 25th Amendment occurred in 1995 with the first meeting of the Working Group on Presidential Disability. Comprised of former members of the executive branch, as well as constitutional, legal and political scholars, the group held three meetings between January of 1995 and December of 1996, all aimed at reevaluating the 25th Amendment. The inner workings of the Commission are found in James Toole and Robert Joynt’s book, Presidential Disability: Papers, Discussions, and

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12 Feerick, The 25th Amendment, XV
Recommendations on the Twenty-Fifth Amendment and Issues of Inability and Disability in Presidents of the United States. While the collection of opinions is fascinating, the recommendations provided by the group consist of mainly cosmetic changes, such as suggestions that all incoming administrations establish guidelines for invocations prior to taking office.13

As the decade progressed, scholarship continued to focus almost solely on health concerns. In 1998, Robert Gilbert released his highly informative book, *The Mortal Presidency: Illness and Anguish in the White House*. Along with insightful accounts of how personal illnesses impacted the Wilson, Eisenhower and Reagan Administrations, Gilbert presents a well supported argument detailing how the rigors of the office make the occupant susceptible to illness.14 Released during the year long coverage of President Clinton’s affair with Monica Lewinsky, Gilbert’s argument was heavily supported by events of the time.

Another indication of the trend towards presidential health can be found in the book *Managing Crisis: Presidential Disability and the 25th Amendment*, this time edited by Robert Gilbert. The direction of this collection of essays is apparent in the table of contents, as five out of the eleven pieces are authored by medical doctors, including three former White House physicians. Despite this focus on the medical aspects of the 25th Amendment, Gilbert’s work also contained essays from two men at the forefront of the constitutional aspects of the problem, John Feerick and Birch Bayh.

Although each essay discusses differing components of the overall issue, the consensus argument was that a greater focus is required on the personal health care of the president. Specifically, the personal physician chosen by the president should serve as the lone public voice concerning any potential health issues the commander-in-chief may face. Additionally, those closest to the president, such as Cabinet members, advisors and even family members, must all be charged with at least casually monitoring the president’s health. It bears mentioning that the tone of each essay is towards unofficial improvements to the 25th Amendment. This represents an acceptance of the Amendment and its current components.

The final chapter in Managing Crisis deals with the 1988 report of the Miller Center Commission on Presidential Disability. This group, whose membership included former Eisenhower Attorney General Herbert Brownell, Birch Bayh, and former Chief Justice Warren Burger, was impaneled near the end of the Reagan Administration to suggest possible changes to the Amendment. Crafted nearly twelve years before Managing Crisis, the Commission’s recommendations are remarkably similar to those in the book, thus signifying the movement towards health concerns even before the Cold War’s conclusion. This trend is reinforced by the Commission’s ten recommendations, all of which deal with the president’s personal health and the manner in which it is either monitored or reported, in a nearly identical manner to those of the Working Group on Presidential Disability. The most telling recommendation concerning the legitimacy of the 25th Amendment can be found in the Commission’s third recommendation, which begins by stating that no further constitutional changes should be made.

Another component of both the Miller Center Commission and Working Group on Presidential Disability was a focus on the mental health of the commander-in-chief. The relatively recent focus on this aspect of presidential health owes itself to stories that have emerged concerning both substantiated and rumored incidents of mental impairment in the Oval Office. Rose McDermott’s work in this realm of presidential health is particularly enlightening, especially her 2007 book *Presidential Leadership, Illness and Decision Making*. The overarching message of McDermott’s studies of the Wilson, Franklin Roosevelt, Kennedy, Nixon and Reagan Administrations is that issues of mental impairment played a critical role in their decision making.\(^\text{16}\) The most alarming aspect of McDermott’s work pertains to the lack of public knowledge concerning the conditions of these and other presidents. Conditions that often remained hidden for decades following their presidencies.

Although it is widely assumed that the intense focus of modern media precludes a president from concealing of a physical illness or disability, there are no such safeguards against mental impairment. The inherent complexities of accurately diagnosing any instance of mental impairment, especially concerning the president, are detailed in another Robert Gilbert piece, “Presidential Disability and the Twenty-Fifth Amendment: The Difficulties Posed By Psychological Illness.” Gilbert focuses on the immense depression experienced by Franklin Pierce, Abraham Lincoln, and Calvin Coolidge following the deaths of their sons.\(^\text{17}\) In each case, personal tragedy doubtlessly influenced the decision making of these three men. However, these


cases also pose the question of how to properly deal with such cases, and Gilbert concludes that there is no guaranteed remedy.

One of Gilbert’s most insightful comments in this piece is his statement that psychiatry is perhaps more difficult than cardiology.\textsuperscript{18} Despite the remarkable evaluations of treatment, both McDermott and Gilbert are left to admit there is no definitive mechanism for dealing with problems of mental impairment in the future. Therefore, while future scholarship in this area may uncover unknown facts about past instances of executive mental impairment, we can assume none will present a definitive method for resolving them.

Given the contemporary state of affairs between 1985 and 2000, the trend towards medical issues is understandable. Improved relations with, and the eventual collapse of the Soviet Union, seemingly marked the end of international dangers towards the president. Additionally, the twelve years of the George H.W. Bush and Clinton Administrations were marked by two relatively healthy presidents. Following the election of George W. Bush in 2000, the conventional wisdom was that threats to our nation and its leaders would be confined to dealing with personal illnesses. Unfortunately, conventional wisdom would soon prove to be remarkably wrong.

\textbf{Disability and Succession in a Post 9/11 World}

Somewhat overlooked in the shocking horror of the September 11, 2001, attacks was the employment of presidential security measures that harkened back to the Cold War. Unnerved by

\textsuperscript{18} Gilbert, “Presidential Disability,” 878.
the attacks, the Secret Service decided to secure President Bush aboard Air Force One, and later, at an underground bunker built to withstand the effects of a nuclear attack.\(^{19}\) This return to strategies of the Cold War was indicative of the change in academic attention, in which the specter of terrorism reintroduced fears of an attack on our nation’s leaders. Even more distressing was the realization that the chaos and uncertainty that invariably accompany instances of executive disability are exactly what such terrorist groups sought to achieve.

Although the notion that an enemy would want to destroy the nation’s capital was a return to a Cold War mentality, the idea of a concentrated attack was not. Outdated scenarios were predicated on a nationwide strike, one in which Washington would experience a similar fate to other locations. However, after 9/11, scenarios now revolved around a concentrated strike on one city or location that may leave other locations unharmed. While the perpetrators of these attacks may be new, the methods for responding to such events had been formulated long before September 11, 2011.

An article by James Mann in the March, 2004, edition of *The Atlantic* provides a great deal of insight into the plans for keeping the government running during a nuclear attack. The plan devised by members of the Reagan Administration called for three teams of government officials to travel to different sections of the country in the event of a nuclear attack.\(^{20}\) Additionally, one member of each team would be a member of the Cabinet, ostensibly to take over in the event the first four persons in the line of succession were either dead or unable to


assume the presidency. Ironically, two men who took an active role in the formulation of these plans, Dick Cheney and Donald Rumsfeld, would find themselves at the center of the government’s reaction to the 9/11 attacks.

An eye-opening quote in “The Armageddon Plan” concerns the prospects for reconvening Congress following a devastating attack on Washington. Then Representative Dick Cheney admitted that planning for such a contingency was ignored for two reasons. One, the amount of time it would take to repopulate Congress, and two, because of the impact a new Congress could have on the plan.21 The rationale behind such a decision rests in the inevitable action Congress would take in electing its leadership. Subsequently, the election of a new Speaker of the House or President Pro Tempore of the Senate would allow these individuals to supersede the Cabinet officials who would have assumed the presidency under the plan. In other words, Congress was ignored because the prospects of them asserting their constitutional authority were deemed problematic.

Along these same lines, a March 3, 2007, Washington Post article by Norman Ornstein titled “A Better Way on Presidential Succession” offered two suggestions. Ornstein’s first suggestion, returning the line of succession to the Cabinet, added to the chorus of similar suggestions since 1947. However, his second suggestion highlighted the dangers of an attack on Washington, D.C., a danger Ornstein countered by proposing that the line of succession include members who did not reside in the nation’s capital.22 Although the Constitutional basis for such a

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21 James Mann, “The Armageddon Plan”.
measure is questionable, the practicality of such a model is obvious, since everyone in the current line of succession lives and works in a relatively concise area in and around Washington.

In a 2004 article quite similar to his *Washington Post* piece, Norman Ornstein includes a quote by Yale Law School Professor Akhil Amar, who calls the current succession law, “an accident waiting to happen.”23 Such a quote is well in line with Amar’s consistent objections to Congress’ inclusion in the line of succession, and which comprise his 1995 article, “Is the Presidential Succession Law Constitutional?” While Amar mentions the standard objections of partisanship and suitability to take over as president, his most insightful opposition comes from his claims that including members of Congress violates the separation of powers doctrine.24 This objection mirrors that of Ruth Silva more than fifty years earlier.

Despite the fact these two articles provide an amazing insight into the proactive planning necessary to combat future attacks, they also are indicative of the scant attention being paid to the issue. Just as in decades past, the passage of time and a string of healthy presidents have combined to diminish focus on such a vital issue of national security. Unfortunately, history has repeatedly shown that warnings and attempts at being proactive are severely limited in their abilities to attract attention. Therefore, the odds are unnervingly high that scholarly attention will continue to be limited until an event places the issue at the forefront of everyone’s mind. In other words, the problem will be ignored until it is too late.

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Conclusion

In December 2010, the *Fordham Law Review* published articles written by participants in the University’s symposium on presidential disability. The list of participants included John Feerick, Robert Gilbert, Rose McDermott and former Senator Birch Bayh. While the suggestions and comments of the participants were far from uniform, one overarching theme was that, while not perfect, the 25th Amendment had proven itself to be as close as we could expect to come.

Although these conclusions were remarkably similar to those of the Miller Commission in 1988 and the Working Group on Presidential Disability in 1997, there was one stark difference, the specter of terrorism. The removal of Congress from the line of succession, a recurring theme since the passage of the 25th Amendment, was once again advanced, but the amount of effort available for such a daunting task appears to be minimal. This pessimistic outlook is not due to a perceived lack of enthusiasm from the participants, but rather from the historical trends of both scholarly and public attention over the past century.

The concerns expressed by these authors often point to removing Congress from the line of succession as a remedy. Additionally, as detailed in Ornstein’s article, the proximity of the government officials to each other presents both a target for terrorists and a danger to the nation. The time to evaluate these changes is now, while such horrific scenarios are still the subject of conjecture, not after they are written in the pages of history.

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Chapter Two

Instances of Presidential Disability
The Framers Consideration

Although not remembered as one of the more prominent participants at the Constitutional Convention, Pennsylvania Delegate John Dickinson was the first to express concern over a topic that would perplex lawmakers for nearly two centuries. During discussions concerning the removal of a president from office, delegates debated the precise wording of the presidential succession clause. Ultimately, this would become Article II, Section I of the United States Constitution and read as follows:

> 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. ²⁶

While in later years legal scholars would find numerous shortcomings in the wording of this section, at the time it was taken to mean that when the president was removed from office, the vice president would then become president. This belief was confirmed by Alexander Hamilton who wrote in Federalist 68: “The other consideration is that the Vice-President may occasionally become a substitute for the President.” ²⁷ However, it was John Dickinson’s question on August 27, 1787, that foreshadowed the potential shortcomings of the clause when, regarding

²⁶ United States Constitution, Article II, Section I.
the last line of the section he asked, “What is the extent of the term ‘disability’ and who is to be the judge of it?”

While the final product left a great deal to be determined, the problem did receive additional attention during the convention. Alexander Hamilton offered a plan on June 18, 1787, that addressed a key issue concerning the succession power of the vice president, but which also ignored the question of disability. Hamilton’s plan stated:

“The President of the Senate shall be the Vice President of the United States. On the death, resignation, impeachment, removal from office, or absence from the United States of the president thereof, the Vice President shall exercise all the powers by this Constitution vested in the President, until another shall be appointed, or until he shall return within the United States, if his absence was with the consent of the Senate and Assembly.”

Although Hamilton’s proposal received little attention, a proposal by a Committee of Detail provided another insight into how the vice presidency was perceived. The Committee proposal contained the following provision: “In case of the President’s removal as aforesaid, death, resignation, or disability to discharge the powers and duties of his office, the President of the Senate shall exercise those powers and duties, until another President of the United States be chosen, or until the disability of the President be removed.”

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28 Feerick, *The Twenty-Fifth Amendment*, 3.
29 Feerick, *From Failing Hands*, 43.
30 Ibid, 43.
Hamilton’s, ignored the issue of disability, it did address the question of who should succeed the president in the event he was unable to fulfill his duties.

Ultimately, the issue was considered by the full delegation. Gouverneur Morris of Pennsylvania suggested that the Chief Justice of the Supreme Court, not the President of the Senate, should serve as a successor to the president.\footnote{James Madison, \textit{Notes of Debates in the Federal Convention of 1787} (New York: Norton and Company, 1987), 535.} James Madison of Virginia then suggested that since the proposal could result in the Senate delaying the instillation of a new president, power should “be administered by the persons comprising the Council to the President.”\footnote{Ibid, 535.} Finally, Hugh Williamson of North Carolina suggested that Congress be allowed to choose occasional successors, and that the overall issue be postponed for the moment.\footnote{Ibid, 536.} It was at this point that John Dickinson asked his profound question concerning disability, one that would remain unanswered for another one-hundred-seventy-eight years.

On September 7, the delegates returned to consideration of the vice presidency. Edmund Randolph of Virginia then offered a proposal stating: “The Legislature may declare by law what officer shall act as President in case of the death, resignation, or disability of the President and Vice-President; and such officer shall act accordingly until the time of electing a President shall arrive.”\footnote{Ibid, 594.} This proposal marked the first time a presidential line of succession was considered. However, just as the disability issue remained unaddressed when the Convention ended, so too did establishing a line of succession.
The next day, a committee was formed to draft a final proposal. The result ignored many of the critical questions that would continually plague constitutional scholars and government officials and instead established vague criteria concerning presidential succession. Most notably, the phrase “the Vice President shall exercise those powers and duties” was changed to read, “the same shall devolve on the Vice President.” Despite this ambiguity, the Constitution as a whole was approved nine days later.

Three critical questions, exactly what powers devolve to the vice president; does the vice president discharge presidential duties for the remainder of the elected term, and Dickinson’s question concerning disability, all cried out for clarification. However, the Constitution was ratified and ultimately George Washington and John Adams would become the first President and Vice President respectively. Given the lack of guidelines, had anything happened to Washington during his term in office, the results for the nation could have been catastrophic. And although it has been largely ignored by history, such a catastrophe very nearly occurred.

**George Washington’s Illnesses**

The impact of executive disability began with our nation’s first commander-in-chief. Having survived cases of smallpox and dysentery prior to the Revolutionary War, George Washington’s health was relatively good when he assumed office in 1789. However, during his eight years in office, Washington experienced two serious illnesses in which doctors felt death

was imminent.\textsuperscript{38} Given Washington’s vital role in both the creation and early operation of our federal government, the impact of his death is troubling to consider even today.

Washington’s first incapacitation occurred in June 1789, just three months into his presidency. Washington developed a very high fever, the cause of which was eventually attributed to a growth on his left thigh.\textsuperscript{39} Prior to the official diagnosis, Washington was treated by the some of the most prominent American physicians of the time, including Dr. Samuel Bard, who initially believed Washington had contracted anthrax.\textsuperscript{40} Just days after Washington fell ill Bard remarked that the infection was “so malignant as for several days to threaten mortification.”\textsuperscript{41}

Once Bard traced the cause of the fever to the president’s thigh growth, surgery was performed and the fever began to diminish.\textsuperscript{42} However, while the cause of the president’s illness had been removed relatively quickly, his recovery was much longer. From June 17, 1789, the date of surgery, until the end of August, Washington’s duties were confined mainly to responding to letters and occasionally seeing visitors, and such visitations were only weekly.\textsuperscript{43} One of Washington’s letters, dated July 3, 1789, offers a firsthand account of both his medical treatment and his condition during his convalescence:

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Ibid, 103.
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I have now the pleasure to inform you that my health is restored, but a feebleness still hangs upon me, and I am yet much incommode by the incision which was made in a very large and painful tumor on the protuberance of my thigh—this prevents me from walking or sitting; however the Physicians assure me that it has had a happy effect in removing my fever, and will tend very much to the establishment of my general health; it is in a fair way of healing, and time and patience only are wanting to remove this evil. I am able to take exercise in my coach, by having it so contrived, as to extend myself the full length of it.\(^{44}\) While the words of both Washington and his physicians display the severity of his illness, his condition was portrayed to the general public in far more encouraging terms.

Although there is no solid evidence of a plot to conceal Washington’s health, press accounts illustrate that those around him were at best anxious about revealing his true condition. An article in the *Massachusetts Centinel*, dated June 27, 1789, was aimed more at reducing public concern than relating the true condition of the president. The article stated:

“The public anxiety has been conspicuously apparent, from some accounts received from New-York, which have mentioned the indisposition of our beloved President:—that our information on this subject might be *authentic*, we have had recourse to the *best channels* for intelligence—and through them we learn:—that about the 16th inst. His Excellency was attacked with a slow fever, which continued on him for several days, and was at periods attended with some

alarm ing symptoms—but we are happy to add, he is now in a state of
CONVALESCENCE.—His Excellency was attended by the principal physicians
of New-York—and chains were extended across the streets, to prevent carriages
passing before his door.” 45

Even though the facts of the article are accurate, it is clear critical details concerning the
president’s health were not shared, especially its dangerous state at the onset. Additionally, a
June 22 article in the Philadelphia Packet and Daily Advertiser, published five days after the
surgery, stated: “that this indisposition will not prove other than incidental, and the cause be soon
removed.” 46

While Washington recovered, his official duties went unattended for a period of nearly
three months. This timeframe is constructed from the accounts of both Washington’s doctors and
the president himself, who wrote in a letter dated September 8, 1789:

“…After the paroxysm had passed I had no conception of being confined to a
lying posture on one side six weeks—and that I should feel the remains of it for
more than twelve—The part affected is now reduced to the size of a barley corn,
and by Saturday next (which will complete the thirteenth week) I expect it will be
skinned over.” 47

45 James Guba and Philander Chase, “Anthrax and the President, 1789,” The Papers of George Washington
From all indications, during this time the presidency went unmanned, an event that seemingly occurred without public knowledge.

On May 9, 1790, less than a year later, Washington contracted what he termed in his diary a “bad cold.” The next day’s entry would be the last for more than six weeks, and Washington’s own words provide a glimpse into how his duties were discharged during this time. On June 24th, Washington wrote:

“A severe illness with which I was seized the 10th. of this Month and which left me in a convalescent state for several weeks after the violence of it had passed; & little inclination to do more than what duty to the public required at my hands occasioned the suspension of this Diary.”

While the lack of entries into a diary may not provide conclusive evidence of Washington’s precarious health, the words of his contemporaries illustrate how close our government came to catastrophe just a year into its existence.

On May 16th, in a letter to his daughter, Thomas Jefferson relayed a startling account of the president’s condition. Jefferson wrote: “On Monday last the President was taken with a peripneumony, of threatening appearance. Yesterday (which was the 5th. day) he was thought by the physicians to be dying.” Additionally, William Maclay, a Senator from Pennsylvania, entered the following account of Washington’s health in his journal the day before Jefferson’s

letter. Maclay reported on his visit to Washington’s bedside, stating: “Called to see the President. Every eye full of tears. His life despaired of. Dr. MacKnight told me he would trifle neither with his own character nor the public expectation; his danger was imminent, and every reason to expect that the event of his disorder would be unfortunate.”

Both Jefferson and Maclay’s words illustrate the dangerous state of Washington’s health. However, in a continuation of the strategy from his earlier illness, those closest to Washington took great care to keep his condition from the public. Three days after Washington fell ill his personal secretary, William Jackson, sent a letter to Clement Biddle, a friend of the presidents in Philadelphia. In the letter, Jackson enclosed an additional note, which he asked Biddle to deliver to Dr. John Jones, a respected physician in the city. Far from seeking medical advice, however, Jackson actually instituted the first attempt to conceal the health of a commander-in-chief.

In the letter, Jackson asked Dr. Jones to come to New York to attend to Washington. Along with this request, Jackson also conveyed his desire to keep the true nature of Dr. Jones’ trip a secret. Jackson wrote: “The Doctor's prudence will suggest the propriety of setting out as privately as possible; perhaps it may be well to assign a personal reason for visiting New York, or going into the country.” Even though news of the president’s health would begin to spread, as indicated by Jefferson and Maclay, Jackson’s actions serve as evidence that public awareness

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of Washington’s condition was something his inner circle tried to conceal. This marked the beginning of a strategy of concealing the president’s condition that would continue for centuries.

As with future instances of executive disability, the truth about the patient’s health would not be known for many years. The letters and diary entries of Washington’s aides, doctors, and political contemporaries would not be available for public consumption until well after their authors had died. However, while the prolonged gap in Washington’s diary provides an indication of trouble, the most profound statement on his condition comes from a letter to Spanish Diplomat Diego de Gardoqui on July 1, 1790. In one of the few messages written during his recovery, Washington wrote: “I thank you, Sir, for the interest you take in my welfare & personal happiness, and it is with pleasure I can inform you that I now enjoy a tolerable share of health after several weeks of severe illness which had nearly terminated my existence.”

The dangers of Washington’s two brushes with death are not confined to his prolonged incapacitation. Although this highlights the dangerous lack of guidelines available to a disabled commander-in-chief, and those around him, the more troubling notion involves the aftermath if Washington had not recovered. The guidelines for replacing a president who died in office were not only untried in 1790, they were essentially unwritten. The vague constitutional wording and lack of guidance from the Framers would prove to be a dilemma when the situation arose for the first time more than half a century later. Had Washington not recovered from his illnesses, it is easy to envision disastrous consequences.

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A commander-in-chief thought to be above partisan politics allowed our fledgling government to establish itself prior to the political battles that would engulf Washington’s successors. Had Washington died so early in his term, it is easy to envision debate concerning who would succeed him, and the amount of power such a replacement would possess. Ironically, this potential catastrophe was foreshadowed in a letter between two delegates to the Constitutional Convention, James Madison and Edmund Randolph, during Washington first illness in 1789. Madison wrote: “the President has been ill, but is now in a safe way. His fever terminated in an abscess which was itself alarming, but has been opened with success, and the alarm is now over. His death at the present moment would have brought on another crisis in our affairs.”

The Presidential Succession Act of 1792

In 1790, a House Committee produced a resolution calling for a line of presidential succession to proceed through the Cabinet. Reaction mirrored that of the Constitutional Convention, as alternatives that included everyone from congressional officials to the Chief Justice as possible presidential replacements emerged. As debate raged on, Representative Joshua Seney of Maryland voiced a dangerous opinion that would continue to reemerge when he announced the House had more important matters to deal with and advocated moving on to other

issues. Unfortunately, the House as a whole agreed, and the issue was abandoned without any resolution.

Nearly a year later, on November 15, 1791, the Senate took up the issue. Just two weeks later, the Senate passed a bill titled: “An act relative to the election of a President and Vice President of the United States, and declaring the officer who shall act as President in case of vacancies in the offices both of President and Vice President.”\textsuperscript{59} The Senate bill included a line of succession that ran through the legislative branch, placing the President Pro Tempore of the Senate and Speaker of the House as next in line behind the vice president. This new proposal for a legislative line of succession seemed to make little sense in terms of executive branch continuity, and sure enough, its origins grew from partisanship.

The original line of succession in the House would have placed Thomas Jefferson, then Secretary of State, just behind Vice President John Adams. Jefferson was not only the titular head of the Cabinet, but also the leader of the political opposition to the Federalists, who enjoyed a large majority in the Senate.\textsuperscript{60} Confronted with the prospect of placing Jefferson just two heartbeats from the presidency, Federalists in the Senate instead created the legislative line.\textsuperscript{61} Although this may seem to be merely a matter of political trivia, it is important to remember that this model remains in place today, and thus our current line of succession owes its origin not to national interest, but partisan politics.

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\item \textsuperscript{58} Feerick, \textit{From Failing Hands}, 58.
\item \textsuperscript{59} U.S. \textit{House Journal}. 1790. 1\textsuperscript{st} Cong., 2\textsuperscript{nd} Sess., 338.
\item \textsuperscript{61} Congressional Quarterly, March 1, 1946, 71.
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When the bill was sent to the House, members immediately raised objections to the inclusion of members of the legislative branch. Representatives Alexander White and William Giles joined in objection on the grounds that since neither the President of the Senate nor Speaker of the House was an “officer,” as defined by Article II, Section I, they were ineligible to serve as president. Elbridge Gerry argued that even though he felt both were officers in the constitutional sense, the entanglement of the executive and legislative branches was something that must be avoided. The valid questions raised by these men went unanswered in 1791, and arguably, to this day.

On January 2, 1792, the full House voted on separate amendments to remove the President Pro Tempore and Speaker of the House from the line of succession. Ironically, the amendment to remove the President of the Senate was narrowly defeated, while the amendment to remove the Speaker of the House was passed. Along with the outcome, the mindset of those who had drafted the Constitution also bares mentioning. In the House, James Madison, Hugh Williamson, Abraham Baldwin, and Thomas Fitzsimmons, all of whom served as delegates to the Convention, all voted to remove the two legislative officials from the line of succession.

Soon after this, the House removed both the Senate Pro Tempore and Speaker, replacing them with the Cabinet. The bill was passed and sent to the Senate, where it was promptly

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64 Ibid.
rejected and amended to once again include the two congressional leaders. Instead of fighting these actions, the House voted to approve the Senate bill, thus placing the line of succession in the legislative branch. Later, the bill would lose its much wordier title and become known simply as the Presidential Succession Act of 1792.

The Act also included provisions for filling dual vacancies via a special election, to be held at differing times depending on when the vacancies occurred. For instance, if dual vacancies occurred more than a year before the next scheduled election, each state would appoint Electors to fill the vacancies by the middle of that December. However, if the next scheduled election was less than a year away, no action would be taken and the President Pro Tempore would serve out the remainder of the term.

Along with the logistical concerns of holding a special election in what would invariably be a time of national crisis, the Act of 1792 ignored other critical issues. Just as the Constitutional Convention failed to respond to John Dickinson’s concerns, Congress failed to define the term disability, or establish any guidelines for dealing with such an event. Additionally, there was no consideration for a mechanism for filling a vacancy within the vice presidency, a recourse that would greatly diminish the likelihood of a legislative succession. Much like the drafters of the Constitution, lawmakers in 1792 would have to rely on good fortune to keep their oversights from becoming a disaster.

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69 Feerick, *The Twenty-Fifth Amendment*, 40.
James Madison

When James Madison assumed the presidency on March 4, 1809, a number of executive branch precedents had been established. However, the protocol for what to do in the event the commander-in-chief was unable to discharge his duties remained unknown. Additionally, hostilities with Great Britain had resulted in the War of 1812 as Madison’s first term was ending. Unlike the first battle with British forces, the American military was now a much better organized military force, one in which a clear chain of command was led by Madison. Yet when Madison fell gravely ill in June of 1813, just three months into his second term, the nation was again faced with the dangers of executive disability, now in a time of war.

Much like Washington, Madison’s illness began with a severe fever, which resulted in a periodic loss of consciousness in June 1813. Unlike Washington, however, Madison’s illness occurred at a time when his role as commander-in-chief required availability to military and government officials. Madison was forced to postpone a June 16 meeting with members of the Wells Committee, which had been formed to resolve a dispute between Madison and Congress over his appointment of Albert Gallatin as a peace negotiator. This partisan dispute would also prevent the Madison Administration from concealing the true nature of his condition.

When Madison sent a letter to again postpone the meeting, concern about his illness grew. On June 23, in an attempt to resolve the growing dispute over the Gallatin nomination,

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Madison proposed placing Secretary of State James Monroe in charge of the Administration’s response to the Wells Committee.\textsuperscript{72} This was the first proposal of a president transferring power to another government official due to incapacitation. Although Senator Wells declined the offer and proposed waiting until Madison recovered, Massachusetts Representative Daniel Webster was not as accommodating.

On June 21, just five days after Madison first postponed the meeting, Webster, armed with five congressional resolutions requiring Madison’s signature, went to the White House and demanded to see the president.\textsuperscript{73} After finding the president too ill to even read the resolutions, Webster departed, though only after stating that Madison “would find no relief from my prescription.”\textsuperscript{74} While Webster’s actions were insensitive, they were indicative of the increased partisan nature of the federal government, a factor that would emerge as a severe impediment against resolving the issue of presidential disability. Additionally, it also explains the desire to conceal Madison’s health for political reasons, in this case, not appearing weak in front of his political opponent.

By July 1, Madison had improved to the point where he could compose letters. Yet despite his improving health, Madison was again forced to postpone a meeting with the Committee on July 6.\textsuperscript{75} Days later, Gallatin’s nomination was rejected by the Senate. Following defeat of the nomination, Secretary of State Monroe drafted a letter to Gallatin in which he

\textsuperscript{72} Ibid.
\textsuperscript{73} Ibid; Howard, Mr. and Mrs. Madison’s War, 89.
\textsuperscript{74} Howard, Mr. and Mrs. Madison’s War, 90.
blamed the Senate for fighting to defeat the nomination while Madison “was confined with a bilious fever, which endangered his life.”

Although the nomination fight was over, Madison’s health problems continued. On July 29, more than a month after he fell ill, Dolley Madison wrote that she had attended to her husband’s bedside for nearly five weeks and that, “even now, I watch over him, as I would an infant, so precarious is his convalescence.” Madison acknowledged his prolonged recovery in an August 2 letter, stating: “I have just recovered strength enough, after a severe and tedious attack of bilious fever, to bear a journey to the mountains whither I am about setting out. The Physicians prescribe it as essential to my thorough recovery and security against a relapse at the present season.” While there is no fixed date for Madison’s recovery, it is safe to state that for at least six weeks, his health rendered him unable to discharge his duties.

Although Madison’s illness occurred following passage of the Presidential Succession Act of 1792, his death may still have proven disastrous. Vice President Elbridge Gerry celebrated his sixty-ninth birthday during Madison’s incapacitation, an advanced age given life expectancies of the time. Having served as vice president for only three months when Madison fell ill, Gerry would fail to serve even half of his elected term, dying on November 23, 1814. Thus had Gerry become president in the event Madison died, the presidency would have then

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78 The James Madison Papers Series: Letter to Albert Gallatin, August 2, 1813.
fallen to the President Pro Tempore of the Senate. However, there was no President Pro Tempore of the Senate at the time.

On March 24, 1812, William Crawford of Georgia was elected President Pro Tempore of the Senate, a position he held until he resigned to serve as Ambassador to France on March 23, 1813. The election of his successor, Joseph Varnum of Massachusetts, did not take place until December 6, 1813. Therefore, for a period of nearly nine months, the post was vacant. As chance would have it, it was during this time that Madison fell ill. Thus in June of 1813, a time in which an invasion of the nation’s capital was less than a year away, the presidential line of succession was comprised solely of the sixty-nine year old Elbridge Gerry.

Given the animosity over the Gallatin nomination, it is safe to assume the sudden shift from the vice president to the President Pro Tempore would have been a dramatic event. Additionally, since the Senate was in session at the time of Madison’s illness, it bares consideration of just how the Succession Act of 1792 would have been implemented. Specifically, would the presidency have passed to Speaker of the House Henry Clay, or would the Senate have attempted to fill the vacancy by quickly electing a new President Pro Tempore. Regardless of how congressional leaders would have reacted in this scenario, the fact is such a drastic change in leadership would have been problematic at any point in American history, much less a time of war.

Just as Washington’s illness drew attention to the need for a line of succession, Madison’s brush with death should have drawn attention to the inherent problems in the line of succession. Unfortunately, whether due to Madison’s recovery or the complications of resolving the problem, the issue was ignored. Thus, as America celebrated its first half century in existence, the nation had experienced three instances of executive disability. Due to the wording of Article II, Section I, and the dangers of a legislative line of succession, the avoidance of a constitutional crisis was due more to luck than forethought. That luck would run out before the nation celebrated its fifty-second anniversary.

**Death in Office**

After half a century of national elections, the selection of a vice presidential candidate was predicated on creating a geographic or political balance, not continuity in a time of crisis. This was never truer than when the Whig Party gathered to nominate William Henry Harrison, a native of Ohio, in 1840. In an effort to broaden the ticket’s appeal, Whigs sought to fill the second spot with a Southerner, a notion that ultimately led to the selection of Virginia Senator John Tyler.80 The lack of expectations for a vice presidential candidate were reflected in the fact that no one at the Convention even spoke with Tyler about his political views, or even ascertained whether he truly considered himself a member of the party.81

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81 Ibid, 89.
While Harrison’s electoral appeal centered on his renowned war record, he was sixty-nine years of age at his inauguration. Whether due to the relatively good health of the office’s previous occupants or merely hope, there is no indication that Harrison’s age was cause for concern amongst administration officials. This mindset was highlighted by Tyler’s decision to return to his farm near Williamsburg, Virginia, after the inauguration, where he remained for his brief term as Vice President. Thus during his Vice Presidential tenure, Tyler had no official meetings with Harrison, nor any other government official.

When Harrison’s health rapidly declined just three weeks into his term, the notion of preparing Tyler for the presidency, or even informing him of Harrison’s condition, was ignored. Although Harrison’s health was mentioned in the press, it was far worse than reported. As the month of April began, physicians attending to the president determined he was terminally ill, and thus the first instance of a presidential death in office was about to occur. However, while those around Harrison had time to prepare for his passing, Tyler relied on limited press accounts, the same as the average citizen.

Tyler remained unaware of Harrison’s grave condition until he received a letter from friend James Lyons, informing him that Harrison was near death on the evening of April 3, 1841. Assuming Tyler received and read the letter immediately, we can surmise that he was informed of Harrison’s condition at most a day before Harrison died on April 4. Historical
records show that the Chief Clerk of the State Department, Fletcher Webster, arrived at Tyler’s farm at dawn on April 5 to inform him Harrison was dead.\textsuperscript{87} Webster’s father, Secretary of State Daniel Webster, was the man who dispatched his son to inform Tyler, and the official who by virtue of his office was looked upon for leadership.\textsuperscript{88} Therefore, as Tyler set out for Washington D.C. on April 5\textsuperscript{th}, he was preparing to enter a city in which the question of who was running the government was very much open to debate.

**The Tyler Precedent**

John Tyler’s arrival in Washington, D.C. just two days later was a considerable feat given travel methods of the time, and very well may have altered the course of history. Although Tyler departed Williamsburg with the intention of assuming the presidency, his mindset was not shared by others in the nation’s capital, in particular members of the Cabinet. Since no president had ever died in office, there was no precedent for who was to assume the office, or even if it was an office one could assume. The only legal guidelines for such circumstances, Article II, Section I of the Constitution, were open to interpretation, in particular the phrase “the same shall devolve on the vice president.” Did this phrase enable the vice president to assume the presidency, or merely serve as a temporary caretaker of presidential duties, and if so, for how long?

As often happens in a case of constitutional interpretation, words were perceived differently. In John Tyler’s mind, Article II, Section I, combined with his vice presidential oath,

\textsuperscript{87} Crapol, *John Tyler: The Accidental President*, 8; Lyons and Shelley, “The Vice President Receives Bad News in Williamsburg,” 337.

permitted him to fully assume the presidency.\textsuperscript{89} Thus Tyler would become the nation’s tenth president and serve until Harrison’s term ended. Additionally, he would discharge all the same powers and duties just as if he had been elected to the office.

Unlike Tyler’s firm beliefs, members of the Cabinet were mired in a state of confusion. Although it was generally accepted that Daniel Webster was the de facto leader of the Cabinet, he was just as unsure of how to proceed as his colleagues. In hopes of securing some legal guidance, Webster contacted Supreme Court Clerk William Carroll on April 5 and asked him to contact Chief Justice Roger Taney to provide a definitive constitutional ruling. Carroll’s letter to Taney began by announcing he was writing "at the instance of Mr. Webster," then stated simply “that the Cabinet would be pleased to see and confer with you at this most interesting moment." This gave the impression they were seeking legal guidance rather than support for a decision they had already made.\textsuperscript{90} However, by trying to avoid the appearance of uncertainty, Webster in turn provided a way for Taney to avoid becoming entangled in the issue.

Taney’s response was equally brief and gave no indication of his views on the subject. Since the letter had come from the Clerk of the Supreme Court, Taney responded: “I do not suppose I could withpropriety come to Washington unless I am requested to do so by the Cabinet or by the Vice-President when he arrives.”\textsuperscript{91} Even though this did not close the door on input from Taney, it did place the Cabinet in a position of having to admit their uncertainty concerning the issue of succession. Additionally, while Taney’s personal views are absent in the

\textsuperscript{89} Dinnerstein, “The Accession of John Tyler,” 449.
\textsuperscript{90} Ibid, 448.
\textsuperscript{91} Norma Peterson, \textit{The Presidencies of William Henry Harrison and John Tyler} (Kansas: Univ. Press of Kansas, 1989), 47.
letter, it is clear he could have ruled on the issue if he wanted. Although nothing is certain, it is very likely that any decision from either Taney alone or the Supreme Court as a whole would have become the accepted law concerning vice presidential succession.  

The contrast between Tyler and the Cabinet in terms of certainty could not have been more apparent on April 6, 1841. As the Cabinet deliberated, Tyler arrived in Washington, D.C. and went immediately to Brown’s Hotel, where at noon he met with the Cabinet and William Cranch, Chief Justice of the Circuit Court for the District of Columbia. After asking each Cabinet member to remain in their positions, to which they agreed, he then asked Cranch to administer the presidential oath of office, in the presence of the Cabinet. After taking the same oath William Henry Harrison had sworn just thirty-two days earlier, Tyler then asked Cranch to release the following public statement concerning the events of the day:

I, William Cranch, chief judge of the circuit court of the District of Columbia, certify that the above named John Tyler personally appeared before me this day, and although he deems himself qualified to perform the duties and exercise the powers and office of President on the death of William Henry Harrison, late President of the United States, without any other oath than that which he has taken as Vice President, yet as doubts may arise, and for greater caution, took and subscribed the fore-going other [oath] before me.

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As a result of Tyler’s decisive actions, as well as indecisiveness on the part of the Cabinet, the precedent for vice presidential succession was established, one that would become known as The Tyler Precedent.

Even though John Tyler was now officially recognized as the nation’s tenth president, perception is often stronger than reality. The Cabinet Tyler inherited was comprised of members whose strong Whig views ran counter to their new boss. Although the Cabinet had been wracked by indecision following Harrison’s death, they became much more resolute following Tyler’s ascension to the presidency. Many also saw the manner in which he assumed office as a grab for power.

This view was apparent just hours after Tyler took the oath of office when he presided over his first Cabinet meeting. Secretary of State Webster began the meeting by informing Tyler of how Cabinet meetings had proceeded under Harrison, a model the Cabinet assumed would continue. Webster stated: “It was our custom in the Cabinet meetings of the deceased President that the President should preside over them. All measures whatever relating to the administration were obliged to be brought before the Cabinet, and their settlement was decided by the majority, each member of the Cabinet and the President having but one vote.” In other words, each

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95 Monroe, The Republican Vision of John Tyler, 81.
97 Oliver Chitwood, John Tyler: Champion of the Old South (American Political Biography Press, 1990), 269.
Cabinet member would seemingly possess the same power as Tyler, a proposition that would never have been delivered to a president whose legitimacy was unquestioned.

Much like his actions following Harrison’s death, what Tyler did next had repercussions far beyond 1841. Leaving no ambiguity as to his regard for Webster’s suggestions, Tyler responded:

“I beg your pardon, gentlemen; I am very glad to have in my Cabinet such able statesmen as you have proved yourselves to be. And I shall be pleased to avail myself of your counsel and advice. But I can never consent to being dictated to as to what I shall or shall not do. I, as President, shall be responsible for my administration. I hope to have your hearty co-operation in carrying out its measures. So long as you see fit to do this, I shall be glad to have you with me. When you think otherwise, your resignations will be accepted.”

Had Tyler acquiesced to the Cabinet’s vision of executive authority, the Tyler Precedent would undoubtedly have been much different. Since there were no constitutional grounds for denying Tyler the presidency, the sole hope of those who opposed Tyler’s ascension rested in the presumption that he would yield to others to define his role as president. However, Tyler’s decisive actions precluded the ideas of many within his own party and Cabinet who perceived Tyler as merely an agent for their wishes and firmly established the model of vice presidential succession.

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98 Chitwood, *John Tyler: Champion of the Old South*, 270.
While the Cabinet attempted to have their say on the matter, Congress was rendered silent until a special session was convened on May 31, 1841. The next day, a letter from Tyler was delivered in which he laid out his visions for his administration in a manner similar to other incoming presidents. The only real congressional opposition to Tyler’s ascendency that day came from Ohio Senator William Allen, who suggested Tyler be referred to as, “Vice President, on whom, by the death of the late President the powers and duties of the office of the President have devolved.” Senator Robert Walker of Mississippi countered with the argument that since Harrison had died and was not temporarily disabled Tyler was not merely acting as president, but had fully assumed the office. Following brief debate, Congress passed a resolution recognizing John Tyler as the tenth president of the United States on June 1, 1841, a move that bestowed legitimacy on both Tyler and the precedent that would carry his name.

Was The Tyler Precedent Legal?

Although Tyler’s actions would be viewed as proper today, the question remains as to whether his actions were constitutional. Several presidential scholars have argued that the vice president was never intended to serve as commander--in-chief. Wilfred Binkley called Tyler’s succession one of the major errors in constitutional history, contending that “no one was ever

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100 Feerick, The Twenty-Fifth Amendment, 7.
101 Feerick, The Twenty-Fifth Amendment, 8.
intended to be president who had not been elected to that office.”\textsuperscript{102} Additionally, Edward Corwin contended that the Framers clearly intended for the vice president to serve only as a temporary president in the event he was needed to perform such a duty, and should only become president if he were elected to the office.\textsuperscript{103} However, Leonard Dinnerstein counters that Tyler’s decision not to rely on members of his own party to direct his administration helped preserve the separation of power between the executive and legislative branches, without which the presidency itself would have been threatened. \textsuperscript{104}

The remainder of John Tyler’s Presidency is a fascinating political story. Angered by Tyler’s abandoning of Whig Party ideals, Tyler experienced not only the mass resignation of his Cabinet and congressional opposition, but was also expelled from the Whig party before his term ended in 1845.\textsuperscript{105} Following these events, it would seem logical that vice presidential candidates would have been chosen more carefully, since their ascendency to the presidency was now a possibility. However, Congress’ lack of attention was shared by the nation’s political parties.

**Succession by Precedent**

The nation would not have to wait long for evidence that the Tyler Precedent had become unwritten law. Less than a decade later, President Zachary Taylor died just over a year into his term. However, unlike Harrison’s death, there was no debate or attempt by other government

\textsuperscript{102} Wilfred E. Binkley, *The Man in the White House: His Powers and Duties* (Baltimore: Johns Hopkins Press, 1959), 268.


\textsuperscript{104} Dinnerstein, “The Accession of John Tyler,” 448.

\textsuperscript{105} Crapol, *John Tyler: The Accidental President*, 19.
officials to prevent Vice President Millard Fillmore from assuming the presidency. Yet despite the lack of political animosity concerning Fillmore’s succession, his subsequent actions presented another unforeseen consequence of vice presidential succession.

When Fillmore assumed office, debate over what became known as the Compromise of 1850 was raging. Disagreement over the admission of Missouri had resulted in a series of congressional bills that attempted to placate both sides of the slavery issue. While Taylor had announced his strong opposition to the bills, Fillmore had let it be known that he strongly supported the legislation. In fact, Fillmore had informed Taylor just prior to his death that if the Senate deadlocked, Fillmore would cast his tie-breaking vote in favor of passage.106

Fillmore’s assumption of the presidency and his stated support for the Compromise of 1850 resulted in a shifting of votes in Congress in favor of the measure.107 The stark change in positions between the Taylor and Fillmore Administrations illustrated a new danger to America’s political parties. Whereas the political views of a running-mate were previously deemed irrelevant, they were now just a heartbeat away from becoming national policy.108 Fillmore’s actions also reinforced the Tyler Precedent of a vice president assuming the full responsibilities and powers of the presidency.

Unlike the deaths of Harrison and Taylor, Abraham Lincoln’s death occurred not from illness, but assassination. The ascension of Vice President Andrew Johnson created a controversy

that had nothing to do with the legality of vice presidential succession, but everything to do with partisan politics. Johnson, a Southern Democrat, represented a shocking change in power to those who supported Lincoln. Despite this animosity, there was no real opposition to Johnson’s assuming the presidency, a further indication of the strength of the Tyler Precedent. However, while the impact of Lincoln’s assassination has been well documented, historians have largely overlooked another aspect.

Soon after Lincoln’s death, an investigation uncovered a plot of coordinated assassinations, aimed at Lincoln, Johnson, and Secretary of State William Seward.109 Although Seward was seriously wounded by his assailant, the man assigned to kill Johnson, failed to carry out his mission. Since Johnson escaped injury due merely to a change of heart by the potential assassin, the continuity of leadership was again ensured by mere luck, not forethought.110 Had Johnson suffered the same fate as Lincoln, there is no certainty as to who would have assumed the presidency.

Under the provisions of the 1792 Act, the line of succession would have led to the President Pro Tempore of the Senate, but only until an election could be held in December.111 Considering the nation had experienced the end of the Civil War and the assassination in less than a week, it is highly questionable whether the United States could have endured such a constitutional crisis. Additionally, the 1792 stipulations called for a national election for

110 Ibid, 206.
president just eight months later. In such an election, question about southern participation could easily have created even more peril for a government already in shambles.

Another Flaw is Discovered

Although such scenarios are thankfully left to the imagination, the impeachment trial of Andrew Johnson two years later was a dangerous reality. The influence of partisanship behind the efforts to impeach Johnson was underscored by the potential beneficiaries of his removal from office. Since there was no constitutional provision concerning the replacement of an absent vice president, Senate Pro Tempore Benjamin Wade stood next in line. Wade, a Republican, was also actively involved in the efforts to impeach Johnson. Had these efforts succeeded, they would also have elevated Wade to the presidency.

Wade’s participation in the Senate trial, along with his vote to convict Johnson, presented an obvious conflict of interest concerning the nation’s highest office. The inherent dangers were readily apparent throughout the proceedings, as Wade was widely known to have discussed potential Cabinet appointments with other Senators, in anticipation for his elevation to the presidency. For a nation whose government was based on the premise of checks and balances, this design was fatally flawed.

Garfield and the Introduction of Disability

Much like the Tyler Presidency, Chester A. Arthur’s term in office receives little mention in historical texts. Also like Tyler, Arthur found himself cast in a difficult position for which there was no precedent and no guidelines for action. When President James Garfield was shot on July 2, 1881, it began the forth instance of executive disability and succession. However, unlike the previous instances in which a president fell ill or was assassinated, Garfield survived, albeit in grave condition.\(^\text{114}\)

While the Tyler Precedent provided guidelines for what to do when a president died, there was no plan for when the president was alive, but clearly disabled. Adding to Vice President Arthur’s troubles were the widespread rumors that either he or his political associates had played a part in the assassination attempt. These rumors were spurred on by revelations that the shooter claimed to have performed the act to make Arthur president.\(^\text{115}\) These rumors contributed to Arthur’s fear of appearing to grab for power.

Arthur’s precarious position is reflected in his actions just after word of the shooting reached him in New York City. After conferring with political allies, several of whom quickly realized suspicion of their involvement was growing, Arthur decided against traveling to Washington, D.C. out of fear of appearing too eager to assume the presidency.\(^\text{116}\) This decision was reversed when the Cabinet requested he travel to the nation’s capitol, and he arrived early on

\(^{114}\) Kenneth D. Ackerman, *Dark Horse: The Surprise Election and Political Murder of President James A. Garfield* (Falls Church, Virginia: Viral History Press, 2011), 399.

\(^{115}\) Ibid, 397.

\(^{116}\) Ibid, 386.
the morning of July 3. 117 However, after arriving in Washington, Arthur would not meet with the ailing Garfield that day, or for the rest of Garfield’s life. Thus began a constitutionally precarious situation in which our government had no leadership for a period of eighty days.

One of the two major problems that confronted Arthur throughout Garfield’s incapacitation was a fear of appearing too eager to assume the office. Although the circumstances surrounding Garfield’s assassination were particularly problematic for Arthur, he would have found himself relegated to an impossible position regardless of how Garfield fell ill. The fear of being perceived as too eager prompted Arthur to err on the side of inactivity, so much so that he refused to perform any official tasks. 118 As a result, Arthur was inherently inclined to reject any attempts by the Cabinet or other government officials to allow him to even temporarily serve as president in Garfield’s absence.

The other problem dealt with guidance from either the Constitution or Congress, neither of which existed in 1881. While the Constitution allowed for the vice president to serve as president in the event the president was unable to perform his duties, there was no clarification for who was to make such a determination. Additionally, there were no procedures for the transfer of power. As for Congress, their only input on the matter remained the 1792 Succession Act, legislation that remained completely silent on the issue of disability or temporary assumption of power. Therefore, the only recourses available at the time were either for Garfield to resign or be impeached, neither of which appear to have been seriously considered.

117 Feerick, The Twenty-Fifth Amendment, 8.
118 Ackerman, Dark Horse, 421.
Garfield’s Cabinet did attempt to craft a resolution as Garfield’s incapacitation neared its second month. The Cabinet agreed that Arthur should be given the power to act as president, assuming that Garfield initiated the arrangement.\textsuperscript{119} While agreement on the constitutionality of Arthur serving in Garfield’s place was uniform amongst Cabinet members, the duration of his service was not. Records indicate the Cabinet was divided over the question of how long Arthur would serve, with some arguing it was only until Garfield recovered while others felt Arthur would serve the remainder of Garfield’s term.\textsuperscript{120} Since Congress was not scheduled to convene until December of 1881, the Cabinet was forced to rely on its own interpretation of the Constitution for guidance.

By September 3, two months after the shooting, the Cabinet finally arrived at a decision. They would present the problem to the incapacitated Garfield, along with their recommendations, in the hope that he would ask Arthur to serve.\textsuperscript{121} For his part, Arthur remained extremely reluctant to take part in any planning out of fear of seeming too eager, a fear that continued to dictate his actions.\textsuperscript{122} However, just as the Cabinet appeared ready to act, Garfield’s recovery suffered a setback, and the decision was made not to bother the ailing president with the matter.

When Garfield finally succumbed to his injuries on September 19, 1881, it marked the end of the nation’s first prolonged crisis with presidential disability. Unfortunately, the issue was

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\textsuperscript{119} Feerick, \textit{From Failing Hands}, 135.
\textsuperscript{120} Ibid, 136.
\textsuperscript{121} Ibid, 138.
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resolved only by Garfield’s death, and not the establishment of any precedents or guidelines for what to do in future cases. Arthur was immediately sworn in as president, again, based only on the Tyler Precedent, and served the remainder of Garfield’s term without a vice president. As a result, one person was once again both next in line for the presidency and a potential juror in the impeachment trial of the sitting president.

Although blame for the seeming indifference to such a significant question can be placed at the feet of the Framers, it is the congressional inaction that is most disturbing. Since the line of succession after the vice president is transferred to congressional leaders, the question arises of just how much desire Congress had to address the issue. Although it is not fair to explain the lack of attention solely by pointing to a personal desire for power, it cannot be ignored. Regardless of the reasons behind such inaction, the end result was a grave dereliction of duty on the part of the legislative branch, a dereliction which would persist well into the next century.

Confusion and Instability

Although Arthur’s inauguration marked the end of one constitutional dilemma, it was also the origin of another, as Congress was not scheduled to convene for nearly three months. As a result, the only two offices in the presidential line of succession, President Pro Tempore of the Senate and Speaker of the House, had not yet been filled.123 Had anything happened to President Arthur during this time, who would have assumed to the presidency remains a mystery.

Recognizing the flaws in the 1792 Act, Arthur acted quickly. On September 23, he drafted a proclamation that called for the Senate to convene on October 10 and select a President Pro Tempore.\(^{124}\) In a commendable act of forethought Arthur, then in New York City, had the proclamation mailed to the White House in case anything happened to him before he arrived in the nation’s capital. However, while this may have provided a mechanism by which a President Pro Tempore was selected, political conditions of the time served to highlight other flaws.

The partisan construction of the Senate in October 1881 was in flux. Originally, the Senate was evenly divided between Republicans and Democrats, but the resignations of New York Republicans Roscoe Conkling and Thomas Platt, and the death of Republican Ambrose Burnside of Rhode Island, gave the Democrats a three seat advantage. (Ironically, these resignations were prompted by an inter-party dispute that cast Garfield and Arthur on opposite sides, a factor which contributed to the conspiracy theories concerning Arthur’s involvement in the assassination.)\(^{125}\) Although three Republicans had been sent from New York and Rhode Island to fill these seats, Senate customs dictated that a President Pro Tempore was chosen prior to the seating of new members.\(^{126}\) Therefore, the election would take place with Democrats enjoying a three seat majority, a fact that insured the person next in line for the presidency would be of a different party than the Republican Arthur.

On October 10, 1881, the Senate convened and, despite Republican objections, selected Democrat Thomas Bayard of Delaware as Pro Tempore. However, two days later, after the three

\(^{124}\) Feerick, *From Failing Hands*, 130.
\(^{125}\) Ibid, 120.
\(^{126}\) Ibid, 131.
Republican Senators were sworn in, a proposal was made for David Davies of Illinois, an Independent, to be selected as Pro Tempore, a reflection of the divided nature of the time. As a result, Bayard’s tenure as next in line for the presidency lasted less than seventy-two hours, and a nation that had just witnessed a prolonged executive incapacitation now saw partisanship dictate who was next in line for the presidency.

While such an incident was ultimately nothing more than an obscure piece of Senate trivia, it represented the inherent danger of politics overruling judgment. By placing congressional officers in the line of succession, officers who could be selected and removed by a majority vote of their peers, the 1792 Act presented a grave danger to stability. As witnessed in October of 1881, majorities and personal views within Congress can change rapidly, and the selection of a Pro Tempore took on an entirely new meaning when it was realized he was now next in line for the presidency. Additionally, the question of respecting the will of the electorate was equally questionable, as first a Democrat, then an Independent, stood next in line to succeed a duly elected Republican. The need for action had never been clearer in the nation’s history, but change would have to wait another five years.

Arthur’s Calls for Action

Although Congress did not display a desire to remedy the situation, President Arthur sought change. On December 6, 1881, just after Congress convened, Arthur’s sent his annual message to Congress, a precursor to the modern day State of the Union Address. Arthur

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concluded his message by listing all of the problems associated with the issue of presidential disability, all of which he had experienced firsthand. In the most direct appeal from a commander-in-chief to resolve these issues until that point, Arthur wrote:

Questions which concern the very existence of the Government and the liberties of the people were suggested by the prolonged illness of the late President and his consequent incapacity to perform the functions of his office. It is provided by the second article of the Constitution, in the fifth clause of its first section, that "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."

What is the intendment of the Constitution in its specification of "inability to discharge the powers and duties of the said office" as one of the contingencies which calls the Vice-President to the exercise of Presidential functions? 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?
I cannot doubt that these important questions will receive your early and thoughtful consideration.¹²⁸

Unfortunately, the prediction at the end of Arthur’s message would quickly prove to be wishful thinking.

Arthur reiterated his desire for addressing the issue in his second message to Congress, though this time it was relegated to merely a sentence within a much longer letter. The next year represented Arthur’s final push for reform, as reflected in his 1883 message to Congress.

Returning to the prominence the issue possessed in his first message, Arthur wrote:

At the time when the present Executive entered upon his office his death, removal, resignation, or inability to discharge his duties would have left the Government without a constitutional head.

It is possible, of course, that a similar contingency may again arise unless the wisdom of Congress shall provide against its recurrence.

The Senate at its last session, after full consideration, passed an act relating to this subject, which will now, I trust, commend itself to the approval of both Houses of Congress.

The clause of the Constitution upon which must depend any law regulating the Presidential succession presents also for solution other questions of paramount importance.

These questions relate to the proper interpretation of the phrase "inability to discharge the powers and duties of said office," our organic law providing that when the President shall suffer from such inability the Presidential office shall devolve upon the Vice-President, who must himself under like circumstances give place to such officer as Congress may by law appoint to act as President.

I need not here set forth the numerous and interesting inquiries which are suggested by these words of the Constitution. They were fully stated in my first communication to Congress and have since been the subject of frequent deliberations in that body.
It is greatly to be hoped that these momentous questions will find speedy solution, lest emergencies may arise when longer delay will be impossible and any determination, albeit the wisest, may furnish cause for anxiety and alarm.\textsuperscript{129}

Arthur’s final message to Congress a year later illustrated his prediction that no action would be forthcoming, as he mentioned it only amongst a list of other concerns facing the Congress as he prepared to leave office.

Although the motivation behind this desire for reform is obvious given his experiences as Vice President, Arthur’s health as president may also have contributed to his diligence. Soon after taking office, Arthur was diagnosed with Bright’s disease, a kidney ailment that was considered fatal.\textsuperscript{130} Although there is no substantial evidence that Arthur experienced any prolonged incapacitation due to his condition, he was nonetheless aware of what his incapacitation or death would mean for the nation. Ultimately, Arthur would serve out his term and leave office in March of 1885, when a new president and vice president were inaugurated which, once again, seemingly ended the dangers of a legislative succession.

\textbf{The Presidential Succession Act of 1886}

As witnessed in past instances of both presidential disability and vice presidential vacancy, the election of a new presidential ticket ends calls for reform. This was no different in March of 1885 when Grover Cleveland and Thomas Hendricks were inaugurated as President.


\textsuperscript{130} Reeves, \textit{Gentleman Boss}, 317.
and Vice President respectively. However, this solution would prove to be short lived, as Hendricks died on November 25, 1885, just eight months into his term. Once again, the Pro Tempore of the Senate was placed a heartbeat away from the presidency, and, for the second time in four years, the only positions in the line of succession were vacant.

Much like Arthur responded to this potential crisis immediately after taking office, Cleveland quickly realized how important his well being was to the nation. Heeding the advice of friends, Cleveland decided not to attend Hendricks’ funeral in Indiana, since any travel would invariably subject him to the dangers of accident or assassination. Fortunately, Congress was scheduled to convene in less than two weeks, at which time they would elect a Pro Tempore and Speaker to serve in the line of succession. Once again, however, the Senate was controlled by a different party than the president.

On December 7, 1885, the Senate elected Ohio Republican John Sherman as Pro Tempore. However, while Republicans controlled the Senate, Democrats possessed a majority in the House, thus the post of Speaker went to Democrat John Carlisle of Kentucky. Therefore, in December of 1885, the presidential line of succession was comprised of a Democratic Cleveland, a Republican Sherman, and a Democratic Carlisle, ensuring that any elevation to the presidency would be accompanied by a drastic shift in political control. Additionally, the lack of a vice presidential replacement mechanism ensured that for a period of eight years, from March of 1881 until March of 1889, the office of the vice presidency would be staffed for merely fourteen months.

Feerick, From Failing Hands, 141.
Ibid, 141.
All of these factors combined to finally force congressional action. Even though no definitive action had been taken during Arthur’s Administration, the subject had received some attention in the Senate. In 1881, Senators Augustus Garland and George Hoar introduced bills that would have moved the line of succession back to the Cabinet, thus preventing the dangers of office vacancy.\footnote{Ibid, 142.} This legislation was sent to the Senate Judiciary Committee and received only scant debate over the next two years. Finally, in 1883, the bill altering the line of succession was passed by the Senate, but received no attention in the House of Representatives, and thus the drive for reform again stalled.

Following Hendricks’ death two years later, the calls for reform began anew. Cleveland’s first annual message to Congress, drafted just after Hendricks died, picked up the mantle of his predecessor by calling on Congress to reform a model that was proven once again to be broken. Cleveland stated:

The present condition of the law relating to the succession to the Presidency in the event of the death, disability, or removal of both the President and Vice-President is such as to require immediate amendment. This subject has repeatedly been considered by Congress, but no result has been reached. The recent lamentable death of the Vice-President, and vacancies at the same time in all other offices the incumbents of which might immediately exercise the functions of the presidential
office, has caused public anxiety and a just demand that a recurrence of such a condition of affairs should not be permitted.\textsuperscript{134}

Aided by Cleveland’s call for action and recent events, Senator Hoar reintroduced his line of succession bill and it was again passed by the Senate on December 17, 1885.\textsuperscript{135} Unlike previous attempts this legislation was quickly passed by the House, resulting in legislation being sent to President Cleveland that would finally reform the Succession Act of 1792.\textsuperscript{136}

The obvious reason for the relatively fast passage of the Act is that it only addressed the line of succession, ignoring questions of presidential disability and the opportunity to legitimize the Tyler Precedent.\textsuperscript{137} Responding to the dangers of placing positions that can occasionally be unoccupied in the line of succession, the 1886 Act elevated the Secretary of State to the position just behind the vice president, followed by subsequent Cabinet positions based on the year of their creation. The two main benefits of this reform were: (1), the guarantee that all positions contained in the line would be filled, regardless of whether or not Congress was in session and (2), ensuring the line of succession for the executive would remain within the executive branch.

Despite ignoring the problem of vice presidential absence and presidential disability, the intention of the 1886 Act was to resolve the flaws of the 1792 Act, and it did. One of the key provisions of the 1886 Act was the removal of the stipulation for a special election, a dangerous prospect following the assassination of President Lincoln in 1865, and one wrought with


\textsuperscript{135} Senate Journal. 48th Cong., 1st Sess., December 17, 1885, 242.

\textsuperscript{136} Feerick, From Failings Hands, 143.

\textsuperscript{137} Hamlin, “The Presidential Succession Act of 1886,” 183.
potential complications.\textsuperscript{138} Additionally, the theme of the Act bestowed an aura of legitimacy over the model of vice presidential succession that had already occurred four times, none of which had any constitutional or legal documentation as support, but which were now granted tacit congressional approval. Finally, the decision by Congress to remove itself from the line of presidential succession was a welcome ceding of power in light of the dangerous threat to the constitutional separation of powers that had taken place during the impeachment of Andrew Johnson.

\textbf{Concealing the President’s Health}

Ironically, the issue of presidential disability and succession throughout the first century of our national existence seemed to follow a pattern. The first instances dealt with temporary disability, the Washington and Madison examples, followed by issues of succession, specifically, the Tyler and Fillmore cases. Next, the dangers of assassination were discovered in the Lincoln and Garfield examples, the latter of which also began America’s experience with prolonged executive disability. The only event that had yet to play a prominent role in this profound constitutional drama was the possibility of a commander-in-chief concerning his illness from the nation. This would soon change.

The most memorable fact of Grover Cleveland’s time as president has traditionally been its non-consecutive timing. After being denied reelection in 1888, Cleveland was elected once again in 1892. However, years after Cleveland left office, details began to emerge about a secret

\textsuperscript{138} Ibid, 185.
operation the president had undergone just after beginning his second term, one in which doctors removed a cancerous tumor from the president’s mouth, along with a large portion of his jaw. This represented the first prolonged instance of a president and his advisors concealing a medical condition from the nation out of concern as to how the President would be perceived.

The origins of the decision to conceal Cleveland’s illness grew from the public perception of cancer in the early 1890s, specifically, that it was undoubtedly fatal. Perception, and the fact he was just two months into his term, prompted Cleveland and a small group of surgeons to devise a plan to remove the tumor without word leaking out to either the public or other government officials. The plan called for the team of surgeons to operate on Cleveland below deck on a friend’s yacht as it sailed along the coast of New York on July 1, 1893, under the guise of a planned fishing trip. As for the procedure itself, the president would be sedated with nitrous oxide and ether for the removal of the tumor and part of his jaw. Then, after a brief recovery period, a prosthetic jaw would be put in place to conceal the operation. Cleveland would then spend a few weeks recovering at his family’s summer house, returning to Washington in time for the congressional session.

The only thing more amazing than the intricate planning and execution of the plan is that it worked. Surgeons successfully removed the tumor and jaw bone, and then implanted the replacement jaw with virtually no complications. This was a remarkable feat given both the surgical practices of the time and the fact the procedure took place aboard a sea born yacht, thus

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140 Ibid, 53.
making it susceptible to both rough seas and other potential accidents. When rumors began to spread in the press that Cleveland’s was experiencing health problems they were quickly dismissed as lies by both the White House and the doctors who performed the operation. Eventually, Cleveland’s aides stated the president had undergone a tooth extraction, in a further attempt to explain away any lingering effects Cleveland displayed.141

Even though Cleveland’s incapacitation was limited to a few days of surgery and recovery, the potential for a constitutional crisis was obvious. The lengths to which Cleveland and those around him went to conceal his condition serve as strong evidence that informing other government officials or the nation would not have been their top priority had something gone wrong. Additionally, the distrust exhibited between Cleveland and Vice President Adlai Stevenson would have further complicated any potential transfer of power. Stevenson, like the rest of Cleveland’s Cabinet, remained unaware of the incident until accounts from surgeons began to emerge more than a decade later.142

While Cleveland’s medical crisis was not the first instance in which a president sought to withhold information about their private lives from the public, it was by far the most elaborate. From the beginning, the intricate planning of the entire affair was undertaken with the desired outcome of misleading the public and the press. Had the surgery not gone according to plan, or had the cancer in Cleveland’s jaw been worse than originally diagnosed, how Cleveland and his advisors would have proceeded remains a mystery. However, given their actions, full disclose seems unlikely.

141 Feerick, The Twenty-Fifth Amendment, 12.
142 Algeo, The President is a Sick Man, 110.
Although times have changed since Cleveland underwent his clandestine surgery, the factors that led to the conspiracy remain just as prominent today. First, Cleveland feared the perception of himself as a dying man, one that given the public perception of cancer at the time was a valid concern. Additionally, the timing of his illness, coupled with the grim prognosis, may well have led to calls for Cleveland to resign, or even face impeachment. Finally, the lack of a clearly defined recovery point for Cleveland served to prevent any consideration to transfer power to Vice President Stevenson. Public awareness of his condition would have made it very difficult, if not impossible, for Cleveland to assert he had fully recovered and thus regain the powers of his office, and thus even a temporary transfer may well have meant resignation.

Grover Cleveland not only signed the Succession Act of 1886 into law, he became an example of one of its glaring flaws. By failing to address the problem of executive disability, the possibility of the nation not having a commander-in-chief was once again very real. Although it is unlikely Cleveland would have transferred power temporarily had such recourse existed, the pattern of ignoring the problem was grossly irresponsible.

The nation’s near misses with constitutional crisis would not change with the passage of the 19th Century. On September 6, 1901, William McKinley would become the third president to fall victim to an assassin’s bullet within thirty-six years, after being shot and gravely wounded at the Pan-American Exposition in Buffalo, New York. Like Garfield, McKinley’s wounds were not instantly fatal, and McKinley would linger near death for eight days, before succumbing to his injuries on September 14.\(^\text{143}\) While most turned their attention to the man who would succeed

the fallen McKinley, Vice President Theodore Roosevelt, there was no consideration of what would happen if McKinley had continued to linger. Once again, the chance for reform was ignored.

**Woodrow Wilson**

When Woodrow Wilson suffered a debilitating stroke on October 2, 1919, it marked the beginning of the longest constitutional crisis in American history. Although Wilson was not the first president to be disabled during his term in office, or the first to be party to a plan to conceal his condition, his incapacitation was by far the longest and most dangerous. While any executive disability would be cause for concern, the manner in which Wilson’s was handled, specifically by his personal physician and his wife, represented a significant dereliction of executive power. Much like with Cleveland, the true conditions of both Wilson’s health and the actions of those around him would remain hidden for years.\(^{144}\)

Unlike the disabilities experienced by Washington and Madison, Wilson’s impairments would prove to be permanent. The after effects of the stroke, specifically, paralysis of the left side of his body and the loss of vision in his left eye, would have been nearly impossible to conceal, especially for a president. As a result, Wilson’s wife, Edith, his personal secretary Joseph Tumulty, and his personal physician, Dr. Cary Grayson, began to shield Wilson from any potential visitors, and, more alarmingly, from most of his official duties. Even though this may

seem to be an impossible task, the First Lady and Grayson were largely successful for the remainder of Wilson’s term, a time span of nearly seventeen months.\textsuperscript{145}

The efforts to conceal Wilson’s condition from his Cabinet began immediately. On October 6, just four days after Wilson’s stroke, Dr. Grayson was asked to speak with a Cabinet that had not seen or heard from their commander-in-chief since rumors of his health problems began to spread. Grayson’s response reflected the combative tone that he and the First Lady would project to anyone who dared question Wilson’s health over the next year and a half, as he began by questioning on what authority that Cabinet meeting had even been called.\textsuperscript{146} In summarizing the meeting, Grayson wrote:

Memorandum:

I was called before the Cabinet this morning at 11:00 o’clock at the request of Secretary Lansing. The entire Cabinet was present. Secretary Lansing asked me the direct questions as to what was the matter with the President, what was the exact nature of the President’s trouble, how long would he be sick and was his mind clear or not. My reply was that the President’s mind was not only clear but very active, and that he clearly showed that he was very much annoyed when he found that the Cabinet had been called and that he wanted to know by whose authority the meeting had been called and for what purpose. Secretary Lansing was somewhat astounded when I spoke thus. From what the French Ambassador


had said previously to Mr. Forster it appeared as if Secretary Lansing was particularly anxious to have Vice-President Marshall act in the President’s place.

Secretary Baker intervened at the close of my remarks and said that he thought it would meet with the approval of the Cabinet to say that they only met as a mark of affection and to say also that everything was going in the even tenor of its way; that there was nothing to cause him to worry about now; that they were all looking out for the President’s interests as best they could. He added: “Please convey our sympathy to the President and give him our assurance that everything is going along all right.” This was unanimously concurred in by the other members.147

C.T.G.

Even though the prognosis for Wilson’s recovery was unknown when Grayson addressed the Cabinet, his assessment of the president’s condition was a complete fabrication.

The person responsible for calling the Cabinet together, Secretary of State Robert Lansing, had suggested that Grayson could legally declare Wilson disabled, a decision that would seemingly clear the way for Vice President Thomas Marshall to act as president. The reaction to this from Grayson and Tumulty was an angry rejection, and with Cabinet officials understandably anxious about making any accusations, talk concerning a transfer of power quickly ended. As a result, Grayson, Tumulty and the First Lady effectively became Wilson’s

147 Ibid.
replacements as commander-in-chief. They continually controlled who saw the president and which correspondents reached him for much of the remainder of his term.  

Undeterred by Grayson and Tumulty’s responses, Secretary of State Lansing continued to convene Cabinet meetings, holding more than twenty between October 1919 and February 1920. This leadership, and his suggestion that Vice President Marshall act in Wilson’s place, led to animosity between Lansing and Wilson, and invariably, to friction with Grayson and the First Lady as well. In a shocking indication of just how far the effort to conceal Wilson’s true condition had reached, Lansing was fired on February 13, 1920. For the next thirteen months the nation would be led by a severely disabled commander-in-chief whose meetings with Cabinet and congressional officials were sparing and brief.

One of the critical results of Wilson’s inability to meet with Congressional Leaders was the defeat of the League of Nations Treaty in the Senate. Additionally, in the time between Wilson’s stroke and the end of his term, twenty-eight pieces of legislation became law merely by inaction on the part of the President. Other roles of the commander-in-chief, such as receiving foreign diplomats, also went unfulfilled, contributing to nearly total inaction within the executive branch. As a result, the remainder of Wilson’s time in office was devoid of any significant accomplishments.

Although the actions of Wilson, his wife, and personal physician warrant a great deal of criticism, the fault of Congress must also be noted. Despite previous brushes with disaster,

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Congress failed to enact any guidelines pertaining to presidential disability. Since the only recourses available for the removal of a living president in 1919 were resignation or impeachment, we are left to wonder what would have happened if Wilson’s condition had become public knowledge. Would Wilson have acceded to any pressure to resign, or would he have resisted such actions? As for the only body that could remove him from office, would Congress have voted to impeach a sitting president due to his health or mental condition? These questions remain a mystery nearly a century later.

The impact of this lack of guidance is apparent in another of Dr. Grayson’s letters. Writing to Samuel Ross on April 14, 1919, Grayson stated:

These past two weeks have certainly been strenuous days for me. The President was suddenly taken violently sick with the influenza at a time when the whole of civilization seemed to be in the balance. And without him and his guidance Europe would certainly have turned to Bolshevism and anarchy. From your side of the water you can not realize on what thin ice European civilization has been skating. I just wish you could spend a day with me behind the scenes here. Some day perhaps I may be able to tell the world what a close call we had.\textsuperscript{151}

While this certainly does not excuse Grayson’s actions, it does illustrate how the presidency was no longer a position that could go unmanned for even a brief period of time.

Although the world had changed significantly between 1881 and 1919, the time period still permitted a degree of presidential absence. As illustrated by the remarkable

success of the plot to conceal Wilson’s condition, media coverage of the president was a far cry from the all encompassing nature of today. Additionally, military technology was still quite primitive by contemporary standards, and lacked the quick strike capabilities that require quick decision making on the part of the commander-in-chief. However, while the world stage would soon change dramatically, the instincts to conceal a president’s disabilities would not.

Calvin Coolidge and Presidential Depression

As the history of executive disability shows, presidents are susceptible to the same ailments as anybody else. Yet all of the illnesses that befell presidents through 1921 were physical in nature. This pattern would be broken three years later by Calvin Coolidge, a man who assumed the presidency following the death of Warren G. Harding on August 2, 1923. Coolidge’s battle with depression following the loss of his son less than a year after becoming president reintroduced the complex question of how to deal with a president who refuses to acknowledge his disability.

By all accounts, the death of Coolidge’s son, Calvin Jr., on July 7, 1924, rendered him unable to discharge the duties of his office in the weeks that followed. While no one could have expected any father to merely carry on after such a tragedy, it is the length of Coolidge’s depression that concerned those closest to him. Several years later, his surviving son John would

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152 Gilbert, “Presidential Disability and the Twenty-Fifth Amendment,” 861.
state that after his brother’s death, the President “was never the same again.” Yet just four months after his son’s death, Coolidge was reelected to his own term in office.

For the remainder of his Presidency, Coolidge would exhibit all the classical signs of what would later be termed clinical depression. Often without warning, Coolidge would exhibit fits of rage aimed at his advisors and even members of his family, prompting both to avoid any actions that could potentially trigger such outbursts. Furthermore, despite early signs of an active presidency, one in which Coolidge was heavily engaged in both congressional and executive branch affairs, his second term was marked by a drastic withdrawal from interactions with members of both branches, often leaving Cabinet members in the dark concerning the his wishes. Publically, this disinterest prompted Coolidge to admit to reporters that he was either unaware or not properly informed about legislation currently being debate in Congress on several occasions.

In a similar fashion to Wilson, Coolidge’s actions indicated that while he was unable to perform his duties, he was unwilling to make such a personal declaration. Thus even if a mechanism existed for him to temporarily transfer power, there is no indication he would have done so. Since the only recourse to remove Coolidge, besides resignation, was impeachment, an action that given the circumstances was unappealing, members of both the executive and legislative branches adopted a “wait it out” mentality. While this seemingly presented no serious

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153 Ibid, 863.
156 Gilbert, “Presidential Disability and the Twenty-Fifth Amendment,” 864.
dangers for the nation, recently, historians have pointed to Coolidge’s inaction as contributing to the unregulated structure of the nation’s economic system at the time.\textsuperscript{157} Considering Coolidge left office just before The Great Depression, such accusations are not without empirical evidence.

Much like the diagnosis and treatment of physical ailments has drastically improved over time, so too has the recognition of depression. While this may serve to benefit Coolidge’s historical reputation, it is safe to conclude that even the knowledge of such a fact in the late 1920s would not have prompted him to admit to such an illness. The American people expect their president to be in control at all times. And while everyone would seemingly be sympathetic to Coolidge’s personal turmoil, such feelings of sympathy do not necessarily translate into popular support.

As with Wilson, a declaration by Coolidge, or those around him, that he was unable to discharge his duties would have essentially ended his presidency. Therefore, just as it had during Garfield and Wilson’s prolonged incapacitations, the federal government adopted a policy of limping along, only this time for a full presidential term. During the four years between 1925 and 1929, the nation was led by a commander-in-chief whose ability and desire to discharge the sworn duties of his office were severely impaired. And while hindsight invariably invites second guessing, even a minimal chance that Coolidge’s incapacitation contributed to economic catastrophe should be enough to illustrate the immense dangers of ignoring the problem.

\textsuperscript{157} Beatty, “President Coolidge’s Burden.”
Franklin Roosevelt and a Question of Responsibility

The health issues faced by Franklin Roosevelt illustrate the dangers of both judging a president solely on his physical condition and of placing personal advancement ahead of national interest. The physical effects of Roosevelt’s bout with polio, effects that he and his advisors went to great lengths to conceal, did little to limit Roosevelt during his first two terms in office. Even when Roosevelt broke the precedent set by George Washington and ran for a third term in 1940, those closest to him perceived his ailments as purely physical. Had Roosevelt left office after two terms, or perhaps even after his third, his story would largely be a lesson of not to judge perspective presidents by their physical abilities. However, when he chose to run for an unprecedented fourth term, the narrative changed.

In March 1944, four months before the Democrats would meet to select their candidate for the general election, Roosevelt went to Bethesda Naval Hospital for a physical. The results of this physical were astounding, as physicians diagnosed the president with varying degrees of high blood pressure, coronary artery disease and congestive heart failure, among other ailments. Their prescribed remedies for these conditions called for Roosevelt to spend no more than four hours a day discharging the duties of his office, and required nearly eighteen hours of sleep and bed rest each day. Unrealistic for any president, such a schedule was ludicrous for a commander-in-chief charged with conducting a two front war.\(^\text{158}\)

This four month span in 1944 marks the shift in Roosevelt’s Presidency from one of inspiration to irresponsibility, as in July he accepted his party’s nomination for another term as

president. By agreeing to run with full knowledge of his personal limitations, Roosevelt made a
decision that was largely driven by personal motivations rather than national interest. Despite the
inherent problems that would have accompanied a new administration taking office in a time of
war, the near certainty of Roosevelt’s death in office presented an even greater danger.
Additionally, there was the ever present danger of Roosevelt’s incapacitation, an event that
would return the nation to the constitutional crises of the Garfield and Wilson days, this time in
the midst of World War II.159

Although Roosevelt deserves a large share of the blame, delegates to the 1944
Democratic Convention must also assume some responsibility. Despite the fact many delegates
were not aware of Roosevelt’s true medical condition, even a cursory view of the president
revealed his perilous health. This fact was illustrated by the demand that Roosevelt replace Vice
President Henry Wallace with a new running mate, a demand Roosevelt would accede to by
selecting Missouri Senator Harry Truman. Years later, many delegates would admit they knew
that in selecting a new vice president, they were also selecting a man who would become
president at some point in the next four years.160

While the selection of Truman appeased delegates, Truman’s brief tenure as Vice
President was a further illustration of Roosevelt’s disregard for the state of his health. After
being sworn in, Truman’s eighty-two day term as Vice President was remarkably uninformed,
since by his own accounts he met with Roosevelt only twice, both of which were at Cabinet

159 Ibid, 639.
meetings. Truman also stated that during his time as Vice President, Roosevelt was not in Washington for more than thirty days, precluding any chance of Roosevelt’s bringing Truman up-to-speed on the affairs of the nation. Although the ignoring of the vice president by the president and his staff was routine, these were not routine times. The combination of Roosevelt’s severely impaired health, the war, the restructuring of both Europe and Asia, and the near completion of the atomic bomb highlighted the necessity of an informed and well prepared vice president.

When Truman found himself thrust into the presidency, he was forced to confront issues for which he had been extremely ill-prepared, creating the necessity for on-the-job training. Ironically, Truman’s own view of the strenuous nature of the presidency was reflected in a speech he gave while campaigning for Roosevelt in August 1944: “It takes time for anyone to familiarize himself with a new job. This is particularly true of the presidency of the United States, the most difficult and complex job in the world. Even in peacetime it is well recognized that it takes a new President at least a year to learn the fundamentals of the job.” Fortunately for Truman, and the nation, his transition to the presidency was remarkably smooth given the circumstances.

Although no one can be sure of President Roosevelt’s rationale in seeking a fourth term, it would be unfair to cite personal ambition as the only factor. Given his larger than life mystique, Roosevelt may well have felt he owed it to the country to see the war to its successful

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162 Ibid, 198.
conclusion. However, even this benefit of the doubt cannot excuse the lack of preparation given to Vice President Truman. By 1945, the Tyler Precedent was more than a century old, and everyone understood that Truman was now only one severely weakened heart from the presidency. Even though considering one’s mortality is naturally a difficult task, even a healthy president owes it to the nation to prepare his second in command for what may occur.

Just four months into his term, Truman authorized the deployment of the atomic bomb on Japan. Along with ending the war, the explosion of such a weapon also marked a frightening transition in the arena of global warfare, the dawn of the nuclear age. It was now clear that the era when the presidency could be left unmanned for even a brief period of time had ended. From this point on, events dictated that there must always be a clear chain of command that ultimately led to the commander-in-chief. However, what would happen in the event the commander-in-chief was unable to perform this duty was still a dilemma which screamed to be answered.

**The Succession Act of 1947**

Logic dictated that Harry Truman would recognize the need for reform concerning presidential succession, yet his actions resulted in the creation of more questions than answers. When Truman asked Congress to revise the line of presidential succession, his stated goal was to reduce the personal power of the president. Truman argued that by placing the Secretary of State, whom the president selects, immediately after the vice president in the line of succession, the president was potentially able to choose his own successor. Truman’s solution was to revert to the line of succession established in the Act of 1792 with one alteration: placing the Speaker of
the House immediately after the vice president, followed by the Pro Tempore, and then the Cabinet. However, instead of resolving the issues of succession, the 1947 Act simply reignited the problems inherent in a legislative line of succession. Additionally, the 1947 Act also presented a dangerous constitutional loophole, a procedure known unofficially as “bumping.”

Under the provisions of the 1947 Act, the Speaker of the House or Pro Tempore may choose to forgo their opportunity to serve as president. Accordingly, the office would fall to the next person in the line of succession. Also, if the situation should arise, as in the case of Arthur’s succession to the presidency, that the leaders in Congress had yet to be chosen, the line would continue through the Cabinet. However, the same provisions allow for someone who has been passed over in the line of succession, for instance the Speaker of the House, to later claim the office, either after they were selected or if they simply had a change of heart. Considering the very real chance of dealing with an opposition Congress, the provisions contained within the Act created the potential for a dangerously partisan battle over the presidency.

The requirement of resignation also presented a serious detriment to those within the line of succession. Any person in the line is required to resign his or her position, whether it is Speaker, Pro Tempore, or Cabinet official, in order to become president, even if the term in office is for a matter of hours. Thus if the vice presidency were to become vacant, a scenario which the Act failed to address, and the president were to be incapacitated, would a Speaker or a Senator be willing to resign to serve as a temporary president? Although a Senator can be

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164 Ibid, 136.
reappointed by their state’s governor, a former Speaker is unable to merely return to his or her previous office.\textsuperscript{165}

Hindsight is not required to see that the Act of 1947 served only to further complicate the issue. By creating a model of transition between the executive and legislative branches, a scenario is easily envisioned in which control of the government is transferred from one political party to another at a time when continuity is needed most. The act replaced the possibility of abuse of presidential power with a greater chance for congressional abuse of power, and unfortunately, became known more for its potential for disastrous consequences than for the issues it served to resolve. To properly gauge the impact of the 1947 Act, one needs only to look at the line of succession still in operation at this time.

**Eisenhower’s Health Problems**

Although no position can fully prepare someone to become president, Dwight Eisenhower’s command of allied military forces in World War II was ideal. Eisenhower brought to the Oval Office the knowledge that leadership must always be clear and unquestioned. However, given Eisenhower’s age and the lack of safeguards for his office, it was clear that this problem was being overlooked at the highest levels. This dangerous situation became even more apparent when Eisenhower suffered a severe heart attack on September 24, 1955, while vacationing in Colorado.

Besides the danger to Eisenhower, another concern was the amount of time between the diagnosing of Eisenhower’s condition and informing Vice President Richard Nixon. Although Eisenhower’s wife first summoned a doctor who diagnosed the heart attack around 3 A.M., Nixon was not notified of the president’s condition until more than twelve hours later. Nixon was told via a call to his private residence, a residence with no security to protect the man now one weakened heartbeat from the presidency. Additionally, the doctor who first treated Eisenhower administered a series of injections designed to sedate him. However, he waited more than three hours before informing anyone on Eisenhower’s staff, and even then merely stated that the president was suffering from indigestion.  

Unlike the cases of Garfield and Wilson, Eisenhower’s incapacitation occurred in the age of nuclear weaponry. At a time when the United States and Soviet Union were never more than a few minutes away from nuclear annihilation, the decision not to inform Nixon reflected the antiquated mindset that the nation could still exist without a commander-in-chief. For twelve hours on September 24, 1955, the United States found itself with a heavily sedated president and a vice president unaware of the situation. This raises serious questions of who would have been responsible for responding to any crisis. Furthermore, the question of what to do in the event Eisenhower survived, but was unable to discharge the duties of his office still loomed large. 

The impossible situation members of the Cabinet were invariably placed in concerning questions of executive disability was quickly displayed. After overseeing a Cabinet meeting on September 30, Nixon announced that Eisenhower’s policies would continue to be carried out.

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167 Ibid, 130.
Also, Sherman Adams, Eisenhower’s Chief of Staff, would fly to Denver and serve as contact between the ailing president and his staff in Washington. Unlike Wilson, the Eisenhower Administration was as open with both the public and other government officials as could be expected in such a situation. Additionally, unlike the previous strategies of limping along and hoping no serious situations occurred, the Administration released a set of guidelines that would be adhered to until Eisenhower recovered.\textsuperscript{168}

The guidelines established by Vice President Nixon and Eisenhower’s Cabinet were admirable in that they admitted the president’s incapacitation and attempted to deal with it accordingly. The procedures established by the Cabinet stated that:

1. On actions which Cabinet members would normally take without consulting either the Cabinet or the President, there would be no change in procedure.
2. Questions which would normally be brought before the Cabinet for discussion before decision should continue to be discussed there.
3. Decisions which would require consultation with the President should go first to the Cabinet of National Security Council for thorough discussion and possible recommendation and then go to Denver for the President’s consideration.
4. The proper channel for submission to the President of matters requiring presidential decisions should be to General Persons in the White House and then through Governor Adams to the President in Denver.\textsuperscript{169}

\textsuperscript{168} Feerick, \textit{The Twenty-Fifth Amendment}, 18.
Although these criteria may not have covered every imaginable scenario, they nonetheless were the first serious attempt at conducting the business of government while a president was disabled. Like many first steps towards solution they were not perfect, but certainly worthy of praise.

The largest contributing factor to the open discussions of transferring power during this time was Eisenhower himself. Unlike Wilson, who sought to preclude any discussions of Vice Presidential action, Eisenhower encouraged Nixon to oversee meetings of both the Cabinet and the National Security Council during his recovery. In a letter to Nixon in early October, Eisenhower wrote: “I hope you will continue to have meetings of the National Security Council and of the Cabinet over which you will preside in accordance with procedures which you have followed at my request in the past during my absence from Washington.” Such official encouragement from Eisenhower allowed Nixon and the Cabinet to operate without considerable fear of accusations concerning usurpation or power grabbing.

Eisenhower’s recovery would continue throughout the rest of 1955, as his gradual return to full time work included meeting with the Cabinet for the first time in November, followed by a return to the Oval Office in January. Although Eisenhower’s prolonged incapacitation was handled with more clarity than any previous case of executive disability, the Administration was obviously fortunate that no domestic or international crisis erupted during this three month period, especially early on. Chief of Staff Sherman Adams, whose responsibilities were greatly increased during the President’s recovery, would later state that the entire process reiterated the

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dangerous lack of guidance from the Constitution for such an event. Additionally, Nixon would later cite the fact that luck had played such a vital role in the process in writing: “The committee system worked during the period of President Eisenhower’s heart attack mainly because there was no serious international crisis at that time. But had there been a serious international crisis requiring Presidential decisions, then, the committee system might not have worked.”

President Eisenhower’s health would again prompt a concern when he was rushed to the hospital with severe pain in his stomach on June 8, 1956, with what doctors diagnosed as ileitis. Early the next day, the President was rushed into surgery for the removal of an obstruction in his small intestine. The surgery itself took over two hours, and coming less than nine months after a heart attack, concern quickly grew. Fortunately, Eisenhower’s recovery would be relatively quick, and allowed him to perform clerical duties just days after the procedure. However, questions of “what if” again began to arise, this time, from the President himself.

As he recovered, Eisenhower grew frustrated with the pace of his recuperation, going so far as to claim he would resign if he suffered another illness. Additionally, Vice President Nixon would later write that Eisenhower spoke to him on several occasions about the incident, wondering aloud what would have happened if an international crisis occurred while he was

172 Feerick, The Twenty-Fifth Amendment, 20.
173 Clarence G. Lasby, Eisenhower’s Heart Attack: How Ike Beat Heart Disease and Held on to the Presidency (Lawrence, Kansas: University of Kansas Press, 1997), 50.
under anesthesia. This profound question elicited a great deal of response from the commander-in-chief. Unfortunately, Congress did not share such concern.

On November 25, 1957, less than a year into his second term, Eisenhower suffered a stroke while dictating a letter to his secretary, Ann Whitman. Later that day, as Sherman Adams, the First Lady and aides met to discuss what should be done concerning a state dinner that evening, President Eisenhower entered the room and attempted to speak. After a few words, he quickly began to stammer and was unable to form words, a repeat of what had prompted Whitman to earlier call for doctors. As his wife and Adams attempted to calm him, Eisenhower loudly declared, “There’s nothing the matter with me! I am perfectly all right!” However, he very quickly followed this statement with another declaration, made after it was suggested he return to bed, stating, “If I cannot attend to my duties, I am simply going to give up this job, that’s all there is to it!”

These two contradictory statements left Adams and the First Lady deeply troubled. Adams went so far as to inform Vice President Nixon that he may become president within the next twenty-four hours. This incident, especially Eisenhower’s first declaration that he was fine, set the stage for a constitutional crisis reminiscent of the Wilson Administration. Had such an event occurred once again, the outcome is anything but certain, especially considering Eisenhower’s popularity.

174 Nixon, Six Crises, 168.  
175 Adams, Firsthand Report, 196.  
176 Nixon, Six Crises, 177.
The good news for Eisenhower’s aides, and the nation, was that his complete recovery was predicted. The bad news, however, was that it would require another prolonged recuperation period. Unlike Eisenhower’s previous illnesses, the state of world affairs was no longer uneventful, as his stroke came just after the Soviet launch of Sputnik and just prior to a NATO meeting which Eisenhower was scheduled to attend. Nixon would later call this “the worst time possible, short of outright war, for the President to be incapacitated.”

Once again, Adams and Nixon met to determine how to proceed with the President disabled, now joined by Attorney General Herbert Brownell. Good fortune would also aid in these discussions, as the next day doctors diagnosed the stroke as minor, and Eisenhower’s condition improved, though another stroke could not be ruled out. The President’s recovery would prove to be remarkably quick, as he returned to his duties full time on December 2, and even attended the important NATO meeting two weeks later. This marked the last of Eisenhower’s illnesses in office, as well as the last executive disability to occur without guidelines concerning a transfer of power.

**The Private Agreement**

The origins of the first agreement between a president and vice president concerning the transfer of power actually began a year before Eisenhower’s stroke. Just three weeks into his second term, Eisenhower and his advisors discussed the problem during a meeting on February 8, 1957. Attorney General Brownell, the man Eisenhower charged with formulating a solution to

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177 Feerick, *From Failing Hands*, 226.
the problem, stated that the critical problem centered on what happens if a president is unable, or unwilling, to declare his own disability. Even though this complex problem would remain unresolved for the time being, Brownell’s opinion did provide some legal justification for the transferring of power to the vice president.\textsuperscript{178}

Considering Eisenhower’s forthright nature concerning both his heart attack and surgery, the probability that he would willing transfer power to Vice President Nixon should another medical situation arise seemed favorable. However, Eisenhower’s stroke that November illustrated the very real possibilities that such an event could preclude him from being able to make the decision to transfer power, either due to loss of cognitive functions or falling into a comatose state. This scenario prompted Eisenhower and his advisors to focus on creating a mechanism for removing the President from power in the event he either could not or would not do so himself.

The first question discussed was who should be charged with the overwhelming responsibility of determining whether a duly elected president was fit to discharge his duties. Brownell and Chief of Staff Adams stated they felt the vice president should be the person who makes such a decision, though they also favored a check of some sort from the Cabinet. However, Eisenhower felt that the Chief Justice of the Supreme Court and a board of medical officials should be charged with making such a decision at a time of presidential inability.

\textsuperscript{178} Feerick, \textit{The Twenty-Fifth Amendment}, 22.
Eisenhower also reiterated that above all, he felt a president should be allowed to determine his own incapacitation and subsequent recovery without outside influence.\textsuperscript{179}

Another Eisenhower recommendation was the one that presented the largest political challenge, the returning of the line of succession to the Cabinet. While it appears everyone in the room was in agreement concerning the logic of such a change, Brownell and Nixon quickly pointed out the partisan suspicion such a move would produce. At the time, the two men behind Nixon in the line of succession, Speaker Sam Rayburn and Senate Pro Tempore Carl Hayden, were both members of the opposition party. As a result, it was quickly decided that the pursuit of such a change would be counterproductive and thus the line of succession would continue to run through the legislative branch.\textsuperscript{180}

On March 29, 1957, Eisenhower unveiled the proposal to legislative leaders at the White House. Unfortunately, the dangers of continuing to ignore the issue of executive disability were no match for opposition from congressional leaders that proved to be bipartisan. First, Speaker Rayburn argued that any attempt to transfer power would be viewed suspiciously by the public, a statement many present at the meeting took as the powerful Speaker’s way of saying he would not support the proposal. Additionally, Senate Republican Leader William Knowland expressed his belief that any declaration of a president’s incapacitation must have congressional input. Faced with opposition from leaders of both parties, Eisenhower and his advisors quickly realized their attempt at reform was over before it ever really started.\textsuperscript{181}

\textsuperscript{179} Feerick, \textit{From Failing Hands}, 227.
\textsuperscript{180} Adams, \textit{Firsthand Report}, 200.
\textsuperscript{181} Ibid, 201.
Despite their remarkable forethought, the Eisenhower Administration was not immune to the pattern of casting the issue aside for more pressing events. Naturally, attention was renewed towards the end of 1957 after Eisenhower’s stroke, though the results mirrored those of the prior year. Richard Nixon would later state that congressional Democrats were driven by a desire to prevent Nixon from serving as president for even a short time prior to the 1960 Elections. Regardless of the reasons behind their inaction, by the beginning of 1958 it was clear Congress was not going to enact any reforms. Fully aware of this, the Eisenhower Administration decided to take matters into their own hands.

In February of 1958, President Eisenhower presented a draft of an agreement he designed to resolve the glaring issues of presidential disability. This early agreement would allow Eisenhower to declare his own inability and transfer power to Nixon, until such time as Eisenhower declared himself recovered and resumed his duties. However, it also allowed Nixon to remove Eisenhower from power in the event the President was either unable or unwilling to do so, after consultation with Cabinet officials. Although such guidelines, specifically those concerning Nixon’s consultation with the Cabinet, were vague, the agreement marked a monumental step forward in resolving an issue that had long been ignored.

After discussing the agreement with Nixon and Brownell, and allowing Brownell to rework certain aspects, Eisenhower was ready to unveil it to the nation. The President laid the groundwork for the announcement during a press conference on February 26, 1958, when, in response to a question concerning congressional inaction on the subject, Eisenhower responded:

182 Nixon, Six Crises, 177.
Well, I brought out long ago, I think after my first illness or certainly quite a while back, that I think this is something that Congress should take action on; and I personally think it probably requires a constitutional amendment if it is going to be clearly corrected. Now, in my own case, because I think between Mr. Nixon and myself there is a rather unique state of mutual confidence and even liking and respect, I think there is no problem; because I think Mr. Nixon knows exactly what he should do in the event of a Presidential disability of the kind that we are talking about. And so, I have got my own conscience clear at the moment, but I still think it should be handled as something for all future cases.\footnote{Gerhard Peters and John T. Woolley, “The President’s News Conference, February 26, 1958. The American Presidency Project, accessed May 10, 2012, http://www.presidency.ucsb.edu/ws/?pid=11309.}

By the time he made this statement, Eisenhower, Nixon and Brownell had all signed an agreement that for the first time allowed a disabled president to either remove himself, or be removed, from power.

On March 3, 1958, the White House released the agreement between Eisenhower and Nixon that stated:

\textit{The President and Vice President have agreed that the following procedures are in accord with the purposes and provisions of Article II, Section 1 of the Constitution, dealing with Presidential inability. They believe that these procedures, which are intended to apply to themselves only, are in no sense outside or contrary to the Constitution but are consistent with its present provisions and implement its clear intent.}
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.

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

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

Although the guidelines concerning Nixon’s consultations remained unclear, and the Constitutionality of the document had not been endorsed by either Congress or the judicial branch, President Eisenhower and his Administration had acted. Ironically, Eisenhower would remain in good health for the remainder of his term in office, and thus the agreement was never formally invoked. However, it would serve as a template for future administrations and ultimately, a Constitutional Amendment.

The Kennedy Assassination

The combination of Eisenhower’s improved health and the election of the youthful and seemingly healthy John F. Kennedy in 1960 once again removed the disability issue from the front pages. Ironically, Kennedy’s health was much more precarious than Eisenhower’s or any of his predecessors, as his battles with Addison’s disease and other ailments required a great deal of daily medication. While Kennedy worked to conceal these ailments, he also announced on August 10, 1961, that he had entered into an agreement with Vice President Lyndon Johnson that was identical to the Eisenhower-Nixon Agreement. However, the implementation of this agreement may very well have caused more of a constitutional crisis than the strategy of merely limping along.

The Kennedy-Johnson Agreement seems to have been reached without any questions being raised as to its legality. This is reflected in an August 2, 1961, memo from Attorney General Robert Kennedy, who stated the overall framework of the agreement was constitutional, in particular section two of the agreement which allowed the vice president to assume the presidency “after such consultation as seems to him appropriate under the circumstances.” Yet considering the relationship between the Kennedy and Johnson staffs, in particular, the acrimonious relationship between Lyndon Johnson and Robert Kennedy, the circumstances were ripe for disaster.

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Imagining a scenario in which the Kennedy-Johnson Agreement was invoked is a topic best left to writers of political fiction. However, any invocation would have involved a scenario in which Johnson would have had to consult with Kennedy’s advisors, including the Attorney General, prior to assuming the presidency. Additionally, since no mechanism had been established for resolving a dispute between the president and vice president concerning the former’s incapacitation, Robert Kennedy’s memo speculated any uncertainty would best be resolved by the Cabinet. Given this group’s loyalty to the president, their judgment could easily be clouded. Finally, considering that Kennedy and Johnson loyalists continue to disagree over events that took place during the 1960s still today, a battle over the governing of the nation is not hard to envision.

By the time Kennedy embarked on his ill-fated trip to Texas in November of 1963, the United States had experienced presidential death seven times -- three of which occurred at the hands of an assassin. In that time the world had evolved into a stage dominated by nuclear weapons capable of mass destruction within minutes. Yet when the unthinkable occurred for the fourth time in American history, the necessity of uninterrupted command became victim to personal feelings and insecurities. As a result, during a time of unimaginable confusion and panic, the United States of America was essentially without a functioning government for over two hours.
There is no doubt the head wound sustained by President Kennedy was instantly fatal and thus the powers of the presidency immediately fell to Vice President Johnson.\textsuperscript{188} Given the shocking events that had transpired on a public street in downtown Dallas, it would have been unreasonable to expect a quick or orderly transfer of power to the Vice President. Johnson, who was riding just two cars behind Kennedy, became the recipient of increased Secret Service protection upon arriving at Parkland Hospital when Kennedy’s grave condition was realized.\textsuperscript{189} However, it quickly became apparent that Johnson’s ability to discharge his new duties was far from certain.

Although Kennedy’s head wound was fatal, his throat wound may not have been.\textsuperscript{190} Given the relationship between the Kennedy and Johnson staffs, it is hard to envision either a friendly or orderly mechanism by which temporary power would have been transferred. The impact of these personal opinions is evidenced by their display during the turmoil following the assassination - a time in which Johnson, secluded in a small room in the hospital, received only vague updates concerning Kennedy’s condition.\textsuperscript{191} Thus at a time when suspicions of a foreign

\textsuperscript{191} Blaine and McCubbin, \textit{The Kennedy Detail}, 244; Johnson, \textit{Vantage Point}, 10; Warren Commission Report, 57.
plot were rampant and half the Cabinet was confined to an airplane over the Pacific Ocean, the
new president was unable to communicate with anyone outside of that room. ¹⁹²

After Kennedy was pronounced dead at 1:00, it was clear a transfer of power had taken
place. Attention then turned to the official swearing-in of Johnson, a process that according to
the Constitution must occur before someone can discharge the duties of the presidency. During
this time, Johnson was rushed from the hospital to Air Force One, where he waited. Since
Johnson was not officially sworn-in as president until 2:38 that afternoon, it remains unclear who
possessed the authority to lead the nation in the one-hundred-twenty-eight minutes between the
shooting and the administering of the oath of office. ¹⁹³

Even though Johnson’s taking the oath of office was a given, controversy still persists
over the manner in which it was administered. According to Johnson, he was instructed by
Attorney General Robert Kennedy to take the oath in Dallas -- a decision that made sense to
reassure both the nation and the world that the United States had a commander-in-chief. ¹⁹⁴
Kennedy, however, contended that Johnson sought his approval for being sworn-in before
leaving Dallas, a differing viewpoint that given the deep contempt between the two is not
surprising. ¹⁹⁵ Although these contrasting views are now mostly fodder for historians, it is
important to note their significance in illustrating the deep suspicions held by the Kennedy and

Johnson staffs towards one another. These animosities presented a dangerous preview of what may have occurred during a prolonged state of presidential disability.

Although the prospect of a prolonged incapacitation would not come to fruition, the transition from the Kennedy to Johnson Presidencies contained its own dangerous scenarios. By his own admission, Johnson’s actions during the first hours of his presidency were dictated more out of concern of perception, from both those closest to Kennedy and the public.\textsuperscript{196} While such concerns were admittedly important, the new commander-in-chief’s most important function at that time was to provide reassurance. Despite the fact all involved admitted the most prudent course of action would have been for Johnson to depart Dallas immediately, Johnson remained on the grounded plane for over an hour. From all indications, the majority of this time was spent debating questions concerning Johnson’s taking the oath of office.\textsuperscript{197}

Of course, the benefit of both hindsight and the absence of concern for perceptions makes dictating Johnson’s course of action much easier. And we now know the murder of President Kennedy was not the first step in any foreign conspiracy or plot to topple the government. However, everyone at the center of this remarkable event, including Johnson and members of what was now his Cabinet, has admitted to considering whether such a plot was unfolding. In spite of these concerns, it was matters of perception that ruled these highly anxious hours.

Although fears of an organized foreign plot proved unfounded, it is important to note that if such an event had materialized, the nation’s response would have been greatly compromised.

Not only was the new president kept isolated from other government officials and largely uninformed of recent developments, but the two men now next in the line of succession were even more vulnerable. Both Speaker John McCormack and Senate Pro Tempore Carl Hayden were in the Capitol building and without any security protection, with McCormack going so far as to reject protection hours later, despite the fact he now stood next in line for the presidency. Even though the world had evolved to a point where the America’s highest office must be constantly manned, those in the upper echelons of the government reacted in a manner more suited for decades past.¹⁹⁸

The Kennedy Assassination and its aftermath were in many ways a microcosm for the issue of presidential disability and succession overall. First, the shocking murder of a president illustrates the sudden nature that invariably accompanied any executive disability. Then, the precarious position Vice President Johnson was suddenly thrust into would have been pitied by for Vice Presidents from John Tyler to Richard Nixon, all of whom were forced to walk the fine line between duty and appearances of a power grab. Finally, the actions of everyone from Johnson on down in the hours after the shooting highlight how no amount of planning can prepare someone for the unexpected. However, what separated President Kennedy’s murder from that of his predecessors was what happened next.

Where the Problem Stood at the End of 1963

¹⁹⁸ Manchester, *Death of a President*, 247.
As the executive branch of government concluded one-hundred-seventy-four years in existence, the issue of presidential disability and succession remained unaddressed. Until that point, attempts at resolving the issue had been confined to altering the line of succession. The disability issue had been ignored by Congress, despite frequently recurring instances that had finally prompted President Eisenhower to try and create a solution on his own. Finally, the question of vice presidential succession had essentially resolved itself by the repeated implementation of the Tyler Precedent. However, no official piece of legislation had been drafted to legitimize such a model.

While these separate cases shared many similarities, the world in which they took place was barely recognizable by the end of 1963. The idea that the presidency could go unmanned for a prolonged period of time was now superseded by the knowledge that even a matter of minutes could mean the difference between the existence of life and the destruction of the planet. Additionally, the fact that the five most recent presidents, Roosevelt, Truman, Eisenhower, Kennedy and Johnson, had all been confronted with the issue in one form or another precluded the excuse that the problem was not a pressing national issue.

Four presidents, Abraham Lincoln, James Garfield, William McKinley and John F. Kennedy, had been the victims of assassination, while another four, William Henry Harrison, Zachary Taylor, Warren Harding and Franklin Roosevelt, had died in office. Additionally, five chief executives had been severely incapacitated by illness, George Washington, James Madison, Grover Cleveland, Woodrow Wilson and Dwight Eisenhower, in addition to Garfield and
Franklin Roosevelt whose illnesses resulted in death. This was where the issue of presidential
disability and succession stood in the closing weeks of 1963.

By 1963, the United States had been led by thirty-six chief executives. Of these thirty-six,
twenty-one died in office, suffered from a prolonged incapacitation, or ascended to the office due
to a president’s death. Therefore, the odds predicted that a president would be more likely than
not to be confronted with the problem at some point during their term. Given the combination of
recent events, the Cold War, and the wide spread knowledge that no mechanism existed for
dealing with a presidential incapacitation, circumstances had never been more favorable for
reform. Fortunately for us all, this opportunity would not be wasted.
Chapter Three

The Legislative History of the

25th Amendment
The Legislative Origins of the 25th Amendment

Just over a week after President Kennedy’s death, the New York Times published an editorial highlighting the dangerous lack of constitutional guidelines concerning presidential succession and disability. The piece, titled “If the President...” chided Congress for failing to address the problem after President Eisenhower’s incapacitation and criticized the private agreements that had occurred between presidents and vice presidents ever since.199 Ironically, it was less than a week later when the White House announced that President Johnson and the man who was now a heartbeat away from the presidency, House Speaker John McCormack, had drafted a private agreement that would allow McCormack to assume the presidency in the event Johnson was disabled.200 Although acknowledgement of the agreement was intended to reassure the nation, it also reminded the public that the men next in the line of succession were the seventy-six year old McCormack and eighty-year-old Senate Leader Carl Hayden.201 This fear became even more disconcerting with the knowledge that since there was no mechanism for replacing a vice president, the office would remain vacant until the new president and vice president were sworn in on January 20, 1965.202

Although many questioned how to remedy the current situation, Indiana Senator Birch Bayh took the initiative of solving the overall problem. Bayh’s initial apprehension over the line of succession occurred soon after he learned of Kennedy’s death, an event made even more

poignant for Bayh since correcting the problem would involve the Senate Judiciary Subcommittee on Constitutional Amendments, for which he was chairman.\textsuperscript{203} The knowledge that Congress would be called upon to correct nearly two centuries of inaction may have seemed arduous, but Bayh soon realized the framework had been discussed by his colleagues a few years earlier.\textsuperscript{204} Therefore, in order to better understand the decisive and relatively quick action taken by Congress beginning in 1964, we must first look at the efforts of Tennessee Senator Estes Kefauver.

On April 18, 1958, shortly after President Eisenhower suffered a minor stroke, Senator Kefauver, then chairman of the Senate Subcommittee on Constitutional Amendments, opened hearings to address problems relating to presidential disability and succession. These hearings were prompted by the recently-released agreement between Eisenhower and Nixon.\textsuperscript{205} The stipulations contained in the agreement presented several issues upon which the Kefauver hearings were based. The most prominent of which was the establishment of a mechanism in the event the president and vice president disagreed over the president’s abilities to discharge his duties.

Testifying in defense of the agreement he had helped design, former Attorney General Brownell argued that any decision concerning a president’s ability to discharge his duties should be left up to the president. Brownell stated that even in a case where the president was clearly disabled yet unwilling to acknowledge such a condition, Congress retained the power of

\textsuperscript{203} Bayh, \textit{One Heartbeat Away}, 6.
\textsuperscript{204} Ibid, 26.
impeachment. However, Brownell’s successor, Attorney General William P. Rogers, testified that such an arrangement required a mechanism for overruling a president who claimed he was not disabled when the consensus of those around him differed. Rogers’ suggested a provision allowing the vice president and majority of the Cabinet to bring such a case to Congress.

Under this plan, any disagreement would be presented to Congress and require a majority vote in the House and two-thirds vote in the Senate in order to transfer presidential powers to the vice president. This arrangement would continue until a majority of both Houses decided the president was able to resume his duties. However, vesting such authority within the legislative branch clearly presented questions concerning separation of powers.

Following five sessions in just over a month, the Senate Judiciary Committee voted to send to the full Senate a plan that reflected the basic principles of the Eisenhower-Nixon agreement, as well as the stipulations advocated by Rogers. Unfortunately, Congress adjourned without action, a move that prompted Senator Kefauver to reintroduce the legislation in the Eighty-Sixth and Eighty-Seventh Congresses, all to no avail. Although there is no single answer as to why Congress failed to act, the prevailing factor centered on the complicated scenarios that could arise concerning the disability issue. Additionally, the varying proposals concerning who should serve as a judge of a president’s level of incapacitation -- proposals that ranged from charging the vice president, the Cabinet, Congress, Supreme Court Justices or a

208 United States Senate, *Hearings on Presidential Inability and Vacancies in the Office of Vice President Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 88th Congress, 2nd Session,* 1964.
special commission designed solely for issues pertaining to presidential disability -- resulted in scattered support for various proposals, but no strong support for one in particular.\textsuperscript{209}

While concerns over presidential disability subsided after Kennedy took office, Kefauver continued in his pursuit of congressional action on the issue. After persuading the Kennedy Administration to study the problem once again, Kefauver re-introduced the 1958 recommendations of the Judiciary Committee. This time he was joined by New York Senator Kenneth Keating, who introduced a resolution calling for implementation of recommendations from a 1960 report by the American Bar Association that asked Congress to thoroughly explore the issue and recommend actions to address the problem. In 1963, following the Kennedy Administration’s investigation of the issue, Deputy Attorney General Nicholas Katzenbach announced support for Senator Keating’s plan. Unfortunately, just when it seemed Kefauver’s efforts would finally begin to produce tangible results, he died of a fatal heart attack on August 10, 1963, thus robbing the cause of one of its staunchest advocates. Kefauver’s work as Chairman would now fall to Birch Bayh, a position whose importance would increase greatly within a few months.\textsuperscript{210}

**Action After Dallas**

Senator Bayh’s efforts were by no means the only call for action in the aftermath of the Kennedy assassination.\textsuperscript{211} The first prominent group to call for congressional reform was the


\textsuperscript{210} Bayh, *One Heartbeat Away*, 28.

American Bar Association; a group that first suggested Congress investigate the matter in 1960. In January 1964, the ABA held a special two-day conference that dealt solely with the legal issues of presidential disability. The recommendations that resulted from the conference were largely similar to both the Kefauver and Keating Resolutions, except for a mechanism for filling a vacancy in the vice presidency.212 This mechanism was predicated on how the chief executive chose members of his Cabinet. According to the plan, the president would nominate a vice president who would require confirmation by a majority vote of both the House and Senate. Although this new plan did not escape criticism, particularly from the chairman of the New York Bar Association and Senator Keating, it was the first to address the problem of a vice presidential vacancy.213

The proposal coincided with the start of hearings by the Senate Subcommittee on Constitutional Amendments. The panel, now chaired by Senator Bayh, began by reviewing various proposals for reform. The most prominent of these was Senate Joint Resolution 35, the legislation drafted by Senator Keating that received new attention following President Kennedy’s death. Bayh and his staff quickly discovered flaws in Keating’s plan, specifically, the lack of a mechanism for appointing a new vice president and the overall vagueness of the proposal.214 Keating’s plan called for ratification of an amendment that merely granted Congress the power to resolve the problem, thus state legislators would be asked to blindly support legislation that had yet to be drafted.

Additionally, the time required to pass an amendment and secure ratification from the necessary thirty-eight states meant that Congress would abstain from debating the issue for at least a year. The issue would then be reintroduced, only now without the urgency and public attention that President Kennedy’s death had lent to the problem. In order to avoid this scenario, Bayh and his staff crafted legislation that addressed the three basic principles they felt were most critical: a mechanism for filling a vacancy in the vice presidency, a set of guidelines for dealing with presidential disability and, finally, reforming the line of succession established in the Succession Act of 1947. This final component resulted from the belief the line should remain within the executive branch instead of including members of Congress.\textsuperscript{215}

Out of these, reforming the line of succession would seem the least controversial, since this was not a new stipulation but rather a reversion to the line established in 1886. However, since the elevation of Lyndon Johnson placed Speaker John McCormack next in line for the presidency, many feared altering the line would be seen as a lack of faith concerning the Speaker’s abilities.\textsuperscript{216} While a fear of offending McCormack was a reasonable cause for reluctance on the part of House members, it was also cited by President Johnson as a reason that hearings on the matter be delayed until January of 1965, when a new vice president would be inaugurated. The following is an excerpt of a phone conversation between President Johnson and aide Lee White that took place on January 16, 1964, in which White asked Johnson how he should respond to Senator Bayh’s efforts concerning altering the line of succession:

\textsuperscript{215} Bayh, \textit{One Heartbeat Away}, 35.
Lee White: “It may be better if I didn’t even get on the record, if I just called Senator Bayh.”

President Johnson: “That’s what I’d do. I’d just tell him that from a practical standpoint the House is not going to pass it, they’re not going to take a slap at the Speaker and he’s going to be interpreted as fighting the Speaker and I’m not going to be interpreted as fighting him and in November we’ll have another vice president and he can’t do anything about it now so I just think he’s spinning his wheels.”

Johnson’s opposition to passing an amendment prior to January 1965 was not confined to just one conversation. He was later quoted as saying such a proposal “wouldn’t get 40 votes in the House,” due to the belief that Speaker McCormack would perceive any changes to the line of succession as a personal affront.

President Johnson and members of the House were not alone in their desire to show deference to Speaker McCormack. After introducing his proposal, now known as Senate Joint Resolution 139, on the Senate floor on December 12, 1963, Bayh immediately went to McCormack’s office to reassure the Speaker his proposal in no way reflected any personal feelings concerning the Speaker’s ability to serve as president. Ironically, due to the time frame

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218 Childs, “A Mad Gamble on Succession.”
required for ratification, Bayh’s proposal could not have become law until well after January of 1965 anyway. Although McCormack’s response was cordial, the Speaker went on to show Bayh an editorial that questioned McCormack’s ability to serve as president. These concerns were based on McCormack’s age and qualifications and, according to Bayh, deeply offended the Speaker. While Bayh stated McCormack realized the proposal was not intended as a personal indictment, he also realized the Speaker had no intention of supporting a bill that would remove him from the line of succession.\textsuperscript{219}

As exhibited by the editorial McCormack referred to in his meeting with Bayh, there was a great deal of concern in the press concerning the Speaker’s ability to serve as president. By December 6, just two weeks after the assassination, several newspapers had already called on McCormack to resign the Speakership, thus removing him from the succession line.\textsuperscript{220} Even those who refrained from calling for such a bold step still referred to McCormack’s age and condition in articles that detailed the dangerous lack of guidelines concerning the disability and succession issue.\textsuperscript{221} Since concern over McCormack being next in line had begun immediately after Kennedy died, his opposition to reform was firmly in place by the time Bayh entered his office in mid-December of 1963.\textsuperscript{222}

\textsuperscript{219} Bayh, \textit{One Heartbeat Away}, 41.
The impact of McCormack’s views was reflected in a conversation between McCormack and President Johnson on March 7, 1964. Johnson’s words illustrate his sincere desire to avoid passage of any proposal prior to the November election, as reflected by his concerted efforts to solicit McCormack’s opposition:

**Johnson:** “What do you think I should say about this succession thing? I think anything I say, they got Eisenhower and Nixon and all of them shoving, and I think anything I say they want to use as a reflection on you. And I’ve taken the position in talking with all of them individually that I don’t know anybody in this country that I think has my confidence more or has more confidence in me and what I believe in than you. That the Congress enacted this long before I became president and it worked alright and it’s the way people wanted it handled. And it seems to me if you want it changed at all you ought to change it after you have a vice president not when you don’t have one, because I think they’d say they’re changing it because they don’t like John McCormack and I don’t want to do that. Now, uh, they say well if you got sick and what kind of arrangements and I say I’ve got the same kind of arrangements Eisenhower had and Kennedy had and they’re all signed up in a safe and everyone knows about them and I trust Mr.
McCormack to go and determine whether I’m disabled or not and if I am he ought to serve, and he would resign and serve.” 223

Although Speaker McCormack’s side of the conversation is unfortunately not as clear as Johnson’s, it is clear that the crux of McCormack’s response was that he would not actively oppose revising the line of succession. This was illustrated by his pledge that he would not interfere with the proposal in any way. However, this prompted Johnson to further encourage McCormack’s suspicions, additional evidence of Johnson’s desire to delay passage of the Bayh proposal. The following is an excerpt of Johnson’s response to McCormack’s pledge not to interfere:

Johnson: “Don’t you think that the succession law amended now, a change in it, would be a reflection on you? I think that would be the purpose of it, the Republicans and the Democrats, they would support it. All these years they talk about age, Rayburn was as old as you wasn’t he? Nobody raised any hell about it then.”

McCormack: “They’ve been piling up to me in the past week or so, both sides, in the corridors and all, talking about the new succession law and hoping I won’t take it personally…..I’d keep my mind open.”

Johnson: “A constitutional amendment doesn’t require my signature does it? And that’s what they’re working on. I thought it, if was just statute I’d could say well I’m not going to act, I’m not going to approve any change in succession law until we get a vice president.” 224

As evidenced by Johnson’s reactions in both conversations, it was his sincere desire to delay any alterations to the succession or disability laws until January of 1965. Thus Bayh’s proposal was now faced with both silent opposition from the Speaker and explicit opposition from the President.225

Hearings by the Senate Subcommittee on Constitutional Amendments

On January 22, 1964, exactly two months after the death of President Kennedy, the Senate Subcommittee on Constitutional Amendments opened hearings. The numerous problems that accompanied such a complex issue were quickly apparent, as the first three Senators to testify each presented conflicting plans for reform.226 Senator Sam Ervin of North Carolina introduced a proposal for filling a duel vacancy in the presidency and vice presidency that called for Congress to meet in a joint session and select replacements within ten days. In the interim, the presidency would be occupied by whoever came next in a line of succession Congress would

later establish. According to Ervin, the benefits of this plan were that both the president and vice president would always be democratically elected, and that Congress could “select from all our great men, public and private, in making their choice.” 227

Next to testify was Senator Keating, who spoke in defense of his bill that he argued was necessary for two reasons. First, it specifically stated that in the event of executive disability only temporary powers would devolve to the vice president and second, it allowed Congress to determine the procedures and remedies to such situations. 228 In addition to the largely unspecified guidelines of his proposal, Senator Keating introduced a new suggestion for avoiding a vice presidential vacancy by having two vice presidents elected along with the president every four years. The first would serve as the Executive Vice President and be next in the line of succession, while the other served as the Legislative Vice President and would fulfill the constitutional duties of the vice presidency and stand second in the line of succession. Aside from adding to the unappealing nature of the vice presidency, the Keating proposal was further damaged by its reliance on prospective congressional action which was far from guaranteed. 229

The final Senator to testify on the opening day of hearings continued the pattern of raising questions concerning the Bayh proposal. Senator Mike Monroney of Oklahoma testified that increased public awareness of the problem was necessary, and thus a bi-partisan commission should be established, “to study the various problems associated with the line of succession,

228 “Presidential Inability and Vice Presidential Vacancies,” CQ Almanac, 1964.
229 Bayh, One Heartbeat Away, 55.
disability and problems of the electoral college." While Monroney’s desire for more public attention was admirable, the prospect of handing off the problem to yet another committee failed to take decisive action at a time when national interest was already high. Senator Monroney’s suggestion was indicative of the mindset held by many congressional members that such a complicated issue would best be handled at a later time - the same mindset held by President Johnson, and one that unfortunately reappeared throughout American history.

The final person to testify on the first day of hearings was James Kirby, a professor at Vanderbilt University’s School of Law and a former counsel to the subcommittee under Senator Kefauver. The main focus of Professor Kirby’s testimony was on the private agreements that had been established between Presidents Eisenhower, Kennedy, and Johnson with the person next in the line of succession. Kirby criticized the agreements by pointing out they had no actual force of law and that they “depend essentially on good faith for their enforcement.” Unlike the previous speakers, Kirby finished his testimony by praising the disability provisions of Bayh’s proposal -- a point of view Bayh and his staff knew Kirby held, and were thus eager to have heard before the full committee.

Although the time frame of the hearings was quite relevant, the nature of congressional attention was apparent the next day when the only member of the committee to appear at the hearings was Bayh. Lack of attendance was not the only potential danger for the subcommittee as the next person to testify, New York Senator Jacob Javits, had introduced his own proposal for

231 Bayh, One Heartbeat Away, 56; Stathis, "Presidential Disability Agreements Prior to the 25th Amendment," 209.
232 Bayh, One Heartbeat Away, 57.
filling a vice presidential vacancy just before the introduction of Bayh’s proposal. Senator Javits began by extolling the merits of his plan that charged Congress with selecting a vice president from amongst either its own members or the Cabinet. Javits argued that these two groups were already in the line of succession, and by virtue of their positions were “already placed in a high position of public trust.” The benefits of Javits’ plan were readily apparent, especially since Congress would be called upon to act quickly in vetting a potential vice president. However, a potential drawback of the proposal was the ever-present danger that partisan politics would play an even larger role in the process and even delay a confirmation vote.

Despite his competing plan, the conclusion of Javits’ testimony was a monumental step forward in the process of finally securing congressional action. Instead of challenging Bayh’s proposal, Javits agreed to amend his proposal to include components Bayh’s -- specifically, the stipulation that a vice presidential replacement be made “by and with the consent of the president.” The overall impact was a signal that the viewpoints held by other Senators could be assuaged through compromise - a significant weapon in the battle to gain the two-thirds majority necessary for passage of the proposed amendment. Senator Javits reiterated the fear of many that action had to occur quickly, since the upcoming presidential election and subsequent inauguration of a new vice president would diminish attention to the issue.

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235 Bayh, One Heartbeat Away, 58.
Although Senator Javits’ contribution aided the drive for legislative action, numerous obstacles remained. Chief among these was a concern that certain aspects of reform violated the doctrine of separation of powers. Nebraska Senator Roman Hruska was the first to express this view, and it was his contention that the danger could be alleviated by confining the decision-making process exclusively to the executive branch.\textsuperscript{237} The testimony of Idaho Senator Frank Church immediately after Hruska’s could not have been more contradictory, as he proposed a mechanism for filling a vice presidential vacancy in which the president would nominate between two and five candidates who would then be voted on by the House of Representatives.\textsuperscript{238} The contrasting views of these two Senators illustrated the various components of the debate that the subcommittee was forced to confront.

The subcommittee’s adjournment until February 24\textsuperscript{th} was intended to coincide with a meeting of the American Bar Association in which Bayh hoped to secure the endorsement of the group for his proposal.\textsuperscript{239} In the meantime, Bayh hoped to win the support of other prominent government officials, such as Senate colleagues and former members of the executive branch, including former Vice President Nixon, and former Presidents Truman and Eisenhower. Although the views of such prominent officials were not known ahead of time, Bayh and his staff were desperate for any endorsement that would help to win over supporters of alternative proposals. Fortunately, Bayh received a significant boost when the American Bar Association

\begin{footnotes}
\item[237] Ibid.
\item[238] Ibid.
\item[239] Bayh, \textit{One Heartbeat Away}, 60.
\end{footnotes}
voted unanimously to support the provisions of his proposal, an endorsement that carried significant weight within the halls of Congress and in the press.\textsuperscript{240}

Despite this support, Bayh and his staff quickly realized their task was far from complete upon hearing from former President Truman. Responding tersely to Bayh’s letter seeking his input, Truman argued that the problem had been resolved by passage of the Succession Act of 1947, the legislation Truman proposed due to his concern over being able to appoint his own successor. While Truman’s support for his own initiative was to be expected, the fact he proposed relying on a plan that did nothing to address presidential disability or a vice presidential vacancy was shortsighted. Also, from a public relations standpoint, the Truman letter could have been disastrous since Bayh was doing all he could to win cosponsors and supporters for the bill. As a result, Bayh and his staff decided not to insert Truman’s letter into the record -- an action they claim was undertaken to protect both Truman and the subcommittee.\textsuperscript{241}

When the subcommittee reconvened hearings on February 24, its prospects seemed favorable, though far from assured. Bayh and his staff sought to capitalize on the support of the American Bar Association by inviting Bar Association President Walter Craig, and his successor, future Supreme Court Justice Lewis Powell to testify, both of whom echoed their group’s support for Senate Joint Resolution 139.\textsuperscript{242} However, Craig and Powell’s testimony was marked by contentious questioning from Senator Keating, who voiced his displeasure with the Bar Association’s decision to withdraw its support for his proposal in favor of Bayh’s. Powell

\textsuperscript{241} Bayh, \textit{One Heartbeat Away}, 61.
\textsuperscript{242} "Presidential Inability and Vice Presidential Vacancies,” \textit{CQ Almanac}, 1964.
responded by attributing the change to a desire to preclude a scenario in which Congress failed to act following passage and ratification of the Keating proposal. Senator Keating concluded his questioning by restating his belief that state legislatures were more likely to ratify his broad proposal than the specific steps outlined in Bayh’s.

The subcommittee then heard from members of the legal and academic fields, each possessing varying points of view on the proposed amendment. The first to testify was Harvard Law Professor Paul Freund, whose endorsement of Bayh’s proposal was again challenged by Senator Keating. Keating asked Freund whether he thought his or Bayh’s proposal was better suited to win ratification by state legislatures. Freund responded by stating he would be embarrassed to present to state legislatures what was tantamount to a blank check for Congress to act in any way they saw fit. He concluded his testimony by pointing out that although the Bayh proposal outlined specific guidelines, it also allowed Congress to amend them if circumstances showed they did not properly address unforeseen problems.

Next to testify was former Attorney General Herbert Brownell, the man who helped draft the Eisenhower-Nixon agreement. Brownell stated the real danger he experienced during Eisenhower’s illnesses was ensuring the vice president could take over as acting president with full authority, and that the president could regain his office once he had recovered. Questioning of Brownell focused on allowing Vice President Nixon and the Cabinet to potentially determine

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244 Ibid.
Eisenhower’s level of incapacitation, and the provisions in Bayh’s proposal that allowed for a similar mechanism.  

When asked if he felt the Cabinet and Vice President could serve as independent arbitrators in such a case, Brownell responded that he felt the Cabinet’s loyalty would always be to the president. Therefore, employing them as a jury in determining presidential disability was the best manner in which to assure enemies of the president did not act out of political or personal motives. Although his testimony may not have been considered unqualified support, the legitimacy Brownell lent to the provisions concerning presidential disability were remarkably significant given his experiences with such an issue.

After Brownell, the subcommittee heard from another former Attorney General, Francis Biddle, who served in the post under President Franklin D. Roosevelt and who joined Brownell in supporting the plan. Biddle began by endorsing the provision for nominating a vice president with congressional approval -- a mechanism he said was appropriate since presidential candidates selected vice presidential candidates anyway and thus this was merely selection by the same process. He also stated that empowering Congress and the Cabinet to act in such times of crisis was acceptable, and that he was inclined to trust their judgment. Like Brownell, Biddle offered more than just support, as he was yet another informed proponent Bayh could point to in an effort to win over undecided peers.

Even though Professor John Feerick lacked the experience of those who preceded his testimony, his contributions were remarkably significant. Feerick’s efforts on behalf of the Bayh

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246 Ibid.
proposal began when he worked to secure support from the ABA. They continued with his testimony, in which he expressed strong support for the proposed amendment based on the danger that an ordinary piece of legislation may have its legality challenged in a time of crisis.²⁴⁸

Feerick also supported placing the vice president and Cabinet in charge of determining presidential disability, given their natural allegiance to the president and the subsequent public trust they would possess in a time of uncertainty. Finally, Feerick responded to charges by Senator Keating that such a detailed amendment was too specific to win ratification by arguing that since the Constitution was so detailed in outlining other stipulations of the presidency, it would be unreasonable to pass the broad amendment Keating advocated.²⁴⁹

The final member of the academic community to testify in support of the Bayh proposal was Professor Ruth Silva, whose endorsement was nothing short of total. Silva voiced her support for employing the vice president and Cabinet as the arbitrators of disability, and contended that the required two-thirds majority in Congress was a proper safeguard against a president being removed for political or other non-medical reasons.²⁵⁰ Silva also objected to Keating’s two vice presidents proposal by arguing that since voters generally do not vote for a vice presidential candidate anyway, party officials would select candidates based solely on political factors, such as ticket-balancing or party unity. Thus such a model would only serve to increase the likelihood that the person next in the line of succession would possess alternative political views to the president’s, which could further complicate an already volatile situation.

²⁴⁸ Bayh, One Heartbeat Away, 69.
The academic community was by no means enamored with the Bayh proposal, a mindset reflected by the testimony of some of the most prominent members in the field of political science. James McGregor Burns argued that neither the executive or legislative branch could be trusted to act in an instance of disability, due to the vice president’s fear of appearing too eager, the Cabinet’s loyalty to the president, and Congress’ slow and partisan nature. Burns advocated the creation of a commission comprised of the Chief Justice, the Secretaries of State and Treasury, the Speaker of the House, and the Pro Tempore of the Senate, each of whom would select a physician charged with determining the state of the president’s health. Although the dangers Burns detailed concerning members of both branches were valid, the creation of such a commission was accurately perceived to present too many additional problems.

Another prominent political scientist who opposed the power of removal being vested in the Cabinet was Richard Neustadt, who argued that such authority would invariably complicate the relationship between the president and his advisors. Neustadt also offered a reluctant endorsement for allowing the president to nominate a vice president, so long as it required the ratification of the Senate only. He concluded his testimony by addressing the overarching problem that creating an infallible set of guidelines and stipulations was impossible given the inherently unpredictable nature of both human health and human events. Neustadt stated that no amendment could guarantee an orderly process in such circumstances, and that only the “good will and good sense” of those involved could ensure a proper transfer of power. This point of

253 Bayh, One Heartbeat Away, 72.
view was reinforced by Professor Sidney Hyman, who stated, "The greater part of what will happen under it will depend on the interplay between the constitutional morality of the nation and the wisdom and uprightness of the chief officers of state."254

The subcommittee then returned to fielding testimony from members of the political arena, and the dangers of partisanship. Although intrigued by New York Governor Nelson Rockefeller’s proposal of a “first secretary of the government” serving just behind the vice president in the line of succession, Bayh feared Rockefeller’s testimony could have threatened support, given the possible battle for the 1964 Republican nomination between Rockefeller and Arizona Senator Barry Goldwater.255 The fear among Bayh and his staff was that providing Rockefeller with such a noteworthy appearance would anger Goldwater and his allies, and result in opposition to the final product the subcommittee would produce. As a result, only Rockefeller’s letter was entered into the record, evidence that even an issue perceived as non-political was never completely free from partisanship.256

Even though former President Eisenhower was far from a non-partisan figure, the prestige and influence of his testimony was too important for the subcommittee to pass up.257 Due to his vacation, the former president did not appear in person before the subcommittee, but the letter he sent provoked, in Bayh’s words, a “jubilant” response. Eisenhower stated he felt any decision on disability should occur only between the president and vice president with the

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255 Bayh, One Heartbeat Away, 71.
256 Ibid, 73.
possible input of the Cabinet, thus agreeing in principle with the guidelines of the Bayh proposal. The second half of the letter was less conducive to Bayh’s cause, as Eisenhower proposed a commission comprised of three Cabinet officials, the majority and minority leaders of both Houses of Congress and four recognized medical personnel to arbitrate any disability dispute. Eisenhower concluded his letter by stating that because there is no guaranteed solution to the problem, we must trust in our government officials to do what is right.

While Bayh’s committee was receiving at least partial support from a former president, the current president was remaining publicly silent. When Bayh sent a letter to President Johnson outlining the intentions of the hearings and soliciting his personal point of view, he also stated that due to the current vacancy in the vice presidency he would understand if Johnson wished to withhold his support. Whether it was Johnson’s strong desire to avoid action until after the inauguration or the rigors of the office and the upcoming election, Bayh received no response. As a result, the subcommittee operated without knowing whether a president who possessed enormous influence within Congress supported or opposed their activities -- the latter of which could have easily destroyed everything they accomplished.

The final two men to appear before the subcommittee provided testimony appropriate for the conclusion of the hearings. Clinton Rossiter supported confining determination of disability to the executive branch and stated that the use of either the Chief Justice or any kind of commission should be avoided at all costs. Rossiter also endorsed the nomination of a vice

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258 Bayh, *One Heartbeat Away*, 76.
259 Ibid, 77.
presidential replacement by the president, with the advice and consent of one or both Houses of Congress, another significant show of support for the Bayh proposal. Rossiter closed his testimony by profoundly stating, “In the most important sense the problem of disability is quite insoluble. A period of clearly established presidential disability in any case is going to be a messy situation, one in which caution, perhaps even timidity, must mark the posture of an acting president.” 261

The final witness to appear before the committee presented an interesting dilemma to Bayh and his staff. Richard Nixon’s testimony was vital given his experiences during Eisenhower’s health scares, but also controversial, since Nixon was rumored to be a candidate for the 1964 Republican nomination for president.262 It was finally decided that Nixon’s input was too valuable not to hear in person, and he appeared on the last day of hearings. In a remarkable bit of irony given his experiences a decade later, Nixon’s testimony centered on the dangers of an opposition Congress exerting control over the selection of a vice president. Nixon illustrated this problem by using the example of President Truman and his contentious relations with the Republican-controlled Congress in 1947, a time in which there was no vice president. This was the major factor in Nixon’s support for the Electoral College selecting a vice presidential replacement, a body that based on the last election would be guaranteed to represent majority support for the president. Nixon concluded his testimony by advocating that any

262 Bayh, One Heartbeat Away, 83.
determination of disability be confined to the executive branch and that any decision ultimately came down to the trust vested in the Cabinet, Electoral College, and Congress.  

As the subcommittee concluded its hearings, the prospects for success seemed bright. Despite the varying points of view expressed during the hearings, there was no solid support for either dismantling the Bayh proposal or significantly altering its components. However, the steps still to be taken were numerous and contained many potential dangers, since they would be taking place during the 1964 campaign. This meant that at least another eight months would pass before any support or guidance from the executive branch could be expected. Additionally, since within that time frame a new vice president would be elected and the nation would mark the one-year anniversary of the Kennedy assassination, there was a significant danger that public support for reform would evaporate.

A Race to Wait

While successful hearings usually precipitate an increase in action, the political landscape of the time was much more conducive to inaction, as both parties were hard at work organizing their upcoming conventions. This mindset went all the way to the Oval Office, as illustrated by President Johnson’s response to Senator Bayh’s mention of the subcommittee’s work during a helicopter ride the two men shared following a labor conference in Atlantic City, New Jersey on March 23, 1964. After attempting to elicit President Johnson’s feelings on the matter, Bayh

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264 Bayh, *One Heartbeat Away*, 90.
received a succinct version of Johnson’s arguments against making any changes prior to the 1964 election. According to Bayh, Johnson stated: “I’ve been following your work, Birch, but I doubt very much if anything can be passed through this Congress, after the election perhaps it will be different.” Given the influence both Johnson and Speaker McCormack held over the legislative process, it was obvious passing such an amendment without their support would be impossible. Therefore, Bayh and his staff continued working with the understanding that real action was at least half a year away.

While Congress was reluctant to act, the American Bar Association acted quickly and decisively. The ABA scheduled a one-day conference to focus on presidential inability and vice presidential vacancy on May 25, 1964, in hopes of gaining feedback from civic, business, and government officials.266 The highlight of the conference was a speech by former President Eisenhower, who in a heartfelt address revealed key events of his own incapacitation, including being kept virtually shut off from the outside world for a week following his 1955 heart attack.267 Eisenhower went on to fully endorse the recommendation that any vice president who ascends to the presidency immediately nominate a vice president to be confirmed by Congress. As to the delicate question of how to handle a disagreement between the president and vice president, Eisenhower suggested it could be resolved by Congress, and not the commission approach

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detailed in his earlier letter to the subcommittee. Following Eisenhower’s speech, the ABA officially endorsed a plan similar to the Bayh proposal.

Two days later, Senator Bayh prepared to recommend his proposal, Senate Joint Resolution 139, to the Senate Judiciary Committee, the last step before being delivered to the full Senate. Tragically, in an eerily similar turn of events to those that took the life of Senator Kefauver, Senator Bayh was involved in a plane crash that claimed the lives of two passengers and seriously injured Bayh, his wife, and his Senate colleague Ted Kennedy. As a result of Bayh’s prolonged convalescence, the Resolution languished until he was able to present it to the Judiciary Committee on August 4, 1964. At that point, the proposal was unanimously approved and referred to the full Senate, with the caveat that when debate began amendments could be offered. Regardless of what lay ahead, the legislation approved by the Senate Judiciary Committee contained the basic guidelines of what would become the 25th Amendment.

On September 28, Bayh unveiled the proposal to the full Senate, and, despite another attempt by Senator Keating to consider his two vice president’s suggestion, it appeared there would be little opposition. The next day the Senate voted in favor of Senate Joint Resolution 139 by a vote of 65-0, a vote that marked the first time Congress had passed legislation pertaining to

268 Bayh, One Heartbeat Away, 123; Phillips, “Eisenhower Backs Disability Change.”
271 Bayh, One Heartbeat Away, 129.
presidential disability.\textsuperscript{273} However, just four days later, Congress adjourned without any further action. While this may have seemed a setback, it would turn out to be the greatest gift the amendment ever received.\textsuperscript{274}

\textbf{From a Crawl to a Sprint}

While everyone understood a new vice president would be elected in November of 1964, it was the magnitude of the election that altered the congressional landscape. President Johnson’s landslide victory meant not only that Senator Hubert Humphrey would be sworn-in as vice president on January 20, 1965, but that Johnson’s already considerable influence in Congress would grow even stronger. When Johnson stated, “I will propose laws to insure the necessary continuity of leadership should the president become disabled or die” in his landmark 1965 State of the Union Address, it became clear Johnson’s resistance to reforms had ended.\textsuperscript{275} The impact of these words was immediately apparent as congressional leaders set to work on accomplishing Johnson’s goals the day after his speech, work that included scheduling hearings on the disability issue.\textsuperscript{276} Acting quickly to regain the momentum, Bayh reintroduced the legislation, this time titled Senate Joint Resolution 1, just two days after the State of the Union Address. This time the

\begin{footnotes}
\item[274] Bayh, \textit{One Heartbeat Away}, 160.
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Resolution was not merely Bayh’s alone, as it now possessed the names of sixty-six cosponsors - thus providing it with the necessary two-thirds majority for a proposed constitutional amendment.277

While Bayh and his new cosponsors were picking up where Senate Joint Resolution 139 left off, their counterparts in the House tried to catch up. The Chairman of the House Judiciary Committee, Representative Emanuel Celler, proposed House Joint Resolution 1, his chamber’s identical version of Bayh’s proposal a day before the Senate received Bayh’s measure.278 The House of Representative’s reaction was made possible by the upcoming inauguration of a new vice president, an action that removed Speaker McCormack as next in line for the presidency, and precluded the idea that action was being taken due to concerns over his abilities.279 In case these actions did not provide enough impetus, President Johnson’s brief hospitalization on January 23 reinforced the dangers of personal agreements and ad-hoc responses to questions of presidential command and authority.280 Johnson’s hospitalization occurred just three days after he and Vice President Humphrey were inaugurated and prior to any formal agreement concerning the potential for presidential disability.

278 Feerick, The 25th Amendment, 83.
Whether driven by his newfound desire for reform or his own recent health scare, Johnson reiterated his desire for a solution when he sent a special message to Congress on January 28 that detailed the dangers of inaction.\footnote{Charles Mohr, "Amendment on Disability is Proposed by President." \textit{The New York Times}, January 29, 1965: 1. Accessed May 29, 2011, from ProQuest; "The President's Message on Disability," \textit{The New York Times}, January 29, 1965: 14. Accessed May 29, 2011, from ProQuest.} Ironically, the message was delivered the same day the White House responded to press inquiries concerning an agreement between Johnson and Humphrey that stemmed from Johnson’s brief hospitalization five days earlier. According to the Johnson Administration, the agreement was a verbal one reached prior to the inauguration -- hardly the definitive set of guidelines necessary in a time of national crisis.\footnote{Arthur Krock, "The Johnson-Humphrey Agreement Mystery." \textit{The New York Times}, January 28, 1965: 28. Accessed May 28, 2011, from ProQuest.} The next day, Bayh’s subcommittee conducted daylong a hearing in which Attorney General-designate Nicholas Katzenbach relayed the Johnson Administration’s approval, with the caveat that Congress rule on any disagreement concerning disability. Katzenbach argued this stipulation could prevent a usurpation of power by a vice president and the Cabinet.\footnote{United States Senate, Hearings on Presidential Inability and Vacancies in the Office of Vice President Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 89\textsuperscript{th} Congress, 1\textsuperscript{st} Session, 1965.} Three days later, the subcommittee voted to send the Resolution to the Senate Judiciary Committee, which, in turn, forwarded the Resolution to the full Senate on February 4. Thus, in the span of one month, the Senate Joint Resolution was introduced, debated, and referred out of the subcommittee and Judiciary Committee -- a true indication of the demand for action that was driving reforms.\footnote{United States Senate, Report on Presidential Inability and Vacancies in the Office of the Vice President by Senate Committee on the Judiciary, 89\textsuperscript{th} Congress, 1\textsuperscript{st} Session, 1965.}
Since the Senate had conducted hearings and solicited testimony from a range of experts, the House Judiciary Committee was well behind their Senate counterparts when they opened hearings on February 9, 1965. A significant point of contention occurred when the ranking Republican on the Committee, William McCulloch, introduced a proposal that Congress rule on a dispute over presidential disability within ten days. Additionally, Representative Charles Mathias presented strong opposition to the mechanism for allowing the president to select a vice presidential replacement. This prompted Senator Bayh, who was testifying before the House Committee, to respond that public opinion and the advice and consent of Congress would serve as safeguards to ensure the best candidate for the job. A final recommendation came from Attorney General Katzenbach, who advocated that if the president declared his own disability, he retain the authority to reclaim his powers by another personal declaration without being subject to congressional action.

When the House Judiciary Committee approved the revised House Joint Resolution 1 on March 24, 1965, it was no longer identical to Senate Joint Resolution 1, due to the inclusions of the ten-day requirement and the provision allowing the president to declare an end to his own inability. Another change adopted by the House Judiciary Committee was to make the proposal more succinct by crafting it into four separate sections. The first affirmed the Tyler precedent of vice presidential succession; the second allowed the president to nominate a

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286 United States House of Representatives, Hearings on Presidential Inability and Vice Presidential Vacancy Before the House Committee on Judiciary, 89th Congress, 1st Session, 1965.  
replacement vice president; the third provided guidelines for the president to declare his own disability and subsequent recovery; and the fourth detailed the procedures for resolving a dispute involving presidential disability. Although these changes were not major revisions to the Senate proposal, they would have to be reconciled before the legislation could be passed and submitted for ratification.

**Merely a Matter of Time**

On February 19, 1965, the full Senate passed Senate Joint Resolution 1 by a vote of 72-0, a tally that reflected both strong support and the realization that resistance was best expressed by way of a recorded non-vote. In the House however, debate was just starting to heat up as various Representatives voiced their displeasure with the Senate Resolution, the House Resolution, and even the notion of reform altogether. Many prominent House Leaders, such as Minority Leader Gerald Ford and Chairman Celler, espoused the view that while the House Resolution was not perfect, it was the best that could be expected. However, this view was not shared by all of their colleagues.

Representative Basil Lee Whitener expressed the view that such an amendment was unnecessary, since Article II, Section 1, Clause 6 of the Constitution already gave Congress the right to determine presidential disability. Additionally, Representatives James O’Hara and John Dingell felt it minimized the House of Representatives as an institution, since it made succession to the presidency by the Speaker less likely. A final concern was raised by Representative

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Clarence Brown, who pointed out that after Lyndon Johnson succeeded to the presidency, his popularity would have precluded Congress from rejecting his vice presidential nominee. Brown warned: “Under certain conditions and certain circumstances a vacancy could exist in the vice presidency and a president could name a billy goat as vice president and some Congresses would approve of that nomination.”289

Despite these objections, House Resolution 1 passed by a margin of 368 to 29 on April 13, 1965.290 Yet, despite passing both Houses of Congress by wide margins, the disparities between the House and Senate Resolutions meant a Conference Committee would be impaneled to draft a uniform Resolution acceptable to both the House and Senate. It quickly became apparent that a disagreement concerning the ten-day stipulation added by the House was a point of contention between the House members of the Committee -- comprised of Representatives Celler, McCulloch, Richard Poff, Byron Rogers and James Corman -- and their Senate counterparts -- Senators Bayh, Eastland, Hruska, Ervin and Everett Dirksen.291

The key discrepancy reflected the bodies in which the members served, as Senators stood opposed to the introduction of time requirements that threatened the long-term debating procedures cherished by the Senate. The impact these differing mindsets would have on the proceedings quickly became evident, as early meetings of the Committee broke down into

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291 Ibid, 104.
sometimes heated arguments over the imposition of a time requirement. These disputes prompted Senator Bayh to offer a compromise in the form of a twenty-one day requirement.\footnote{Bayh, \textit{One Heartbeat Away}, 289.}

Considering that a Senate filibuster of the 1964 Civil Rights Act was still fresh in everyone’s minds, it was not surprising that some viewed unlimited debate pertaining to the disability of the president as a significant danger. Additionally, since Senators had accepted House stipulations allowing the president to reclaim his office by a personal declaration, and were willing to accept a twenty-one day time frame, a feeling grew amongst Senators that they had compromised enough and it was now the House’s turn. All of this led to Senator Bayh’s decision to reach out once again to the American Bar Association for help in pressuring the House to agree to a compromise. Bayh claimed he needed a “small miracle” from the Bar Association in order to avoid a disastrous collapse at such a late stage.\footnote{Ibid, 291.}

As the weeks passed, the potential for compromise only diminished further. At a meeting on June 10, prompted by House member’s refusal to concede on their ten-day requirement, Senator Bayh slammed his fist on the table and declared that he and his Senate colleagues would go no further. As he left, Bayh told House members they would have to take responsibility for destroying the prospects of reform.\footnote{Ibid, 292.} This breakdown prompted Lewis Powell to meet with the Committee and encourage them to reach some sort of compromise on an issue in which the ABA had invested an enormous amount of time and effort. However, Powell’s true influence would be illustrated afterwards.
Following the meeting, Bayh and Powell discussed the situation at a Washington D.C. airport. In a twist of fate, Representative Celler walked by and saw Powell discussing strategy with Celler’s Senate adversary. Not anxious to be labeled as the cause of failure, Celler began to reconsider his position. The impact of this reconsideration was illustrated just days later as, on June 23, 1965, the Conference Committee agreed to the twenty-one day compromise for congressional action.

Although the proposed amendment had undergone many changes, it continued to bare a resemblance to its predecessor, the Eisenhower-Nixon agreement. This was best illustrated in the components by which the president may transfer power to the vice president or, lacking such a procedure, the vice president and the Cabinet may vote to transfer power. The following is the proposed amendment that was sent to the states for ratification on July 6, 1965:

**Section 1:** In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

**Section 2:** Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

**Section 3:** Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he

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transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4: Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.296

Ratification of the 25th Amendment

296 25th Amendment to the United States Constitution.
The manner in which the proposed 25th Amendment to the Constitution was finally passed by Congress would prove to be indicative of the ratification process by state legislatures. After the compromise by the Conference Committee, the bill was passed on a voice vote in the House of Representatives on June 30, 1965, and on July 6, it was approved in the Senate by a 68 to 5 vote.\textsuperscript{297} The relatively easy manner by which the proposed amendment passed both Houses of Congress and thirty-eight state legislatures can be attributed to a trend that emerged early on in the Senate hearings, when a number of competing proposals were presented. Once other proposals were dismissed and discussion came down to only one bill, the process was free from fierce debate. Thus when individual state legislatures were presented with the option of simply approving or rejecting the amendment, passage became much simpler.

Even though organized opposition to the Amendment was not much of a concern, the dangers of a prolonged ratification process were obvious. However, one impetus for action came from the personal health of President Johnson, who was forced to undergo surgeries in 1965 and 1966, both of which required anesthesia and reinforced the dangers of inaction to both the state legislatures and their constituents.\textsuperscript{298} The only significant opposition came by way of an article in the \textit{South Carolina Law Review} that questioned the authority given to the president in filling a vice presidential vacancy. This article was distributed to every member of the Arkansas State Legislature prior to its vote and briefly resulted in a postponement by that body while the

\textsuperscript{297} "Presidential Disability Amendment Ratified by States." \textit{CQ Almanac Online}.

\textsuperscript{298} Feerick, \textit{One Heartbeat Away}, 111.
article’s facts were considered. Although there remained scattered voices of opposition, they were no match for the coordinated efforts of the American Bar Association, which transferred the lobbying efforts so effective in winning congressional passage to the state legislatures. This endeavor resulted in ratification by thirteen states by the end of 1965, and thirty-one states by July of 1966, just one year after the Amendment had been sent to the states.

Although ratification by the required thirty-eight state legislatures seemed to be a foregone conclusion at the beginning of 1967, the final process was not free from controversy. Five states -- Minnesota, Montana, Nevada, North Dakota and Ohio -- were competing to be the thirty-eighth state to ratify the Amendment. Each sought to time their legislature’s vote in a manner allowing them to achieve such a feat, a strategy that even prompted Nevada to retract its ratification on February 8, 1967, after it was discovered the state would be the thirty-seventh supporter. This practice was repeated by the North Dakota State Legislature which claimed their ratification by voice vote on February 9 was invalid. Thus, the 25th Amendment found itself two states short of ratification due solely to the desires of state legislators to mark their place in history. This game of legislative chicken finally came to an end on February 10, 1967, when Minnesota became the thirty-seventh state to ratify the Amendment -- a move that prompted Nevada to ratify roughly an hour later. This vote assured Nevada a place in constitutional history, but more importantly, assured the nation that the dangerous issue of presidential disability would no longer be left to personal agreements or other dangerous contingency plans.

300 "Presidential Disability Amendment Ratified by States." *CQ Almanac Online*.
301 Ibid.
John Dickinson Has His Answer

On February 23, 1967, nearly two centuries after the Constitution was drafted, a ceremony was held in the White House to commemorate ratification of a 25th Amendment that finally provided an answer to John Dickinson’s question concerning presidential disability. Speaking to those most responsible for congressional passage of the Amendment -- Senator Birch Bayh and Representative Emanuel Celler -- and those who were now officially assigned a role in determining his ability to discharge his duties -- Vice President Hubert Humphrey, House Speaker John McCormack, Senate Pro Tempore Carl Hayden, and the Cabinet -- President Johnson declared: “It was 180 years ago, in the closing days of the Constitutional Convention, that the Founding Fathers debated the question of Presidential disability. John Dickinson of Delaware asked this question: ‘What is the extent of the term 'disability' and who is to be the judge of it?’ No one replied. It is hard to believe that until last week our Constitution provided no clear answer.”

After providing a brief history of instances in which the president was either disabled or the vice presidency was vacant, Johnson summarized the basic principle behind the need for such an Amendment by saying: “Once, perhaps, we could pay the price of inaction. But today in this crisis-ridden era there is no margin for delay, no possible justification for ever permitting a

vacuum in our national leadership. Now, at last, through the 25th Amendment, we have the means of responding to these crises of responsibility.” After offering praise to those behind the drive for change, Johnson concluded his remarks and returned to discharging the duties of his office. An office that after one-hundred and seventy-eight years finally had a set of constitutional guidelines concerning presidential disability.

**Conclusion**

The series of events that led to the passage of the 25th Amendment can best be described as a perfect storm, the first component of which was recent history. Between 1945 and 1963, the nation witnessed the death of a seriously ill president, the repeated incapacitation of another due to a series of illnesses, and the assassination of a third. All of these prevented the reemergence of the mindset that the danger of presidential incapacitation was too remote to warrant action. This antiquated mindset had proven a serious obstacle to previous attempts at reform.

The second factor was the state of the world in the mid 1960s. Events such as the Cuban Missile Crisis, the standoff in Berlin, and the emergence of conflict in Vietnam, illustrated the need for a clear and constant chain of command, the first requisite of which is clarity about who is in charge. The prospect of merely limping along until the president recovered, or even until the next scheduled presidential election, was clearly no longer a remedy. Fortunately, this lesson was not learned the hard way.

The third factor was perhaps most responsible for the quick passage of the 25th Amendment, the strong Democratic control of the federal government following the 1964
Election. The support of President Johnson at a time when his control over the legislative process was nearly absolute was an immeasurable benefit, as was the presence of a newly inaugurated Vice President, which removed the notion of action due to Speaker McCormack’s capabilities. Additionally, the fact that everyone in the congressional line of succession came from the same party removed the possibility of citing partisanship as a source of opposition. While components of these factors had been present following previous instances of executive disability, they had never been as strong as they were in January of 1965.

As the Johnson Administration gave way to the Nixon Administration in January 1969, the notion that the issue of presidential disability and succession had been resolved was understandable. For the first time, a commander-in-chief assumed the office with a clear set of guidelines concerning what to do in the event he was either incapacitated or died during the next four years, guidelines that most agreed were the best that could be expected given the nature of the problem. The scant attention devoted to the issue at this time focused mainly on a curiosity concerning how and when invocations of the 25th Amendment may occur. As it turned out, the wait for an answer would be remarkably short.
Chapter Four

Invocations of the 25th Amendment
Gerald Ford’s Selection as Vice President

The fact that any invocation of the 25th Amendment would occur in a time of uncertainty was never more evident than in the fall of 1973. Vice President Spiro Agnew’s resignation on October 10 of that year in the wake of a bribery scandal set in motion the first invocation of Section Two, allowing President Nixon to nominate Agnew’s replacement. Although any nomination to the nation’s second highest office would prompt scrutiny from Congress, the time in which Agnew’s resignation took place raised the stakes even more. Members of Congress were fully aware they were not only selecting a new vice president, but likely the nation’s next commander-in-chief.303

The precarious state of the Nixon Presidency created a scenario that only fiction writers could have envisioned when drafting the 25th Amendment. After months of congressional hearings and shocking revelations concerning Watergate, the prospects for Nixon completing his term in office seemed to diminish daily. Additionally, Nixon’s relations with Congress were already acrimonious due to his refusal to turn over tape recordings to investigators. All of this greatly increased the chances that the first invocation of the 25th Amendment could quickly deteriorate into a partisan battle for control of the presidency.

In addition to partisanship, the wording of Section Two presented problems. Since objections had been raised concerning a time limit for confirming a vice presidential nominee, the section lacked any guidelines for how a nominee was to be vetted, or the timeframe of the process. The only stipulation called for the approval of a majority of both Houses of Congress

before a nominee could assume the office. As a result, there were no restrictions on how long Congress could take before voting on Nixon’s nominee.

Nixon’s lack of leverage was highlighted following a meeting with congressional leaders soon after Agnew resigned. According to Nixon’s account, the meeting included Democratic warnings that any nominee seen as a potential Republican candidate for president in 1976 would face a fierce battle for confirmation.304 Nixon’s list of potential nominees were, in order of preference, John Connally, Nelson Rockefeller, Ronald Reagan and Gerald Ford, with all but Ford perceived as a potential candidate in the next election.305 Nixon’s untenable position was all the more ironic considering that his testimony before the Bayh Committee less than a decade earlier centered on Nixon’s concerns about the dangers of an opposition Congress ratifying a vice presidential nominee.

For his part, Nixon’s list was comprised of attractive candidates for Republicans. Along with the former Democrat Connally, the inclusions of Reagan and Rockefeller were clear attempts by Nixon to appeal to the conservative and liberal wings of the party respectively. In appealing to these groups, Nixon sought to shore up his base for his upcoming impeachment fight, a battle in which Democratic support was already lost. Thus less than twenty-four hours after Agnew’s resignation, the battle between Nixon and Congress was already underway. Unfortunately for Nixon, it was a battle in which Congress had the advantage.

It quickly became apparent to Nixon that the top three names on his list would be difficult to confirm. Connally, Nixon’s top choice, had angered many Democrats when he left the party to

304 Nixon, RN, 925.
305 Ibid, 926.
become a Republican, an event that would result in significant congressional opposition. Reagan and Rockefeller were each perceived to be strong candidates in 1976, and thus their likely ascension to the presidency would make them even more formidable. This left only House Minority Leader Gerald Ford, a selection that congressional leaders assured Nixon would present the least amount of opposition.

Just two days after Agnew resigned Nixon called a prime time press conference to announce his selection of Ford. Shortly before the announcement Nixon phoned Connally, his first choice, and informed him that the political fight his nomination would produce was something Nixon could not afford, given his own precarious standing.\(^\text{306}\) In a remarkable admission, Nixon conceded that Congress had dictated who he would be able to nominate.

Ironically, if Nixon had chosen to fight for his desired choice, he would have found support. A poll taken the day after Agnew resigned showed an astounding 93% of respondents opposed precluding prospective nominees because of their political aspirations in 1976.\(^\text{307}\) Additionally, any delay tactics on the part of Congress would have been subject to public scrutiny since a member of their own party, House Speaker Carl Albert, stood next in line. Finally, given Nixon’s lack of popularity among Democrats, his survival depended solely on support from his own party. Therefore, Nixon essentially had nothing to lose in dealing with congressional Democrats.

\(^{306}\) Ibid, 928.

Another source of support did come from a Democrat in Congress, though he was hardly an unbiased observer. Senator Birch Bayh voiced his opposition to precluding any nominee based on political aspirations, calling the chance of career advancement “a fact of political life.” After stating the only criteria should be a nominee’s capabilities as both vice president and president, Bayh stated that such a selection process “has to be out of the political arena.” However, Nixon clearly was reluctant to undertake another battle.

The fact that congressional leaders’ demands were public knowledge made the selection process even more remarkable. Prior to the announcement press accounts confirmed that Ford was not Nixon’s first choice, though we would later learn he wasn’t even in the top three. Ironically, the majority of concern expressed during debate over Section Two of the 25th Amendment was that it placed too much power in the hands of the president. As the Ford example illustrated, this was not the case.

**The Saturday Night Massacre**

A critical point during congressional debate was the acceptance that any invocation would involve a degree of chaos. However, past events also show that after the initial shock, there was usually a period of acceptance and calm. Thus following the three day period that comprised Agnew’s resignation and Ford’s nomination, it seemed the nation would be permitted

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309 Ibid.
to return to a sense of normalcy, or as much as possible given Watergate. Unfortunately, this did not occur.

Nixon’s prolonged battle with Special Prosecutor Archibald Cox reached a stunning conclusion on October 20, 1973. In a series of events that became known as the Saturday Night Massacre, Nixon ordered Attorney General Elliot Richardson to fire Cox, an order Richardson refused to carry out and instead resigned. The task then fell to Deputy Attorney General William Ruckelshaus, who followed Richardson’s example and also resigned. Finally, Solicitor General Robert Bork, next in line at the Justice Department, carried out Nixon’s orders and fired Cox. This dramatic series of events culminated with FBI Agents sealing off Cox’s office and securing all files dealing with the investigation.\(^{311}\)

Although Nixon and his advisors expected some public backlash, even they were surprised by the nearly uniform anger of the public and Congress. Within a matter of days, twenty-two separate bills were introduced in the House of Representatives calling for impeachment proceedings to begin. Additionally, some urged a delay in confirming Ford until Nixon either turned over audio tapes that Cox had sought, or even until Nixon resigned.\(^{312}\) This course of action had originally been advocated by Senator Edward Kennedy, who suggested blocking any confirmation until the issue of the tapes was decided.\(^{313}\) While this tactic ran counter to the intention of the Amendment, the broad wording of Section Two provided no safeguards.

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\(^{313}\) Feerick, *25th Amendment*, 130.
Although he was not involved in the actions of the Nixon Administration, the resulting negative reaction quickly impacted Ford. In the days after the firings, the congratulatory messages Ford received quickly gave way to calls for Ford to withdraw as Nixon’s nominee. While many of these letters were extremely critical of Nixon, they largely urged Ford to withdraw out of a fear that joining the Nixon Administration would destroy Ford’s image as an honest public servant. These messages illustrated the stark contrast between the public perceptions of Nixon and Ford as the confirmation process began to take shape.

The Confirmation Process

The main question facing Congress after Ford was nominated concerned how to proceed. Usually, congressional proceedings are dictated by either stated guidelines or precedents. However, the guidelines of Section Two merely charged Congress with voting on a vice presidential nominee. And since this would be the first time a vice president was chosen without an election, there was no precedent to offer guidance.

One of the critical questions facing the Senate was what committee should handle the confirmation process. Talk of a joint House and Senate Committee was quickly rejected in the House, where members felt they would be overshadowed by their Senate colleagues. Additionally, political factors quickly became a determining factor, as many Senate Democrats sought the opportunity to question a potential 1976 nominee. However, after Ford’s selection was announced, his nomination was referred to the Rules Committee based on the belief that

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314 A collection of these messages can be found in Gerald Ford’s Vice Presidential Papers- Box 22, at the Gerald R. Ford Library.
Ford would not run in 1976, and that his confirmation was expected.\textsuperscript{315} These factors caused many Senators to forego their desire to question the nominee.

On the other side of the Capitol, the House of Representatives was charged with vetting a member of its own leadership. While the Senate debated how to conduct their hearings, the House quickly decided to refer the matter to the Judiciary Committee. Like the Senate, Ford would be questioned by Committee members, and, assuming they approved, his nomination would be sent to the floor for confirmation. Given Ford’s long service and the esteem in which he was held by members of both parties, his confirmation seemed all but assured in the House.\textsuperscript{316}

Despite his reputation, however, it quickly became apparent that Ford would not avoid the rigors of a confirmation hearing. Just six days after the nomination was announced, House Judiciary Chairman Peter Rodino’s office established the rules governing the Committee’s Hearings. These thirty-three guidelines mainly established standards concerning how witnesses would be called before the Committee and their testimony. However, the labeling of the hearings as an investigation into Ford’s qualifications, along with the occasional reference to the “interrogation” of witnesses reinforced the severity inherent in any confirmation process.\textsuperscript{317}

Ironically, the stated focus on Ford’s qualifications did not dictate his staff’s preparations for the hearings. This focus was mainly on accusations directed at Ford by Robert Winter-Berger in his book, \textit{The Washington Payoff}, specifically those concerning Ford’s alleged sessions with a

\textsuperscript{315} Feerick, 25\textsuperscript{th} Amendment, 133-135.
\textsuperscript{317} Rules of Procedure Governing the Investigation into the Qualifications of the Honorable Gerald R. Ford to Become Vice President of the United States, October 18, 1973, folder “Senate Committee Rules of Procedure,” Box 243, Gerald Ford Vice Presidential Papers, Gerald R. Ford Library.
psychiatrist and a loan Winter-Berger claimed to have given Ford.\textsuperscript{318} The concern over Winter-Berger’s accusations is also reflected in the briefing book prepared for Ford by his staff in which six chapters dealt with refuting claims made in the book. In fact, out of the thirty topics outlined for Ford in the briefing, all but his biography concerned responding to accusations of impropriety.\textsuperscript{319} This was a clear indication of the direction Ford and his advisors believed the committee would be heading.

Along with personal accusations, Ford was also forced to contend with fallout from Watergate. And while Ford and his staff prepared for what they envisioned as a detailed investigation into all aspects of his background, members of Congress were much more concerned with Ford’s opinions concerning Nixon’s actions. The depth of congressional interest in Watergate was reflected in Ford’s handwritten notes pertaining to meetings with members of the House Judiciary Committee on November 16, 1973.

Ford’s notes from his individual meetings with a bi-partisan group of sixteen Committee members show that each Representative referenced the events of Watergate in their preliminary questioning. Specifically, most Committee members pressed Ford on how he would reestablish a trust between the executive and legislative branches that had been shattered by the scandal. Ford was also questioned as to whether or not he had discussed the scandal with Nixon, and whether

\textsuperscript{318} Memo, Tom Korologos and Fred Webber to William Timmons, October 31, 1973, folder “Committee Hearing-Draft Answers,” Box 241, Gerald Ford Vice Presidential Papers, Gerald R. Ford Library.

\textsuperscript{319} Table of Contents, undated, folder “Confirmation Briefing Book-Table of Contents,” Box 237, Gerald Ford Vice Presidential Papers, Gerald R. Ford Library.
or not he would turn over the audio tapes that were being requested at the time. Though not expressly stated, many of these inquiries were predicated on the notion that Ford would assume the presidency at some point if he were confirmed. This lent further credence to the idea possessed by many Committee members that they were confirming the next president.

Another issue that arose during the confirmation involved constitutionality. Article 1, Section 6, Clause 2 of the Constitution, commonly referred to as the Ineligibility or Emoluments Clause, states the following:

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

At first glance Ford’s nomination presented no problems. However, Ford had voted in favor of legislation in October 1973 that raised the salary for the vice president. As a result, some questioned whether Ford was eligible to become vice president.

After this concern was raised, the House’s Legislative Counsel ruled that the vice president was not a civil officer, and thus the clause did not apply. Since this objection was largely perceived as merely an attempt to prevent Ford’s confirmation, it seems there was little

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321 United States Constitution, Article 1, Section 6
more investigation performed and the matter was dropped. As a result, the eligibility of members of Congress to be nominated under Section Two currently owes itself to an opinion emanating from the House Counsel’s Office, and thus subject to future interpretation. Oddly enough, less than a year later, President Ford’s legal counsel Fred Fielding drafted a memo that questioned whether Senator Barry Goldwater would be eligible to fill the vacancy left when Ford became President.  

**Congressional Action**

Although Ford was widely respected within Congress, his confirmation would take place against the backdrop of Watergate. On Ford’s first day of testimony before the Senate Rules Committee on November 1, the White House announced that Leon Jaworski had been appointed as Special Prosecutor, replacing Archibald Cox. Fortunately for Ford, his demeanor and the belief that he would not run for the presidency in 1976, served to placate members of the committee. Ford also made sure to acknowledge the unprecedented circumstances of the situation, stating in his opening remarks: “These are not ordinary times. Nor, I suppose, will the times ever be ordinary when the 25th Amendment must be invoked.”

Much like the vetting process, the questioning of Ford before the Senate Committee made history as it unfolded before television cameras. Not surprisingly, the majority of questions

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326 *Hearings on Nomination of Gerald R. Ford of Michigan to be Vice President of the United States Before the Senate Committee on Rules and Administration, 93rd Congress, 1st Session* (1973).
centered on Watergate and Ford’s views concerning the actions of President Nixon. Placed in the precarious spot of balancing support for the man who nominated him and the increasing number of Americans in and out of Congress who were angered by Nixon’s actions, Ford’s testimony did nothing to endanger his prospects for confirmation. Even questions regarding accusations Ford took money from a lobbyist for political favors seemed to have no negative impact, and produced no embarrassing details. Finally, the testimony of House members from both parties in support of his nomination seemed to clear the way for Ford’s Senate confirmation.  

The hearings also included an appearance by Senator Birch Bayh, who provided a better understanding of the intentions of the 25th Amendment. The most significant aspect of Bayh’s testimony concerned Congress’ role according to Section Two. Bayh termed Congress’ role in such circumstances as a “surrogate electoral body for the people,” since a vice president was being selected without the benefit of a national election. Bayh also stated his belief that members of Congress should ignore political differences and vote solely on the capabilities of the candidate to serve as both vice president and president. Given the overwhelming vote for Ford’s confirmation, many of Bayh’s colleagues clearly agreed with this sentiment.

Along with a unanimous vote in favor of Ford’s nomination, the Senate Rule Committee also established an important precedent for future nominees. The Committee Report stated that while its members may not agree with Ford’s voting record, he was nonetheless qualified to serve as vice president. It also stated that under the 25th Amendment, it should be expected that the president will nominate a candidate in line with his own political philosophy, and thus the

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328 Transcript of Rules Committee Hearing on Nomination of Gerald Ford for Vice President- November 5, 1973.
qualifications for confirmation should not be partisan.\textsuperscript{329} A week later, the full Senate reflected widespread agreement with this point of view in approving Ford’s nomination by a vote of 92-3.\textsuperscript{330}

The vetting of Ford in the House of Representatives followed a similar pattern as Senate proceedings, but was more contentious. The belief that Ford’s nomination should be delayed due to Nixon’s actions was expressly stated by Representatives John Conyers and Robert Kastenmeier during Judiciary Committee hearings, though this view was quickly rebutted by their colleagues.\textsuperscript{331} Additionally, many in the House argued that since Ford would likely assume the presidency, his nomination required an in-depth vetting process.\textsuperscript{332} However, like the Senate, a consensus opinion began to emerge that differences with Ford were largely based on personal or political beliefs, not Ford’s qualifications.

On November 29, the Judiciary Committee voted 29-8 to send Ford’s nomination to the full House. As in the Senate, the House Committee Report stated that regardless of politics, Ford was qualified for the position to which he had been nominated.\textsuperscript{333} During debate by the full House, James O’Hara of Michigan offered support for Ford’s nomination that largely summarized what many believed to be the role of Congress under Section Two. O’Hara stated:

I fail to see, in my reading of the 25th Amendment, any requirement that the Congress withhold its consent to the nomination of any Vice President because

\textsuperscript{329} Senate Executive Report, No. 93-26 (1973).
\textsuperscript{330} \url{http://www.govtrack.us/congress/votes/93-1973/s499}.
\textsuperscript{331} Feerick, \textit{The 25th Amendment}, 141-146.
\textsuperscript{332} Hearings on Nomination of Gerald R. Ford of Michigan to be Vice President of the United States Before the House Committee on the Judiciary, 93\textsuperscript{rd} Congress, 1\textsuperscript{st} Session (1973).
\textsuperscript{333} House Report, No. 93-695 (1973).
his views are at variance with those of the majority of the Congress. I submit that
to allow ourselves to be caught up in measuring Mr. Ford’s qualifications for
office against the subjective yardstick of our own philosophies would be to
disserve the American people who expect Congress, at this critical moment in
history, to rise above partisanship.\textsuperscript{334}

Based on Bayh’s Senate testimony, O’Hara’s argument was clearly in line with the intentions of
the 25\textsuperscript{th} Amendment.

Even though Ford’s swearing-in was already scheduled, House debate continued until
just before the ceremony. Despite the fact Ford’s confirmation was now assured, several
members continued to oppose it, though mainly as a way of speaking out against Nixon. In
homage to the Succession Act of 1792, Bella Abzug of New York recommended a special
election be held if Nixon were removed from office to fill the dual vacancies that would be
created.\textsuperscript{335} Despite the harsher tone of opposition to Ford exhibited by some of his fellow House
members, his nomination was ultimately confirmed by a vote of 387-35.\textsuperscript{336} Immediately after the
vote, Ford was sworn into office in the House Chamber, becoming the fortieth Vice President of
the United States, but the first not popularly elected.

\textbf{Some Precedents Are Set}

\textsuperscript{334} 119 Congressional Record 39882 (1973); Feerick, \textit{The 25\textsuperscript{th} Amendment}, 147.
\textsuperscript{335} 119 Congressional Record 39840 (1973).
\textsuperscript{336} \url{http://www.govtrack.us/congress/votes/93-1973/h468}.
Despite a lack of guidelines, members of Congress did a remarkable job concerning the first invocation of the 25th Amendment. In times that were anything but ordinary, the confirmation process of a vice presidential nominee took place in a remarkable fifty-four days, all while impeachment proceedings against the president were also underway. Additionally, members of Congress largely cast partisan views aside and made a judgment based on Ford’s ability to serve, an event clearly worthy of praise. Although they undertook their duties with no precedent to guide them, the 93rd Congress in turn established a valuable precedent for their successors.

**Ordained by Law, Not John Tyler**

Ironically, the first instance of vice presidential succession governed by law and not precedent was also the least surprising. Although Garfield’s prolonged incapacitation removed some of the sudden shock from his death, Richard Nixon’s resignation on August 9, 1974, came as no surprise to anyone. As a result, Gerald Ford, the man Congress confirmed as Vice President just nine months earlier, would become the first President to assume the office without being elected to either the presidency or vice presidency.

While such an event may run counter to the Framers intentions, it is important to remember what would have occurred without the 25th Amendment. House Speaker Carl Albert, a Democrat from Oklahoma’s Third Congressional District, would have assumed the presidency following Nixon’s departure. Along with the sudden shift in party control of the executive branch, Albert’s duties as Speaker precluded him from being kept abreast of the issues facing the
commander-in-chief. As a result, the nation would have found itself with a president from a different party than the one elected in a landslide less than two years earlier, thrust into an office for which he was ill prepared.\textsuperscript{337}

Furthermore, Nixon’s own struggles in deciding to resign must be considered. Given the poisonous relationship between Nixon and Congress, it is highly doubtful Nixon would have handed power over to his political enemies as quickly as he did to Vice President Ford.\textsuperscript{338} The ensuing impeachment battle in Congress would have only served to divide a nation that was already in the grips of its worst Constitutional crisis. It also would have presented a transfer of power far more contentious than the smooth transition from Nixon to Ford.

Although there were several brushes with legislative succession prior to 1974, it is clear the nation would have experienced its first in this case were it not for the 25\textsuperscript{th} Amendment. If Nixon remained in office his conviction in the Senate was certain. Additionally, Democrats in the Senate would not only be voting to remove the Republican Nixon, but also to elevate a member of their own party to the presidency. Even though an overwhelming percentage of Americans wanted Nixon removed from office, there would have been no escaping a highly partisan battle.

\textbf{Ford’s Selection of Rockefeller}

\textsuperscript{338} Woodward and Bernstein, \textit{The Final Days}, 405-407.
Ironically, Ford found himself in much the same position as Nixon soon after taking office. Democrats enjoyed a strong majority in Congress and were now invigorated by expected gains in the upcoming mid-term elections. Republicans on the other hand were still distracted by the aftereffects of Watergate and divided between moderate and conservative factions, the latter of which was suspicious of their new president. Even though members of both parties pledged to work Ford, it was clear his selection of a vice president would be his first major battle.

Press speculation concerning Ford’s choice began even before Nixon announced his resignation. Among the early favorites for the nomination were GOP Chairman George H.W. Bush, Senators Howard Baker and Barry Goldwater, former Attorney General Elliot Richardson, and New York Governor Nelson Rockefeller. The inclusion of Rockefeller on the list was not surprising given his national prominence, but did invite speculation as to how conservatives in the party would react to his selection. Since Ford was not the first choice of conservative Republicans, there was good reason to wonder how they would react to the selection of another perceived moderate.

For his part, Ford refused to discuss the matter prior to taking the oath of office, calling any speculation “premature.” Yet shortly after assuming the presidency, Ford informed congressional leaders that he would nominate a candidate within ten days, signifying that the choice would be his first major decision. Given Ford’s declaration that he would not be a

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340 Ibid, 23.
candidate in 1976, it was widely assumed that whoever was selected would quickly become a heavy favorite to win the Republican nomination.

Unlike Nixon, whose search for a vice president was conducted in secrecy, Ford solicited suggestions from Administration officials, members of Congress, political allies, and even personal friends. However, this change in strategy did not allow Ford to escape the same political realities confronted by his predecessor. A conservative nominee, likely to be popular within the GOP, would require a contentious confirmation at a time when Ford was seeking to establish bipartisan relationships. Conversely, a nominee viewed as favorable in Congress could present troubles for Ford as he sought to establish himself within his own party, an accomplishment he would desperately need to govern.

This dilemma was reflected in the suggestions Ford received. As head of the Republican National Committee, Bush received the most support from party members, as well as from Republicans in the House, members of the Ford Administration and friends of the President. The only group that did not offer a majority of support to Bush were Senate Republicans, who narrowly favored Rockefeller over Bush and Barry Goldwater. Since Bush and Rockefeller occupied the top two positions in the results produced by every group, it seemed Ford’s dilemma came down to these two candidates.

The Selection

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341 The numerous letters and telegrams containing these suggestions can be found in the Files of Robert T. Hartman, Boxes 19-21, at the Gerald R. Ford Library.
Staying true to his self imposed deadline, Ford announced his selection of Rockefeller on August 20, 1974. While speculation was rampant as to why he made this choice, Ford stated the only factor he considered was the nominee’s ability to serve as president.\(^\text{343}\) However, Rockefeller’s cross party popularity made him a formidable candidate in 1976, a remarkable turnaround for a party that weeks earlier many predicted may not survive Nixon’s downfall.\(^\text{344}\) In keeping with Ford’s so called honeymoon after assuming the presidency, there was little opposition to the Rockefeller choice from congressional Democrats, which indicated the nomination would be approved quickly.

This is not surprising since, much like Nixon’s selection of Ford, Ford’s choice of Rockefeller cannot be labeled as purely his own. Ford would later write that Democrats in Congress had threatened a fierce confirmation battle for any nominee they opposed, a threat that mirrored the ultimatum given to Nixon ten months earlier.\(^\text{345}\) Furthermore, the precarious state of the Republican Party provided no assurance that such a battle would be successful. Therefore, it is safe to state that both invocations of Section Two were dictated not by the president, but by Congress.

Ford was also forced to confront anger from within his own party. Long suspicious of the former New York Governor, many Republicans were quick to express their displeasure with Rockefeller’s selection. Led by Barry Goldwater, who, in response to the selection stated, “You can kiss the Republican Party goodbye,” the response from within Ford’s party was much


\(^{345}\) Ford, *A Time to Heal*, 143.
harsher than outside. In addition to criticizing the selection, Republican Senators Bill Scott, William Brock, Marlow Cook, Harry Bellmon, and James McClure, all indicated they would vote against the nomination. Bellmon took his criticism a step further when, in response to being asked his opinion of the selection, responded: “What the hell is Ford thinking about? This cuts my throat down in Oklahoma. Rocky is a big liberal who ran out from his family and wife. Put amnesty (for Vietnam draft evaders) on top of that and I think LBJ was right that maybe Ford played too many football games without his helmet.”

The Nixon Pardon

Just as then-Representative Ford saw the bi-partisan support for his nomination destroyed by the Saturday Night Massacre, President Ford saw his honeymoon period come to an end exactly one month after Nixon’s resignation. On September 8, Ford announced his decision to grant Nixon a full pardon, an action that was met with swift anger from both Congress and the public. For the latter, this opposition would be felt by Republican candidates in mid-term elections less than two months away. The former, however, was just weeks away from beginning confirmation hearings for Rockefeller, a process that until the pardon was predicted to go smoothly.

Ford’s problems with Congress not only involved Rockefeller’s fate, but speculation concerning an arrangement between Nixon and Ford prior to Nixon’s resignation. The quick

346 Memo from Tom Korologos: Damage Assessment on Rocky & Other Firestorms, August 21, 1974, folder “VP Rockefeller Confirmation (1)” Box 12, William E. Timmons Files, Gerald R. Ford Library.
347 Ibid.
348 Ibid.
decision in favor of the pardon led many to speculate that Ford had agreed to pardon Nixon while still Vice President, an accusation Congress began to investigate. This led to the extraordinary decision by Ford to appear before the House Judiciary Committee to answer questions about the scandal.\textsuperscript{349} Despite Ford’s forthright nature, and the lack of any tangible evidence relating to a secret agreement, suspicion of Ford’s actions continued throughout the confirmation process.

For his part, Rockefeller called Ford’s decision one of “compassion and courage.” He also stated that only time would tell whether anger in Congress over the pardon would delay or complicate his confirmation hearings.\textsuperscript{350} Despite the controversy, Rockefeller’s interactions with Congress prior to the hearings were largely uneventful. The only noteworthy event involved the unique request by Congress that Rockefeller merely reveal his stock holdings rather than placing them into a blind trust, as other public officials had done. The rationale behind this decision pertained to Rockefeller’s vast holdings and the fear that placing them in such a trust could have an adverse impact on the national economy.\textsuperscript{351}

**The Confirmation Process**

In spite of the anger directed at Ford in the wake of the pardon, there was still little to indicate Rockefeller would not be confirmed when hearings began on September 23, 1974. Rockefeller testified for nearly two days before the Senate Rules Committee in a manner that

\textsuperscript{349} Feerick, *The 25th Amendment*, 166.
\textsuperscript{351} Feerick, *The 25th Amendment*, 167.
was largely based on the Ford confirmation hearings ten months earlier. Despite sharp questions concerning everything from Rockefeller’s personal wealth, his actions as Governor, and his views on topics such as abortion and executive privilege, nothing emerged that endangered the nomination. When the hearings adjourned two days later even Senator Robert Byrd, who had fiercely questioned Rockefeller during the hearings, conceded that nothing seemed to stand in the way of Rockefeller’s confirmation. However, the Committee adjourned without voting on the nomination.

Along with lingering anger over Nixon’s pardon, the upcoming mid-term elections also presented a problem. With members of Congress back home campaigning, no action was taken concerning Rockefeller’s nomination. Additionally, despite a favorable review from the Senate Rules Committee, details began to emerge concerning gifts and political contributions given by Rockefeller and his family, some of which involved members of Congress who would soon be voting on his nomination. Unlike Ford’s nomination which had withstood negativity prior to the hearings and proceeded quickly through Congress, Rockefeller’s was in trouble by the end of October.

The mid-term elections on November 5, 1974, removed some of the negative press from Rockefeller, but at the great expense of his party. Republicans lost forty-eight seats in the House of Representatives and five in the Senate, a devastating loss spurned by both Watergate and

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353 Hearings on Nomination of Nelson A. Rockefeller of New York to be Vice President of the United States Before the Senate Committee on Rules and Administration, 93rd Congress, 2nd Session (1974).
Ford’s pardon of Nixon. As a result, Democrats in Congress were now emboldened to take on a Ford Administration whose popularity had sharply decreased in the wake of the pardon.

Additionally, Republicans in Congress were left wondering how much support they should give to the Rockefeller nomination, which given the events of the last month now seemed endangered.

Another issue involved the work of a now lame duck Congress. Many began to question whether a Congress in which more than fifty of its members had been voted out of office should be allowed to confirm the next vice president. Additionally, there was confusion about how to handle the hearings and confirmation votes themselves, since it was not certain a vote would be held prior to Congress’ adjourning for the year. Thus if Rockefeller was not confirmed before adjournment, the entire process may have to begin anew when Congress reconvened. The 25th Amendment offered no guidance on such issues.

For his part, Ford decided to take the initiative in pushing through Rockefeller’s confirmation. A week after the mid-term elections, Ford drafted a letter to prominent congressional leaders from both parties urging them to act quickly on the nomination. Citing the need for a vice president, which he described as the essence of Section Two of the 25th Amendment, Ford stated that any vacancy in the office should be “as brief as the careful consideration of a nominee by the President and the Congress will permit.” He also cited his own confirmation, which had taken only eight weeks, as the precedent by which Congress should abide. Finally, Ford cited Rockefeller’s compliance in both the hearings and in the Committee’s

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355 Letter to Mike Mansfield from Gerald Ford, November 11, 1974, folder “VP Rockefeller- Confirmation (1),” Box 12, William E. Timmons Files, Gerald R. Ford Library.
request for personal financial documents as evidence that Rockefeller had done everything he could to expedite the process.\textsuperscript{356} In short, it was now time for Congress to do the same.

The man at the center of the controversy also sought to regain his strength before hearings began again in mid-November.\textsuperscript{357} Although the hearings would ostensibly concern Rockefeller’s ability to serve as vice president and, if necessary, president, there was no doubt they would no center on his financial dealings. For five days, beginning on November 13, the Senate Rules Committee grilled Rockefeller solely about these matters, all of which dealt with alleged improprieties.\textsuperscript{358} When the hearings ended, with nothing proven pertaining to the allegations, the Rules Committee voted unanimously to send his nomination to the full Senate.

On November 21, 1974, the House Judiciary Committee began their hearings. Much like the Ford nomination, the House hearings involved the same issues and line of questioning that had taken place in the Senate, nearly all of which pertained to Rockefeller’s financial dealings. After Rockefeller’s testimony, the Committee heard from financial experts concerning his financial holdings, issues that continued to dominate the proceedings. Also like Ford’s confirmation, Representative Abzug again called for a delay, this time arguing that the House should delay voting on the matter until the new Congress convened.\textsuperscript{359}

Although House Judiciary Committee members were not as agreeable as their Senate colleagues, they nonetheless approved Rockefeller’s nomination by a vote of 26-12. The twelve

\textsuperscript{356} Ibid.
\textsuperscript{358} Feerick, \textit{The 25th Amendment}, 176-180.
\textsuperscript{359} Hearings on Nomination of Nelson A. Rockefeller of New York to be Vice President of the United States Before the House Committee on the Judiciary, 93\textsuperscript{rd} Congress, 2\textsuperscript{nd} Session (1974).
Democrats who voted against the nomination stated they did so due to conflict of interest fears concerning Rockefeller’s wealth and his influence as vice president. Although no malfeasance had been proven, concern over Rockefeller’s financial actions had dominated both his House and Senate hearings, all of which were designed ostensibly to gauge his abilities as vice president. Nonetheless, by the middle of December, Rockefeller’s nomination stood before both the House and Senate, a remarkable recovery given the events of the previous three months.

As with Ford, the Senate voted overwhelmingly in favor of Rockefeller’s nomination by a vote of 90-7. Two of the seven dissenting votes came from Senators Bayh and Goldwater, each of whom cited Rockefeller’s financial dealings as the cause of their objections. The House vote was more contentious, but Rockefeller’s nomination was approved comfortably by a 287-128 vote. Whether the higher number of nay votes for Rockefeller was due to concerns over his financial dealings, or merely a reflection of the bitter political atmosphere following Watergate, it was also symbolic of the tougher battle faced by Rockefeller. Nonetheless, Rockefeller was sworn-in as the nation’s forty-first Vice President on December 20, 1974, exactly four months after he had been nominated.

Two for Section Two

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360 Feerick, The 25th Amendment, 183.
While any invocation of the 25th Amendment is invariably a tumultuous time, the circumstances of the first three invocations were astounding. The resignation or impeachment of a president or vice president was something the drafters of the Amendment had envisioned, but surely not in both offices within a time frame of ten months. Additionally, historical evidence indicated that an invocation of Section Two would begin with a shocking event, but then a slow return to normal. However, in these two cases, the announcements that preceded them had been largely expected, and the more startling event would occur in the weeks after each nomination had been announced.

Comparing these events with the expectations of the drafters of the amendment is difficult. Although both vice presidential nominees were selected by the president, there can be no doubt both decisions were heavily influenced, if not dictated, by Congress. On the other hand, both Ford and Rockefeller received fair, if occasionally contentious, hearings and both men were judged by their contemporaries and by history as well qualified holders of the office. Additionally, both men were confirmed in a relatively quick manner, in spite of events which threatened to delay or even derail their nominations. In the end, these factors stand out as the most important criteria in evaluating the process as a whole, and therefore, it should be deemed a success.

As Congress realized during debate over the 25th Amendment, it is impossible to fully plan for the unexpected. This was never more apparent than in the fourteen months spanning October 1973 and December 1974, a time of two presidents, three vice presidents, and extreme partisan rancor. In the midst of all this, the 25th Amendment was invoked for the first time. All of
this created the potential for disaster for both the Amendment and the nation. Instead, both endured and resulted in the establishment of precedents for how our government should act in even the worst of times.

A final example of how much impact the 25th Amendment had on both the Nixon and Ford Administrations concerns Henry Kissinger. His service as Secretary of State placed Kissinger fourth in the succession line, behind the Vice President, Speaker and Senate Pro Tempore. However, as noted by a constituent letter to New Jersey Representative James Howard, Kissinger was not a natural born citizen, and thus ineligible to serve as president. Upon receiving the letter, Howard forwarded it to the White House.

The response from Counsel to the President Philip Buchen highlights how the 25th Amendment did not address the line of succession. Citing the Succession Act of 1947, Buchen noted that everyone in the succession line must be constitutionally eligible to serve as president, thus meeting the age and citizenship criteria established in Article 2, Section 1. Therefore, while Kissinger was technically within the line of succession, he would be ineligible to serve if the need had arisen during his tenure as Secretary of State. As a result, if the presidency had devolved to the Cabinet, Kissinger would have been passed over in favor of the Secretary of Treasury. Since the likelihood of such an event was remote, it appears this scenario was largely overlooked, with the exception of Howard Schmidlin, a resident of New Jersey’s Third Congressional District.

The Reagan Shooting and the 25th Amendment

An overarching fact with the disability and succession problem is that it requires calm and orderly action in the most turbulent of times. The extent to which chaotic events can impact decision making was never clearer than on March 30, 1981. While leaving the Washington, D.C. Hilton, President Ronald Reagan, along with three others, was seriously wounded by a deranged assassin. Although many Americans quickly recalled the horrors of the Kennedy assassination upon hearing the news, logic dictated that the 25th Amendment would preclude the uncertainty that accompanied the tragedy in Dallas. Ironically however, the uncertainty concerning who was running the country would prove to be even greater than in November 1963.

The confusion surrounding the shooting began immediately after John W. Hinckley fired six shots at Reagan as he was nearing his limousine at 2:27 that Monday afternoon. Within a span of 1.7 seconds, Hinckley emptied his .38 caliber revolver before being subdued by Secret Service agents. Of those six shots, the third and sixth missed any human targets, while the first, second and fourth shots struck Press Secretary James Brady, Washington, D.C. police officer Thomas Delahanty and Secret Service Agent Timothy McCarthy, respectively. The fifth shot initially struck the bulletproof limousine, and then ricocheted between the narrow opening

between the vehicle and the back door. It was this bullet that struck Reagan as he was being forced into the car by Secret Service Agent Jerry Parr.367

By his own admission, Reagan initially believed he had escaped being hit by gunfire. After being thrown into the limousine by Agent Parr, Reagan immediately felt a sharp pain in his back, which he believed to be the result of Parr landing on top of him.368 Seconds later, Parr began a quick examination of Reagan’s head, mouth and chest for any signs of blood or injury, none of which were found. He also asked Reagan if he had been hit, to which Reagan replied he didn’t think so, but that his chest had been injured by Parr’s landing on top of him.369

Given the quick examination and the lack of injuries exhibited by Reagan, except for a pain in his back and chest, Parr radioed that they would be returning to the White House.370 However, shortly thereafter, Reagan began to cough up what he described as “extremely red, frothy blood,” prompting him to assume that Parr had punctured his lung when entering the car.371 Given the uncertainty concerning the shooter and a possible motive, a return to the security of the White House was the wisest decision. Despite this, Parr made the decision to head for George Washington University Hospital, given the discomfort of the President and the appearance of blood when he coughed.372 This decision saved Reagan’s life.

369 Wilber, Rawhide Down, 88.
370 Herbert L. Abrams, "The President Has Been Shot": Confusion, Disability, and the 25th Amendment (New York: W.W. Norton, 1992) 56; Wilber, Rawhide Down, 89.
372 Abrams, The President Has Been Shot, 56; Wilber, Rawhide Down, 91.
Although he was unable to catch his breath, Reagan insisted on walking into the emergency room upon arrival a few minutes later. However, as he stepped inside the door, Reagan collapsed into the arms of Parr and Secret Service Agent Ray Shaddick. After carrying Reagan to a gurney, physicians set to work on discovering the cause of Reagan’s injuries, as everyone involved continued to believe he had not been shot. The preliminary diagnosis ranged from a broken rib and punctured lung to a heart attack brought on by the stress of the shooting. Regardless of the cause, many of the doctors and nurses who began treating the President later stated they did not think he would survive.

As Reagan’s clothes were removed, Dr. G. Wesley Price noticed a small slit in the President’s skin just under his armpit. Only then did everyone around the President realize that he had been shot. Over the course of the next half-hour, the emergency staff at George Washington Hospital continued to work on Reagan, a time period in which he drifted in and out of consciousness and received several blood transfusions. After an x-ray revealed that the bullet was lodged inches from his heart, Reagan was prepped for surgery, which began at 3:24 pm; fifty-seven minutes after Hinckley began shooting. Yet while questions concerning Reagan’s health were becoming clearer, the question of who was running the country grew cloudier by the second.

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374 Wilber, *Rawhide Down*, 99.
375 Abrams, *The President Has Been Shot*, 58; Wilber, *Rawhide Down*, 100.
376 Wilber, *Rawhide Down*, 110.
“Who’s Minding the Store?”

Whether news of the president being shot came from Ford’s Theater in 1865, downtown Dallas in 1963, or the nation’s capital in 1981, the universal reaction was shock. And just as with those events, shock is quickly replaced by questions, the most prominent of which are, is the president alright, who did the shooting, and why? And while these are clearly vital questions that require prompt answers, a much more pressing question is often overlooked in events such as these: is the president able to discharge the duties of his office, and, if not, who is in charge?

As the news spread throughout the world, the scene in the White House was one of chaos. Word first reached the White House just three minutes after the shooting, thanks to David Prosperi, an assistant to the critically wounded James Brady. Prosperi raced back into the Hilton after the shooting and used a pay phone to contact Deputy Press Secretary Larry Speakes, informing him only that shots had been fired and that Brady had been hit. Over the next few moments the news spread quickly throughout the West Wing, as Speakes passed word directly to Communications Director David Gergen, who then informed Chief of Staff James Baker. At this point, the key members of Reagan’s staff began gathering in Baker’s office to await further news.

Roughly ten minutes later, Deputy Chief of Staff Michael Deaver called Baker from the emergency room to report that Reagan was injured, but had not been shot. At nearly the same time, Treasury Secretary Donald Regan, whose Department oversaw the Secret Service, arrived

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379 Ibid, 82.
in Baker’s office and stated that he had also been informed that Reagan had not been shot.\textsuperscript{380} Just after the arrival of both Regan and Special Advisor Ed Meese, Deaver informed Baker that the President had in fact been wounded, and that surgery may be required to remove the bullet.\textsuperscript{381} At this point, Baker, Meese and Speakes decided to go to the hospital.\textsuperscript{382}

While these events were unfolding in the White House, Secretary of State Alexander Haig was in the process of traveling from the State Department to the White House. Haig arrived just as Baker, Meese and Speakes were departing, and immediately met with National Security Advisor Richard Allen. At this point, Haig, Allen and Gergen began meeting in the White House Situation Room, where they were joined by other staff members and aides.\textsuperscript{383} This now became the command post for White House officials for the remainder of the day.

By approximately 3:05 pm, many of the officials who under the 25\textsuperscript{th} Amendment would be charged with deciding if Reagan should be removed from power had gathered in the Situation Room.\textsuperscript{384} However, one official who had not yet been informed Reagan was wounded was Vice President George H.W. Bush. Told of the shooting just minutes after it occurred, Bush was informed by a Secret Service Agent that Reagan had escaped injury, and thus he decided to continue on his flight to Austin, Texas. A few minutes later, Bush was informed that Secretary of State Haig needed to speak with him right away, but Bush was unable to hear Haig due to static

\textsuperscript{381} Deaver, \textit{Behind the Scenes}, 19.
\textsuperscript{383} Abrams, \textit{The President Has Been Shot}, 84; Alexander Haig, \textit{Caveat: Realism, Reagan and Foreign Policy} (New York: Macmillan, 1984) 150.
\textsuperscript{384} Abrams, \textit{The President Has Been Shot}, 85; Wilber, \textit{Rawhide Down}, 132.
on the phone lines. After another failed attempt to speak by phone, a message was received from Haig that read:

“Mr. Vice President: In the incident you will have heard about by now, the president was struck in the back and is in serious condition. Medical authorities are deciding now whether or not to operate. Recommend you return to D.C. at the earliest possible moment.”

This message and a heavily distorted picture on a black-and-white television aboard Air Force Two were the only reports Bush and those around him received in the immediate aftermath of the shooting.

After receiving Haig’s message, the decision was made for Bush to return to the nation’s capital. Yet given the time needed for both refueling and a return from Texas, Bush would not arrive for at least another three hours, during which time Reagan would be under anesthesia. If events had warranted contacting Bush during this time, it appears the only reliable means would have been via a message, the same manner in which Bush learned of the shooting. This method of communication would have greatly impaired the ability to inform Bush of vital information.

Back at George Washington Hospital, Baker, Meese and Deaver gathered along with Nancy Reagan to await word of the President’s condition. Although none of these three men had an official role in any potential determination of Reagan’s capacity according to the 25th Amendment, their influence would carry a tremendous amount of influence with the Cabinet.

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385 Wilber, Rawhide Down, 132.
386 Haig, Caveat, 152; Wilber, Rawhide Down, 132
387 Wilber, Rawhide Down, 133.
Additionally, as they had the ability to speak with Reagan’s doctors in person, they would have a much better insight into his condition. As Reagan was being wheeled into surgery, the three men known as “The Troika” had a brief chance to speak with the President. Removing his oxygen mask, Reagan ironically became the first government official to raise the issue of who was in charge when, upon seeing Baker, Meese and Deaver, asked, “Who’s minding the store?”

At 3:25 pm, President Reagan entered the surgery room. From then until approximately 7:30 that evening, he would be under anesthesia. Between 7:30 and 8:00 that night, Reagan spoke briefly with his wife and was administered morphine due to severe pain from the procedure. For the next seven hours, Reagan was heavily sedated and relied on a respirator to help him breathe. While this was the normal treatment for a patient who had endured such traumatic injuries, Reagan was obviously no ordinary patient.

Around 3:00 a.m. on Tuesday, March 31, the decision was made to remove Reagan’s breathing tube. After this was done, Reagan was asked by a nurse if he knew where he was, to which he responded he did not. Told that he was in the hospital and what time it was, Reagan responded that he thought it was still Monday afternoon. For the next few hours, Reagan drifted in and out of sleep, but was able to speak and joke with the doctors and nurses caring for him. At 6:00 a.m., he was moved from the recovery room to the intensive care unit. A little over an hour later, after receiving another morphine injection for pain, he signed a piece of legislation.

388 Ibid, 144.
389 Abrams, The President Has Been Shot, 63-65.
390 Ibid, 65; Wilber, Rawhide Down, 209-211.
391 Wilber, Rawhide Down, 210.
to stop an increase in dairy price supports, his first official act since being shot seventeen hours earlier.\textsuperscript{392}

The Decision Not to Invoke the 25\textsuperscript{th} Amendment

Although it would be impossible to create a list of scenarios in which the 25\textsuperscript{th} Amendment should be invoked, there is no doubt the events of March 30, 1981, would be such a case. In the seventeen hours between leaving the Hilton and signing the dairy price control bill, President Reagan endured the following:

1) A gunshot wound which struck a rib and lodge roughly one inch from his heart;
2) A collapsed left lung;
3) The loss of nearly half the blood in his body in the aftermath of the shooting and during surgery;
4) A nearly three-hour surgery in which the an incision was made on Reagan’s side, necessitating the spreading apart of his fifth and sixth ribs;
5) The insertion of a breathing tube for roughly twelve hours;
6) At least two injections of morphine to help treat intense pain from both the injury and the surgery;
7) Grogginess associated with the anesthesia and pain medication, resulting in Reagan’s statement around 3 a.m. Tuesday morning that he thought it was still Monday afternoon.\textsuperscript{393}

\textsuperscript{392} Abrams, The President Has Been Shot, 66.
\textsuperscript{393} This information is collected from various parts of both Abrams’ The President Has Been Shot and Wilber’s Rawhide Down.
While recovery from these injuries would be a remarkable accomplishment for any person, there is one factor that makes Reagan’s recovery extraordinary. Throughout this time period, Ronald Reagan was apparently capable of discharging the duties of his office.

In fairness to some members of the Reagan Administration, the subject of invoking either Sections Three or Four of the 25th Amendment were considered in the aftermath of the shooting. Prior to leaving the White House for the hospital, Baker and Meese briefly mentioned the possibility of invoking the amendment after learning from Deaver that Reagan had been shot. Additionally, White House Counsel Fred Fielding arrived in the Situation Room with the letters to the Speaker of the House and President of the Senate necessary to invoke either Sections Three or Four, depending on the wishes of either Reagan or the Cabinet, respectively. Finally, Fielding also began briefing individual Cabinet Members, including Secretary of State Haig and Transportation Secretary Drew Lewis, on the stipulations relating to executive disability.

However, what occurred next is an example of both irresponsible behavior and how action often overrules authority in a time of chaos. As Fielding was reviewing disability provisions with Haig and Vice President Bush’s Chief of staff Daniel Murphy, Special Assistant Richard Darman entered the room. Overhearing the conversation, Darman quickly stated that such documents did not belong in the Situation Room, nor did any talk about possibly invoking the 25th Amendment. Acting on authority from Baker, Darman then took the letters and locked

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them in his personal safe, where they remained for the rest of the day. Thus with much of the Cabinet assembled in the Situation Room, the decision concerning whether or not to invoke the 25th Amendment was made by a presidential aide.397

At best, Darman’s actions were grossly irresponsible. While his desire to protect Reagan would be admirable in other cases, the necessity of discussing such matters when a president has been shot and is entering surgery is obvious. Furthermore, despite acting on orders from Baker, neither he nor Darman possessed any official authority concerning the determination or declaration of presidential inability according to the 25th Amendment.398 Finally, by affixing such a negative implication on a subject that would for obvious reasons already be difficult for Cabinet members to mention, Darman may well have prevented any further consideration of the matter by others in the room.

Around the same time as this scene was playing out in the White House, Reagan’s three closest advisors were meeting in a small waiting room at George Washington Hospital.399 It was at this meeting that “The Troika” of Baker, Meese and Deaver collectively decided that since Reagan’s condition was classified as stable, there was no need to invoke the 25th Amendment.400 Later on, while Reagan was in surgery, Baker and Meese again discussed the idea with White House Political Director Lyn Nofziger, but again the decision was made that no invocation was

398 Baker, Work Hard, 146.
399 Ibid, 146; Meese, With Reagan, 83.
400 Abrams, The President Has Been Shot, 94; Deaver, Behind the Scenes, 22.
necessary. Since Reagan was at this time under anesthesia, the declaration that he was fully able to discharge his duties is highly dubious.

“As of Now, I Am in Control Here”

According to the White House, President Reagan remained in full control of his office in the hours after the shooting. Since this time frame included periods of unconsciousness, heavy sedation and confusion concerning what had happened and where he was, we can draw the conclusion that this was not the case. Within the first seventeen hours following the shooting, it was clearly impossible for Reagan to have made any decisions pertaining to his office, much less to consider all the variables that accompany any executive decision. However, while history has proven that Reagan was not in charge, the question of who actually was remains unclear.

Although talk of the 25th Amendment was deemed to be inappropriate, the necessity of keeping Vice President Bush informed of Reagan’s condition was understood by all. Unfortunately, since Bush was confined to an airplane with poorly functioning communication equipment, keeping him apprised of the quickly developing situation was exceedingly difficult.

In a scenario eerily similar to that of Dallas on November 22, 1963, the president had been shot, the vice president knew little about the situation, and fears of a conspiracy were rampant. Also as in 1963, history shows that if the initial shooting had been the work of a well organized group, the chaotic aftermath would have greatly aided their cause.

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Questions concerning who was in charge quickly began to spread across the nation and its television airwaves, a reaction the White House tried to control by holding a press briefing which began around 3:35pm. At the briefing, David Gergen stated the Reagan had in fact been wounded in the shooting and that surgery may be required. A short time later, Larry Speakes, the Deputy Press Secretary who first received word of the shooting, returned to the White House from the hospital. Speakes went straight to the press room to discuss the situation with reporters. Unfortunately, Speakes was ill-prepared for many of the questions he received, especially those pertaining to who was actually running the country.

While Speakes’ inability to answer reporter’s questions cast him in a negative light, he can be forgiven to some extent. First, Speakes was thrust into the role of Press Secretary because James Brady had been critically wounded in the shooting, and even erroneously reported has having died in the aftermath. Second, having been at the hospital, Speakes was unaware of the meeting taking place in the Situation Room, and thus had no information about the actions of other Administration officials. Finally, Speakes’ inability to properly answer the question of who was running the country was not due to ignorance, but rather that no one was sure.

While Speakes was struggling to reassure both reporters and the nation that someone was in charge, Secretary of State Haig had seen enough. Racing from the Situation Room, Haig arrived in the briefing room just as Speakes was finishing and appeared at the podium. What Haig said next would not only come to define his decade’s long career in government, but also

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402 Abrams, The President Has Been Shot, 95.
illustrate the lack of understanding concerning the 25th Amendment that seemed to permeate the White House that day. Haig stated:

“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 to the vice president, he will do so. As of now, I'm in control here, in the White House, pending the return of the vice president and in close touch with him. If something came up, I would check with him, of course.”

Much like Speakes, the chaotic conditions of the time must be considered when passing judgment on Haig’s actions. That being said, Haig’s statement was not only incorrect, but also exhibited a decision well beyond his authority.

The most apparent error in Haig’s statement concerned the line of succession. After the vice president, Haig omitted Speaker of the House Top O’Neill and President Pro Tempore of the Senate Strom Thurmond, each of whom stood before Haig in the line. Since the 25th Amendment was not invoked, this placement was not an issue in terms of authority on that day. However, the rest of Haig’s statement concerning his control was clearly based on his belief concerning the line of succession, a point that illustrates the lack of attention paid to the 25th Amendment.

The second error in Haig’s statement pertains to constitutional authority. Haig’s declaration that he was in control in the White House lacked constitutional authority since again, without invocation of the 25th Amendment, members in the line of succession have no official

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duties besides those associated with their positions. Using Haig’s logic, Speaker Tip O’Neill should have been brought in to chair the meeting in the Situation Room, given his placement behind Vice President Bush. In actuality, Haig’s control of the meeting, much like Darman’s actions in removing the letters, was based more on force of personality and action, rather than constitutional authority. These actions illustrated the opinions expressed during the drafting of the 25th Amendment that no amount of guidelines can fully account for personal actions in a time of crisis.

While Haig’s statement failed to reassure the nation, back in the Situation Room, it nearly caused a riot. Secretary of Defense Caspar Weinberger confronted Haig about his statement; specifically Haig’s claim that no military alerts had been raised in spite of the fact Weinberger had done so. After a few seconds of arguing, Haig told Weinberger that he needed to “read the Constitution,” once again alluding to Haig’s mistaken opinion of his authority. At this point, Haig was informed by Counsel Fred Fielding that his earlier statements were incorrect.

Throughout the drama in both the White House Press and Situation Rooms, Baker, Meese and Deaver were, like the rest of America, relaying on television for much of their information. After witnessing Haig’s statement, one they had not authorized or even been prepared for, they were as shocked as other officials who realized Haig’s errors. This outrage was ironic as, despite their positions and close relationship to Reagan, none of these three men possessed any constitutional authority for either determining Reagan’s capabilities or acting in his place either.

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404 Abrams, *The President Has Been Shot*, 97.
405 Ibid, 97; Barrett, *Gambling With History*, 119.
However, this did make it clear to everyone involved that the Administration needed to at least get on the same page concerning their actions.

The final considerations of the 25th Amendment on the day of the shooting occurred later that evening. Around 5:30 pm, Baker called to inform those in the Situation Room that invoking the Amendment was no longer a consideration since surgeons had successfully removed the bullet from near Reagan’s heart. Since Reagan was still in surgery and about to face twelve hours of recovery in which he was heavily sedated and drifted in and out of consciousness, this conclusion was highly speculative and ignored the intentions of the Amendment’s framers. Roughly an hour later, Baker arrived in the Situation Room and informed everyone that Reagan’s prognosis for a full recovery was good.

Finally, around 7:00 p.m., Vice President Bush arrived in the Situation Room. After being briefed about the situation, National Security Director Richard Allen raised the question of a temporary transfer of power to Bush. However, Bush quickly said no such action was necessary as Reagan’s condition was improving. From all indications, this was the last time anyone in the Administration discussed invoking the 25th Amendment on March 30, 1981.

### Should the 25th Amendment Have Been Invoked?

The critical question is should either Sections Three or Four of the 25th Amendment have been invoked? Given the guidelines of Section Three, Reagan would have had to sign a letter

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407 Abrams, *The President Has Been Shot*, 98.
408 Haig, *Caveat*, 161.
declaring his disability in the hour between being shot and receiving anesthesia. Although Reagan would theoretically require only a few seconds to sign his name to such a document, this could easily have led to questions of whether or not Reagan had time to fully consider his actions. Additionally, the legislative history of the amendment illustrates that Section Three was envisioned mainly for scheduled procedures, not for sudden events in which the president is critically injured. Therefore, it is proper to shift focus to Section Four.

The origins of Section Four can be found in the Eisenhower-Nixon Agreement of 1958. Fearing that he may be rendered comatose or unable to communicate, Eisenhower established a mechanism for being removed from power by his Vice President and Cabinet in the event he was unable to do so himself. This is in essence what occurred the day Reagan was shot. Again, while Reagan technically could have asked for and signed such a letter prior to being rushed into surgery, such an expectation is unrealistic for any person in such a situation. As a result, it was left up to Vice President Bush and Reagan’s Cabinet to act.

Through no fault of his own, Vice President Bush was unable to make an informed decision concerning the situation prior to returning to the White House later that evening. Besides the inherent reluctance of seeming too eager to assume the presidency, Bush was unable to receive detailed reports on Reagan’s condition due to the technical inadequacies of Air Force Two. Thus even had Bush insisted on invoking Section Four after learning of the shooting, an action which by itself may have been controversial, he would have been unable to communicate with anyone in the Situation Room.
Therefore, we are left with the Cabinet. In the aftermath of the shooting, the Secretaries of State, Defense, Treasury, and Transportation, were joined by the Attorney General in the Situation Room. Although Section Four stipulates that both the Vice President and a majority of the Cabinet, in this case seven votes, must agree to transfer power, there is no indication other Cabinet Secretaries would have resisted such a move from the de-facto leaders of Reagan’s Cabinet. This conclusion is arrived at due to both the prominence of Haig, Weinberger and Attorney General William French Smith, as well as the information this group possessed concerning Reagan’s condition. However, as illustrated by Darman’s actions, and the reactions of the group, invocation was never seriously considered. This was a critical error in judgment by those assembled in the Situation Room that afternoon.

Once again, the most immediate flaw in Reagan maintaining power throughout that day was his condition. Even ignoring the twelve-hour period after surgery in which Reagan drifted in and out of consciousness and was heavily medicated, his incapacitation during the three hours in which he was under anesthesia cannot be argued. Had a crisis occurred during this time, communicating with Reagan would have been impossible. Concluding that Reagan was unable to discharge his duties while being operated on is not a question of judgment, but merely one of common sense.

Additionally, the chance that immediate presidential action may be needed was by no means remote. Prior to the shooting, the news of the day had been the amassing Soviet military presence on the Polish border, a situation that threatened to explode at any moment. This, along with the fact Hinckley’s motive remained unclear, produced a great deal of speculation
concerning a Soviet plot, much like fears following the death of President Kennedy.\footnote{Wilber, \textit{Rawhide Down}, 176.} While these suspicions would prove groundless, the nation’s ability to react to such events while Reagan was in surgery and recovery is highly questionable.

While Reagan’s Cabinet bears responsibility for the failure to invoke Section Four, there are also two factors which severely limited their options. The first is merely a question of chance, in this case, the location of Vice President Bush. Had Bush been in the nation’s capital that day, as he was on most, his presence in the Situation Room may well have made the difficult decision of invoking Section Four a little more appealing to the Cabinet. Again, given his absence, elevating Bush to acting president would not have resolved all the problems concerning executive authority, as communicating with him proved exceedingly difficult.

The second issue was not only beyond the control of Reagan’s Cabinet, but of every group of presidential advisors since ratification of the 25\textsuperscript{th} Amendment, the inherent flaw in the legislative line of succession. Thanks to the desire to appease John McCormack in 1965, the man directly behind Bush that day was House Speaker Tip O’Neill, a Democrat and Reagan’s primary political opponent. Not surprisingly, there was no mention of passing power to O’Neill on March 30. As a result, there were essentially only two options available to the Cabinet when Reagan entered surgery: transfer power to a nearly unreachable Vice President Bush, or, in a nod to the Garfield and Wilson’s examples, limp along and hope everything remains calm until the president recovers. Fortunately, this decision did not prove disastrous.
Given his actions, it is admittedly ironic to argue that elevating Secretary of State Haig in the succession line would have resulted in a less chaos. However, the notion of elevating Speaker O’Neill to the presidency for a matter of hours would have introduced a host of new complications. Such a statement is not a reflection of O’Neill’s abilities, but rather on the model of thrusting someone unfamiliar with the issues facing the president into the nation’s highest office in a time of extreme uncertainty. Although elevating the Secretary of State to such a position is not guaranteed to return order to the government, its chances for success are much higher.

**Why Wasn’t Section Four Invoked?**

In a return to the mindset of the Garfield and Wilson Administrations, the absence of disaster resulted in many lingering questions being ignored. However, in order to better understand the 25th Amendment, it is vital to ascertain why it was not invoked on March 30, 1981. And while all of the circumstances surrounding the shooting and its aftermath contain clues to solving such a riddle, the words of those involved is the best evidence. Therefore, it can be stated that the reason Section Four was not invoked was based far more on concerns of perception than on national interest.

One of the most prominent examples of this comes from the man who exercised a great deal of authority that day, Chief of Staff James Baker. In his memoirs, Baker admits to reluctance to invoke Section Four due partially to his close friendship with Bush and some
lingering suspicions from the 1980 primaries.\footnote{Baker, \textit{Work Hard}, 146.} Baker also wrote that he knew Bush would be sensitive to these criticisms as well. Also, Baker confirmed that he instructed Darman to take control of the papers drawn up by Fielding concerning a transfer of power.\footnote{Ibid, 145-146.}

The most revealing claim made by Baker alludes to the impact of Bush not being in Washington at the time. According to Baker, both he and Meese determined that transferring power to Bush while he was in the air would be "\textit{difficult.}"\footnote{Ibid, 145.} Furthermore, he reiterates the decision that no transfer was needed, despite Reagan being under anesthesia. Once again, the rationale for such a decision is not spelled out.

The amount of control exhibited by Reagan’s closest advisors is reiterated by Chris Hicks, who in 1981 was an associate counsel in the office of White House Counsel Fred Fielding. Speaking with Nancy Kassop in 2004, Hicks stated:

> The president was near death. It was a political decision to hide that and not reveal it at the time. But for a while there, we were uncertain about what lay ahead. We might have a dead president -- or worse, a comatose one. Meese, Baker, Deaver and Mrs. Reagan had the information and controlled what they chose to give to the rest of us. The way the White House runs is not precise -- you try to get the best political mileage you can.\footnote{Kassop, "When Law and Politics Collide," 156.}
Although there is nothing legally wrong in these actions, they serve to highlight Bush and the Cabinet, were not kept fully apprised of the real situation at the hospital. As a result, their ability to fulfill the duties assigned to them by the 25th Amendment was severely compromised.

While there was no official authorization for the actions of some of Reagan’s advisors, Martin Anderson, an Assistant to the President, stated that what took place following the shooting was logically justified. Reflecting on the events of March 30 more than a decade later, Anderson stated:

Basically the academic view is, you've got the President in charge, he's in control. Something happens to the President, who's in control and who's in charge? Wrong, that's not the way it works. It is not like throwing a light switch. I think what happened that day is probably a clearer example of it. When we got the information that he had been shot, we did not know the seriousness of it. We did not know if he was dead, we didn't know how wounded he was, we just knew he had been shot. Now, what happened was, and no one can seem to understand this is--nothing. You wait. You find out what the situation is. You don't rush off and assume, "Oh my God, he's been shot, we're going to put the Vice President in charge." Or you don't say, "Well, he's been shot but he's in charge so let's talk to him and see what he is going to do." You wait and say, "Well, let's see what happens." And people were very calm and they just settled down.415

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Anderson went on to discuss how many of the functions of the federal government occur without executive oversight, thereby suggesting that the absence of a president for a matter of hours is not a cause for great concern. While Anderson’s contention may be accurate, it also relies heavily on good fortune, a variable that fails to provide any assurances.

A final factor that may have contributed to the decision not to invoke pertains to the time in which the shooting occurred, specifically, just sixty-nine days into Reagan’s Presidency. Both Fielding and Hicks admitted later that preparations for disability contingencies began after Reagan was shot, a model that obviously leaves much to be desired.416 Despite occurring after the fact, Fielding and Hicks’ preparation did result in the completion of an “emergency book,” which covered a wide array of scenarios concerning the health of both Reagan and Bush. According to Fielding, one copy of this book remained with him at all times, while another was kept in a White House safe.417

Another Administration official who cited the influence of timing was Reagan’s personal physician, Dr. Daniel Ruge. Discussing the decision not to invoke in 1988 to the Miller Commission panel studying executive disability, Dr. Ruge stated:

It was discussed. There is a big difference between Dan Ruge on March 30, 1981, after a shooting when he'd only been on the job two months for one thing, and what Dan Ruge would have been like four years later [at the time of Reagan's colon cancer operation] when he would have actually had time from April 1981 to July 1985 to think about it. I think very honestly in 1981, because of the speed of

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417 Ibid, 156.
everything and the fact that we had a very sick president, that the 25th Amendment would never have entered my mind even though I probably had it in my little black bag. I carried it with me. The 25th Amendment never occurred to me.\(^\text{418}\)

It should be noted that in February 1989, a month after Reagan left office, Dr. Ruge publicly stated that Section Three of the 25th Amendment should have been invoked following the shooting.\(^\text{419}\)

Although the tasks that confront any incoming administration are overwhelming, the vital nature of the disability issue requires that guidelines be discussed prior to a president being sworn into office. Additionally, each member of the Cabinet should be aware of the guidelines of the Amendment and the critical role they may be called upon to play. Whether due to the brevity of Reagan’s time in office or the belief that other matters took precedence, it seems clear that a lack of awareness concerning the 25th Amendment influenced the decision making process following the shooting. According to Fielding: “To be very frank with you, that day, when I mentioned the 25th Amendment I could see eyes glazing over in some parts of the Cabinet. They didn't even know about the 25th Amendment.”\(^\text{420}\)

\section*{The Lessons of March 30th}


\(^{420}\) Miller Commission Report, 23.
Despite the fact President Reagan would make a full recovery, his condition remained greatly impaired in the weeks and months that followed. Two days after the shooting, while the nation heard stories of the President’s amazing recovery, Reagan developed a very high fever, a sign doctors feared could be the result of either an infection or internal bleeding.\(^\text{421}\) The fever would remain for the next week, and while the public received encouraging news concerning Reagan’s condition his attending physicians later admitted they were quite concerned about the President’s prognosis, given the aggressive infection.\(^\text{422}\) Ultimately, Reagan’s fever would come down, and he was discharged from George Washington Hospital on Sunday, April 11.

In spite of White House claims that Reagan’s recovery was quickly progressing, history has shown that the President was greatly impaired for at least the first few weeks following his hospitalization.\(^\text{423}\) Much like in the hospital, Reagan’s ability to focus during briefings was limited, and he continued to require a great deal of rest, some days spending more time sleeping than awake.\(^\text{424}\) During this time, access to the President was limited to his closest aides, specifically, the Troika of Baker, Meese and Deaver, who continued to exert a great deal of control over the Administration.\(^\text{425}\)

Given the reluctance to invoke the 25\(^{\text{th}}\) Amendment on the day of the shooting, it is not surprising that there seemed to be no consideration of it during Reagan’s recovery. And while a

\(^{421}\) Abrams, *The President Has Been Shot*, 67-68.


strong argument can be made that such an invocation was justified, it may very well have been this prolonged recovery that made Section Four so unappealing to Reagan’s aides initially. If the Cabinet had chosen to invoke Section Four on March 30, 1981, this would not have ended questions concerning Reagan’s abilities, but merely focused them in a different direction. Subsequently, the inquires would then center on when Reagan would be returning to the presidency, as well as what criteria Administration officials would employ to gauge Reagan’s capabilities. Given the amount of effort that went into portraying Reagan’s condition, it is safe to assume the Administration did not want to face these questions on a daily basis during Reagan’s recovery.

Furthermore, had Reagan suffered a setback in his recovery, it is likely press inquires would have begun into whether he returned to office too quickly. Considering Reagan’s own estimation that he was not completely recovered until October, more than six months later, it is clear there was no definitive point of recovery. While there is no specific evidence that this factor contributed to the decision not to invoke Section Four, it is impossible to discount its relevancy. The support for this conclusion grows when considering the actions of the Reagan Administration when they faced another instance of executive disability four years later.

Reagan’s Surgery and the First Temporary Transfer of Executive Power

Unlike in March 1981, Ronald Reagan had firmly established himself in office by July 1985. Having been elected by one of the biggest landslides in American history nine months

earlier, Reagan continued to enjoy a great deal of both popular and political support in his second term. Support quickly turned to concern on July 12, 1985, when the White House announced that a cancerous polyp had been discovered in Reagan’s colon, and that surgery to remove it would be performed the next day. While the public and the press concentrated on the medical implications of the surgery, Reagan’s staff began to consider an invocation of the 25th Amendment.

In stark contrast to the shooting, Fielding and his team now had nearly twenty-four hours to consider whether or not Reagan should invoke Section Three of the Amendment. Along with an expanded time frame, the Administration also benefited from the work undertaken by Fielding and Hicks after the assassination attempt, a project that included several scenarios for invocation, including a surgical procedure.\(^{427}\) Also, given the second guessing that had followed the decision not to invoke the Amendment following the shooting, the White House was clearly sensitive to encountering such questioning a second time.\(^{428}\) As a result, Fielding began to consult with Bush, Chief of Staff Don Regan and Attorney General Ed Meese as to the proper course of action.

One event that greatly influenced these meetings was a conversation Fielding had with Reagan, Bush and Don Regan a few days earlier concerning the 25th Amendment. Since Reagan had been scheduled to undergo a colonoscopy, which resulted in discovery of the polyp, the four met to discuss a possible invocation due to the test itself. Along with an agreement not to invoke, Reagan also let it be known that he feared establishing a precedent for invoking the Amendment.

\(^{427}\) Kassop, “When Law and Politics Collide,” 156.
\(^{428}\) Abrams, The President Has Been Shot, 199.
for a “minor” procedure. This reluctance concerning a precedent would prove to be very influential.

Just hours before Reagan was scheduled to undergo surgery, Fielding drafted two letters. The first was the letter that Fielding kept in the “emergency book” he and Hick created following the shooting. This letter, addressed to the Speaker of the House and President Pro Tempore of the Senate, specifically invoked Section Three of the 25th Amendment and only required Reagan’s signature and delivery to the aforementioned members of Congress. However, this was not the letter Reagan would sign.

As a result of Reagan’s reluctance to establish a precedent, Fielding drafted another letter that, while temporarily transferring power to Bush, made it a point to avoided specifically invoking Section Three. Ultimately, this would be the letter that Reagan signed at 11:28 am on Saturday, July 13, 1985, marking the first time in our nation’s history that the official powers of the presidency were temporarily transferred to the vice president. The letter stated:

*Dear Mr. President: (Dear Mr. Speaker:)*

I am about to undergo surgery during which time I will be briefly and temporarily incapable of discharging the Constitutional powers and duties of the Office of the President of the United States.

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.

429 Ibid, 199.
Nevertheless, consistent with my longstanding arrangement with Vice President George Bush, and not intending to set a precedent binding anyone privileged to hold this 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.

I shall advise you and the Vice President when I determine that I am able to resume the discharge of the Constitutional powers and duties of this Office.

May God bless this Nation and us all.

Sincerely,

RONALD REAGAN

By specifically avoiding a direct invocation of Section Three, it can be argued that the 25th Amendment was not invoked in this case. However, were that argument to be made, the question quickly becomes where does the authority to transfer power to the vice president come from absent the Amendment?

Regardless of the legal qualifications in the letter Reagan signed, it is commonly held that this was the first official invocation of Section Three of the 25th Amendment. Although Fielding’s testimony before the Miller Commission in 1988 makes it clear that Reagan sought to avoid an invocation, the final report of the Commission states that the legal disclaimers within the letter were merely intended to win Reagan’s approval. In other words, they contained no legal implications.

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432 Miller Commission Report, 10.
433 Ibid, 10.
Ending the Invocation

As previously mentioned, any invocation of Section Three invariably raises the question of when to declare the president capable of resuming his duties. Such a question contains many elements, chief among which is should the president return to power when he has fully recovered or merely when he is again able to communicate with those around him, such as after anesthesia for surgery has worn off. This was the question confronting Fielding, Chief of Staff Donald Regan, and Press Secretary Larry Speakes, following the two hour and fifty-three minute surgery in which the polyp and roughly two feet of the President’s colon were removed. Immediately after the surgery, Reagan was disoriented and drifted in and out of consciousness due to the anesthesia for several hours.434

After conferring with the doctors treating the President, Fielding and Regan decided on a test they felt would measure Reagan’s capacity to regain his office. Since Reagan’s doctors felt there was no way to properly determine whether all the effects of the anesthesia had worn off, it was decided any such determination would strictly be one of opinion, not medical fact. As the letter Reagan needed to sign to resume his duties had already been drafted, the decision was made to present the letter to Reagan and ask him to read and sign it. If he were able to complete these two tasks, both Fielding and Regan agreed that he was able to resume his authority.435

The letter was presented to Reagan at 7:22 p.m.; almost exactly eight hours after the anesthesia had first been administered. Reagan promptly read and signed the letter returning him to power, which stated:

_Dear Mr. President: (Dear Mr. Speaker:)_

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.

Sincerely,

RONALD REAGAN

Although the only test was to see if Reagan could read and sign the letter, Chief of Staff Regan later stated that he was impressed by Reagan’s wanting to return to a discussion of the budget the two men had had prior to the surgery. 

_Did Reagan Resume His Duties Too Quickly?_

Overall, the first invocation of Section Three went exactly according to plan. President Reagan transferred power to Vice President Bush for the period in which he would be unable to discharge the duties of his office, then resumed authority when the disability had ceased. Since prior to the 25th Amendment the only options would have been either hoping nothing eventful

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437 Abrams, _The President Has Been Shot_, 205.
occurred during Reagan’s incapacitation or resignation, there can be no argument that these guidelines presented a much needed alternative. That being said, the suspicions held by Reagan and his aides towards the Amendment were clearly displayed.

The clearest indication of uncertainty is found in the letter President Reagan signed. Instead of simply invoking Section Three, Reagan’s legal team sought specifically to avoid the Amendment, while employing its provisions. Even though this was merely a legal qualification, it illustrates the mindset that the Amendment was more of a potential danger than benefit. As exhibited by the statements of many Reagan Administration officials concerning the assassination attempt, this mindset was by then more than four years old.

The second piece of evidence is the opinion that the framers of the 25th Amendment did not envision its invocation under such circumstances. Judging from congressional debates and the testimony of former executive branch officials, it is clear that a surgical procedure requiring anesthesia is exactly the scenario for which Section Three was created. Ironically, it is difficult to conceive a better example of the necessity of Section Three than a time in which the president is unconscious, as it removes the highly dangerous method of relying solely on good fortune. If major surgery requiring the use of anesthesia is not the proper time to invoke Section Three, one wonders what scenario the Reagan Administration would have viewed as appropriate.

This is not merely a personal opinion, but one supported by the man who has the most insight into the creation of the Amendment, Senator Birch Bayh. Speaking with Dr. Herbert Abrams in June of 1990, Bayh called the decision not to invoke the Amendment in March of
1981 “totally irresponsible” and claimed it may have even violated the Constitution.\textsuperscript{438} He went on to state that power should be transferred to the vice president anytime the president is unable to function, as is obviously the case concerning anesthesia.\textsuperscript{439} In other words, if Section Three was never intended to be used in the case of surgery, it would come as surprising news to the man who drafted the Amendment.

The final piece of evidence involves the period of time for which Reagan was deemed unable to discharge his duties. The time frame established by the letters shows that Reagan was incapable of serving as president for seven hours and fifty-five minutes on July 13, 1985. And, as illustrated by the Fielding and Regan’s statements, the decision to approach Reagan with the letter returning him to power was made as soon as it seemed the effects of the anesthesia had worn off. Therefore, it is safe to state that Reagan’s aides viewed the situation as one in which Section Three should be in effect for as short a time as possible. However, this raises a question of what was possible as opposed to what was prudent, given the circumstances.

Both Regan and Fielding contended that asking President Reagan to read and sign the letter returning him to power was an appropriate test to determine if he were able to discharge his duties. It is unfair to criticize either man, as there were no tried and true guidelines available for measuring such an event, and thus they were forced to create one on their own. Additionally, both aides should be commended for their consultation with physicians in an attempt to ascertain the signs of recovery, consultations in which physicians stated there was no definitive manner of determination. As a result, both men were faced with the often unpleasant task of creating a

\textsuperscript{438} Abrams, \textit{The President Has Been Shot}, 257.
\textsuperscript{439} Ibid, 257.
precedent. All indications are that Regan and Fielding acted as best they could in this instance
given the circumstances.

Furthermore, it can even be assumed that technically, Reagan was able to discharge the
duties of his office roughly four hours after the surgery ended. After signing the letter, Reagan
conversed with Regan and Fielding, as well as physicians and nurses who were treating him, and
all involved felt he was well aware of his surroundings.440 Also, unlike in the aftermath of the
shooting, Reagan was not given significant amounts of pain medication, though he was given
some morphine earlier in the day. The morphine was administered in the spinal canal, since
physicians felt this would not impair Reagan’s mental abilities, a decision that raises even more
questions about his capacity after being shot.441

A more significant question to consider is whether or not it made sense for Reagan to
resume his duties just eight hours after surgery. Again, while there is ample evidence that
Reagan was lucid when he signed the second letter, it is also reasonable to consider whether he
would have had the ability to fully comprehend and consider the ramifications of any action.
While there were no events or locations where imminent danger was feared, would it not have
made more sense for Vice President Bush to continue in the role of acting commander-in-chief
for at least a few more hours, or even days? Although it is understandable that Reagan and his
aides wanted to avoid any indication of a prolonged incapacitation, it is difficult to imagine such
a perception originating from even another day of recuperation.

441 Abrams, *The President Has Been Shot*, 204.
Much like in March of 1981, it seems the decision making process concerning the 25th Amendment was dictated mainly by appearance. This is borne out by Fielding’s own words three years later, when he stated:

But in my mind, again, my own personal view was if you were comfortable with the President's condition, the sooner the better for any number of reasons. And certainly it was a very practical, political reason that the public out there needed reassurance the President was in fact really O.K., this wasn't a death-threatening situation that he . . . had come through the procedure and was lucid enough to take back the problems.  

Additionally, it should be noted that the time frame in which Reagan signed the second letter was dictated by Regan and Fielding, who approached Reagan with the letter instead of waiting for him to request it. Finally, it should be noted that Reagan himself admitted he endured a great deal of pain and achieved little sleep over the next two days.

While it is idealistic to state that political concerns should play no role in any invocation of the 25th Amendment, it is fair to demand that it not be the determining factor. Considering that Reagan was unable to walk until two days after his surgery, or eat solid foods for more than four days after, the question of whether or not Reagan was truly able to discharge his duties is a valid one. Additionally, Reagan’s diary entries for the first five days after his surgery mention meeting

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443 Abrams, The President Has Been Shot, 205.  
with Regan only to “do what chores are necessary.”\textsuperscript{445} Given the reluctance to officially invoke Section 3, along with the Administration’s obvious sensitivity to portraying the seventy-four-year-old commander-in-chief as disabled, it is safe to conclude that this decision was also based more on public relations than actual ability.

\textbf{The Birth of Iran-Contra}

While the dangers associated with the Reagan Administration’s handling of the 25\textsuperscript{th} Amendment have been confined to the hypothetical, what happened in the days after Reagan’s surgery illustrates the impact of even a seemingly minor executive decision. On July 18, five days after surgery, Reagan met with National Security Advisor Bud McFarlane and received word of two Iranian government officials interested in talking with the United States.\textsuperscript{446} A seemingly small gesture on its face, Reagan’s decision to pursue the relationship gave birth to the Iran-Contra affair that nearly destroyed Reagan’s Presidency two years later. During hearings into the scandal, Attorney General Meese testified that Reagan’s approval of the deal may have been impacted by either the after effects of the surgery or the medication he was receiving at the time.\textsuperscript{447}

Obviously, it is purely speculative to question whether or not Reagan’s mental or physical condition after surgery contributed to his order to McFarlane to proceed with meeting. Additionally, even if Reagan were unaware of his actions at the time, there were instances in the

\begin{footnotesize}
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\item\textsuperscript{445} Ibid, 342.
\item\textsuperscript{446} Ibid, 343.
\item\textsuperscript{447} McDermott, \textit{Presidential Leadership}, 203-204.
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future in which the decision could have been reversed. However, it clearly illustrates the necessity of a president always being in complete control of his faculties. This necessity is not only the rationale behind the creation of the 25th Amendment, but also a fact that was ignored in March 1981 and quickly forgotten in July 1985.  

Before the end of his term in office, President Reagan would undergo two more procedures to remove skin cancer cells from his face and another colonoscopy, none of which required general anesthesia. However, Reagan admitted to hoping that the scar from one skin procedure would disappear before anyone in the press took notice. While this is merely a cosmetic consideration, it is also indicative of how the Reagan Administration viewed the two instances of disability they faced. Concerns over appearance and press reaction wielded significant influence over the decision making process, especially following the assassination attempt. Fortunately, the dangers inherent in these decisions are left mainly to speculation.

**George H.W. Bush and Bill Clinton**

Unlike the suspicion that marked the Reagan Administration’s view of the 25th Amendment, his successors have viewed the guidelines in a much more accepting manner. Perhaps based on his own dealings with executive disability, President George H.W. Bush asked both White House aides and his personal physician to meet and discuss the possible instances in which the Amendment may be needed prior to taking office in January 1989.  

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448 Ibid, 203.
meeting on April 18, 1989, roughly three months after Bush took office, involving Bush, Vice President Dan Quayle, their wives, Bush’s personal physicians, a representative of the Secret Service and Chief of Staff John Sununu. This meeting was solely to acquaint everyone with the 25th Amendment, as well as to discuss what to do in the event Bush was unable to sign a letter removing himself from power.451

In May 1991, Bush found himself on the other side of a potential invocation of Section Three when he experienced an irregular heartbeat while jogging. Although Bush never lost consciousness, doctors warned that if medication did not regulate his heartbeat, they would perform a short procedure in which he would be given anesthesia.452 In a commendably transparent process, the Bush Administration announced that if this procedure was deemed necessary, Bush would invoke Section Three, transferring power to Vice President Dan Quayle.453 Ultimately, Bush’s condition responded to medication and thus no procedure was required. However, the forthright nature in which his Administration dealt with the issue warrants a great deal of praise.

Like President Bush, his successor appeared to view the 25th Amendment as a useful recourse. When President Clinton sustained a serious knee injury in March 1997, doctors quickly decided that surgery would be required to repair the damage. However, Clinton’s physicians informed him that if the procedure went according to plan, only local anesthetic would be

452 Abrams, The President Has Been Shot, 261.
453 Ibid, 261.
required, thus he would remain conscious throughout the procedure.\textsuperscript{454} Clinton was also informed that if there were any unforeseen complications, or if the damage to the knee was worse than expected, the use of full anesthesia would be required.

In a similar manner to the Bush Administration, Clinton and his staff were entirely forthright concerning a possible invocation of the 25\textsuperscript{th} Amendment. Throughout the surgery, Clinton’s Chief of Staff stood ready to transfer power to Vice President Al Gore in the event there were any complications, or if procedure required general anesthesia.\textsuperscript{455} Since Clinton remained fully conscious throughout, no such transfer was necessitated. However, like his predecessor, Clinton and his staff deserve praise for their honest and open approach to the 25\textsuperscript{th} Amendment.

**George W. Bush and a Post 9/11 World**

It can be definitively stated that President George W. Bush held no concerns over setting a precedent concerning an invocation of the 25\textsuperscript{th} Amendment. During his time in office Bush temporarily transferred power to Vice President Dick Cheney on two occasions in June 2002 and July 2007, for roughly two hours in each case. Both invocations of Section Three were due to scheduled colonoscopies which required sedation.\textsuperscript{456} In each instance, Bush cited the War on

\textsuperscript{455} Ibid, 749.
Terror and the potential need for decisive action on the part of the president without questions of legality or capability as the rationale behind his decision.457

Unlike President Reagan’s 1985 invocation, the letter signed by President Bush on June 29, 2002, specifically invoked Section Three of the 25th Amendment. The letter read:

 Dear Mr. Speaker: (Dear Mr. President:)

As my staff has previously communicated to you, I will undergo this morning a routine medical procedure requiring sedation. In view of present circumstances, I have determined to transfer temporarily my Constitutional powers and duties to the Vice President during the brief period of the procedure and recovery.

Accordingly, in 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. Pursuant to Section 3, the Vice President shall discharge those powers and duties as Acting President until I transmit to you a written declaration that I am able to resume the discharge of those powers and duties.

Sincerely,

GEORGE W. BUSH458

The letter Bush signed to resume his duties also specifically mentioned Section Three of the 25th Amendment, a further illustration of how the Bush Administration viewed the legislation. Additionally, the letter Bush signed on July 21, 2007, was nearly identical to the 2002 letter, and again specifically mentioned Section Three.459

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459 These letters, along with the Reagan July 1985 letter, can be found at: http://www.presidency.ucsb.edu/acting_presidents.php
Since President Bush cited the ongoing War on Terror as his rationale for invoking the Amendment, the question becomes whether the introduction of domestic terrorism has forever altered the way presidents and their staffs view even a short-term incapacitation. Although merely speculative, it is worth considering whether Bush would have invoked Section Three had his procedure occurred prior to September 11, 2001. Although President Reagan underwent the same procedure twice during his time in offices there was never any serious discussion of invoking Section Three under the circumstances. Additionally, given the relatively routine nature of the procedure, it would have been fairly easy for the Bush Administration to wait and announce the procedure after it had taken place.

Regardless of the reasoning behind such a decision, the Bush Administration should be commended for its utilization of the 25th Amendment. President Bush carried on the mindset of his two immediate predecessors that a justified invocation of the Amendment would neither weaken the presidency nor set a dangerous precedent for future administrations. Additionally, as the procedure Bush underwent could easily have been kept from the public, the decision to invoke Section Three was clearly one of caution. Hopefully, this is a view that will continue, as the danger of terrorist attack can never be precluded and necessitates a commander-in-chief who is in full command at all times.

Rumors and Section Four

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The only provision of the 25th Amendment that has not been invoked as of this writing is Section Four. Given the ramifications of such an action, along with the obvious reluctance of a vice president to be seen as too eager to take command, this lack of invocation is not surprising. And while predicting the future is always a dangerous prospect, it is safe to state definitively that any potential invocation will occur only in the most extreme of circumstances, and only when the vice president and Cabinet are left with no other recourse. However, while there has never been an official invocation, historical evidence shows that discussions about possible invocations occurred on at least two occasions.

The history behind these events is unlike those of formal invocations. There are no official documents signed by the president or minutes of official gatherings, rather we are left with the memoirs of administration officials, which often require scrutiny. And while rumor and innuendo are best avoided, both of these cases have been documented by diverse sources and all accounts present remarkably similar details. As a result, I feel they warrant attention in this work.

**President Nixon and the Stress of Watergate**

The first case occurred in the closing days of the Nixon Administration. As President Nixon’s actions grew more erratic, including his self imposed seclusion on several occasions, there was talk amongst Nixon’s advisors about a possible invocation of Section Four. While Nixon’s political power was essentially nonexistent due to Watergate, there was a growing fear that his instability was a danger to American foreign policy, in particular due to the growing

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world view that Nixon was unable to govern.\footnote{Robert Dallek, \textit{Nixon and Kissinger: Partners in Power} (New York: Harper Collins, 2007) xii and 528.} However, by all accounts, consideration of such action was limited purely to minor speculation. 

As it became clear that Nixon’s Presidency would not survive the Watergate investigation, the subject of the 25\textsuperscript{th} Amendment was raised a final time. As Nixon’s legal team began to prepare for a potential impeachment trial in the Senate, White House Counsel Fred Buzhardt and Chief of Staff Alexander Haig prepared a list of options for Nixon to consider. Designed mainly as a choice between continuing to fight and resignation, one option suggested Nixon’s invocation of Section Three, which would allow him to step aside and concentrate fully on fighting impeachment.\footnote{Bernstein and Woodward, \textit{The Final Days}, 325.} In a sign Nixon’s hopeless battle, the option of invoking Section Three was raised exactly a week prior to his resignation.

Although neither Sections Three nor Four were invoked, their consideration is fascinating given the circumstances. While Section Four was designed for a possible case of mental instability on the part of the president, the prospect of Section Three being employed to help defend against impeachment was not envisioned by the framers of the Amendment. Considering that voluntarily ceding power during an impeachment trial seems to remove a crucial benefit of the office, it is highly unlikely such recourse would ever be used. However, in Nixon’s case, he had nothing to lose.

The potential invocation of Section Four is one that dealt with a subject even more complicated than a president’s health, his mental condition. Based on the accounts of several White House officials, it is clear that President Nixon’s mental state was severely compromised
in his final weeks in office. And while the other two branches of government worked to check Nixon’s power, his constitutional authority over the military remained absolute until the moment of his resignation. Clearly, this was a dangerous scenario for both the nation and the world.

Yet before any criticism is directed at Vice President Ford and the Cabinet, it is important to consider what such an invocation would have meant. First and foremost, it would have ended Nixon’s Presidency. Declaring a president unable to discharge his duties while in surgery is one thing, but declaring him mentally unable to do so is entirely different. As a declaration of mental impairment is difficult, perhaps impossible, to be deemed fully resolved, it is nearly impossible to envision a scenario whereby Nixon resumed his duties.

Additionally, it would have placed Ford in the even more precarious position of participating in his own rise to power. Despite the unlikelihood of public sentiment shifting towards the highly unpopular Nixon, this would obviously have made Ford susceptible to the charge feared most by a vice president in such circumstances, that of a usurper. Given the actions of those around Nixon in his final days in office, it is clear the strategy employed was one reminiscent of the Wilson and Garfield days, limp along and hope the situation is resolved quickly and without incident. While this illustrates the inherent dangers of such a mindset, it also highlights the overwhelming reluctance that will invariably accompany any potential invocation of Section Four.

**President Reagan’s Mental Condition**
The other speculative invocation of Section Four again involves the Reagan Administration, though this time centers on the President’s mental condition. In March of 1987, Reagan named former Senator Howard Baker as his new Chief of Staff after firing Donald Regan. Soon after taking over the post, Baker received a memo from his aide, James Cannon, who had conducted a series of interviews with White House staffers. In laying out his recommendations based on the interviews, Cannon’s first piece of advice to Baker was startling: “consider the possibility that Section Four of the 25th Amendment might be applied.”

In order to gain a proper perspective of the situation Baker encountered, the political atmosphere of the time must be considered. The Iran-Contra affair, which originated in Reagan’s decision following his 1985 surgery, had exploded onto the front pages and threatened to bring down the Reagan Presidency. Additionally, the final report of The Tower Commission, a group organized to investigate the Administration’s handling of the affair, charged that Reagan was out of touch and delegated too much authority to subordinates. As a result, the news that Reagan may be uninterested in his duties as president was not without evidence.

Baker discovered that Cannon’s recommendation was based on reports that Reagan was inattentive at Cabinet meetings, and that many staffers speculated he preferred to spend his time in the residence, rather than working. Much like the proposed invocation during Watergate, a declaration involving Reagan’s mental capabilities would also have marked the end of his term in office, as a convincing recovery from such an affliction is all but impossible. As a result, any

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discussion of such an action would have placed Vice President Bush, along with the Cabinet, in an extremely tough situation. Unsure of how to proceed in such an unchartered area of executive disability, Baker decided to closely monitor Reagan the next day as he conducted his business, without the President’s knowledge.\footnote{PBS.org, “American Experience-The Presidents: Chapter 26-Reagan.” Accessed December 19, 2012, from: http://www.pbs.org/wgbh/amERICAN Experience/films/reagan/player/.}

By all accounts, Reagan passed Baker’s test convincingly. Baker found the President to be fully engaged in the Cabinet meeting, including with new members of his staff and the press, on hand to cover Baker’s first day.\footnote{Annis, Howard Baker, 214; American Experience- Reagan} As a result of Reagan’s engaged nature both that day and in the weeks that followed, Baker and his staff determined that the President was fully in command of his faculties, and thus no invocation of Section Four was required.\footnote{McDermott, Presidential Leadership, 204.} Subsequently, there is no indication that such action was considered throughout the final twenty-two months of Reagan’s Presidency.

Even though both cases relating to possible invocations of Section Four took place in extraordinary times of scandal, the gravity of such a move would be equally heavy on any White House, regardless of political circumstances. For the vice president and Cabinet to declare the duly elected president unable to discharge his duties, the president’s condition must be beyond speculation. Any second guessing, or possible challenge from the deposed president, would invariably cast a shadow over both the new president and those around him. Also, as seen in the actions of vice presidents from Arthur to Bush, the fear of being perceived as overly eager to assume the presidency inherently limits the actions anyone in such a role is willing to take.
Conclusion

Ironically, the circumstances in which the 25\textsuperscript{th} Amendment has been invoked thus far have been remarkably orderly and routine. The elevation of Gerald Ford to the presidency, despite the circumstances behind it, took place with nearly fifteen hours of formal warning, and arguably weeks and months of informal preparation. By the same token, the two instances of vice presidential replacement were also relatively free from controversy, a remarkable achievement given their circumstances. Finally, the three transfers of power occurred due to scheduled medical procedures, all of which were free of complication.

Ironically, it has been the decisions not to invoke the 25\textsuperscript{th} Amendment that are most compelling. Despite the stated desires of the framers of the Amendment to remove the influence of political factors, the shooting of President Reagan illustrates how such a goal may well be impossible. Additionally, the reluctance to even formally discuss an invocation of Section Four, whether against the backdrop of Watergate or the Reagan assassination attempt, shows how those closest to the president fear those guidelines. While this may seem to be a dangerous scenario, we must also remember the ramifications of what any invocation of Sections Three and Four mean, quite simply, the removal of the duly elected president from office. Considering this fact, it is beneficial for the nation that such actions are taken with the utmost of reluctance.
Chapter Five

The Dangers of Legislative Succession
Legislative Succession

The inherent flaws of a legislative line of succession are not surprising considering its origins. As detailed in chapter two, the notion of placing congressional leaders after the vice president was born not out of logic, but partisanship. When the Federalist majority in the Senate realized the Succession Act of 1792 placed Secretary of State Thomas Jefferson two heartbeats from the presidency, the concept of legislative succession was created.

Concerns over the legislative line were expressed early on, particularly in the House of Representatives. Members of the House, including James Madison, actually passed legislation creating a Cabinet line of succession on February 15, 1792. However, their efforts were no match for the Federalists in the Senate, led by Treasury Secretary Alexander Hamilton. As a result, the legislation was amended to include the Senate Pro Tempore and Speaker, not the Cabinet, and returned to the House five days later. Unfortunately for the nation, the House passed the amended draft and the legislative line of succession was born.

The trivial nature of the Federalists’ efforts was reflected in a letter from Hamilton to Edward Carrington soon after the Succession Act of 1792 was passed. Regarding the ordering of the succession line, Hamilton wrote:

“You know how much it was a point to establish the Secretary of State as the officer who was to administer the government in defect of the President and Vice-President. Here, I acknowledge, though I took far less part than was supposed, I ran counter to Mr. Jefferson’s wishes; but if I had had no other reason for it, I had

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already experienced opposition from him, which rendered it a measure of self-defense.”

Regardless of the suitability of the Cabinet line, it seems no argument would have been sufficient to sway Hamilton and his allies in Congress.

The model of legislative succession was also complicated by repeated vacancies in congressional leadership. Since early sessions of Congress only convened for roughly half the year, it is difficult to understand how this shortcoming was not envisioned. As a result, we can conclude that the anti-Jefferson sentiments of many in Congress overpowered their better judgment. Regardless of its dubious origins, the shortcomings of the legislative line quickly became apparent. In recognition of these problems, the Succession Act of 1886 replaced congressional leadership with the Cabinet.

Unfortunately, President Truman’s stated opposition to being able to choose his own successor resulted in the restoration of the legislative line in 1947. The opportunity for reform again presented itself during the drafting of the 25th Amendment, but sadly, personal interests again ruled the day. And thanks to this desire to placate Speaker McCormack, the line of succession was left unaltered. Although such a mechanism has yet to be employed, there has never been more of a need for change.

**The Problems of Legislative Succession**

**Awareness**

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The most glaring problem in a member of Congress being thrust into the presidency involves a lack of knowledge. This is not a reflection on the capabilities of any Speaker of the House or President Pro Tempore of the Senate, as attaining either position requires both prolonged public service and immense awareness of political and policy issues. Rather, it is a reflective of the all encompassing nature of such roles, particularly the Speakership.

Given the amount of attention their duties require, it is unreasonable to expect either to remain familiar with every issue facing the president. Therefore, charging them with the immense duties of the office would require a great deal of on the job training. Since any invocation of the 25th Amendment, especially one that moves further down the line of succession, is inherently a sudden event, such a prospect is very troubling.

A counter argument would be that any person who assumes the presidency must undergo some period of adjustment, as no position can fully simulate the tremendous demands of the office. While such a claim is accurate, it is important to further examine the two methods by which someone becomes president: popular election or succession. Although the backgrounds of our elected presidents are quite varied, one common denominator is that they enjoyed at least some period of transition. During this time, each president-elect was able to fill Cabinet and other staff positions, as well as prepare to assume the office. Again, while no training can fully prepare a president-elect, the transition period is clearly beneficial preparation.

The second method is more sudden, and thus lacks a transition period. But so far, the only office holders who have succeeded to the office have been vice presidents. Regardless of the length of their service in office or their relationship with the president, nearly all of these men
had at least been party to the inner workings of the administration. Ironically, the sole exception to this model is John Tyler.

Fortunately, Tyler’s case remains the exception, although Harry Truman’s Vice Presidential tenure was also remarkably limited in both time and contact with the president. And while there is no guarantee that future vice presidents will have close relationships with their bosses, the evolution of the vice presidency does ensure a better informed second in command. Over the last half-century, the office of the vice president has greatly expanded in both authority and appeal, as presidents have made sure to include their potential successors in both Cabinet and national security briefings. Additionally, the three most recent Vice Presidents, Al Gore, Dick Cheney and Joe Biden, have all enjoyed a remarkable amount of both influence and access to the president, a trend that shows no signs of weakening.

Even though access to Cabinet meetings and the president does not guarantee a fully prepared vice president, it at the very least makes him or her better prepared than someone outside of the administration. In other words, we are left with two choices: a vice president who receives daily briefings on issues of national security and who is involved in various other facets of the administration, or the Speaker of the House. Just as with other aspects of the 25th Amendment, we all hope the countless scenarios that must be accounted for never come to fruition. However, hope is no substitute for forethought, and thus we must often look not for perfection, but the best possible recourse for the worst possible case. In this case, there can be no

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doubt that the vice president is better suited to assume the presidency than the Speaker of the House.

Now I know what you are thinking – the legislative line of succession only comes into play after the vice president, so such an argument is redundant. However, think about what makes the vice president best suited to assume the presidency; a familiarity with administration activities, knowledge of foreign affairs comparable to the president’s, and a relationship with both the president and the Cabinet. Along with the vice president, there is another government official who possesses these qualifications, the Secretary of State. In fact, the case could easily be made that any member of the president’s Cabinet satisfies these three qualifications. Based on this, we must now ask ourselves whether it makes more sense for the line of succession to run through the Cabinet or Congress.

Much like the vice president, members of the Cabinet are guaranteed to enjoy at the very least a working relationship with the president. As a result, even if the president and a Cabinet official disagreed on a matter, the official would nonetheless attend Cabinet meetings and possess at least a working knowledge of the administration and its key players. And while this is true of any Cabinet member, it is particularly true of the Secretary of State. Like the vice president, the Secretary of State is a member of the National Security Council and, due to the responsibilities of the position, remains as equally informed on foreign affairs as the president.

Along with the president, vice president and Secretary of State, the Secretaries of the Treasury and Defense are also members of the National Security Council. As a result, the knowledge of the administration each possesses provides these officials with a great deal of
preparation that would help smooth any sudden transition to the presidency. And since any event that results in moving beyond the vice president in the succession line is by nature a national crisis, it becomes even clearer that Cabinet officials are better suited to assume the presidency. Unfortunately, if such an event were to transpire at the time of this writing, the two officials who would assume the presidency do not fall into this category.

Along with originating from partisan animosity, the notion of elevating members of Congress to the presidency ignores an obvious lack of preparation for the job. Even in Congress’ earliest days, the Speaker position required the full attention of its occupant, and this during a time when Congress was only in session for roughly half a year. Over time, the Speaker’s duties have only increased. Today, to label the Speaker’s duties as arduous would still be an understatement.

In many ways, the role of Speaker is similar to that of the president. The holder of both offices must stay abreast of the major issues, work to forge compromises, and perform the delicate balancing act between the interests of their own party and those of the opposition. Also, much like the president’s Cabinet, the Speaker relies on a number of colleagues to ensure his or her polices are enacted. But while this may seem to support the argument for legislative succession, we must remember that the relationships between the Speaker and his or her deputies are formed by experience and a shared ideology. This is not the case concerning the Speaker and the Cabinet, and in fact, the relationship is often contentious.

When considering the inclusion of the President Pro Tempore of the Senate in the line of succession, the idea moves from the illogical to the absurd. Although the position is awarded by
a vote of the full Senate, the role has become merely ceremonial since the 81
\textsuperscript{st} Session of Congress in 1949.\textsuperscript{474} Tradition now dictates that the position is awarded to the Senator from the majority party with the longest service. In other words, the third position in the line of succession is attained through being able to both win reelection and survive.

To further illustrate this point we need only to look at the average ages of the office holders since the 25\textsuperscript{th} Amendment was ratified in 1967. Beginning with the 90\textsuperscript{th} Congress, there have been ten Senators who have filled the Pro Tempore position for at least one full year, including Senators Strom Thurmond and Robert Byrd who served on non-consecutive occasions. Of these Senators, the average age at the beginning of their term as Pro Tempore was 77.4, while at the end of the term, the average age was 84.4 years. This number also includes four Senators, Richard Russell, Allan Ellender, Robert Byrd, and Daniel Inouye, who died in office. The current occupant of the office as of this writing, Senator Patrick Leahy, was 72 when he began his term.\textsuperscript{475}

These figures are not intended to imply anyone of a certain age is incapable of serving as president, rather, they are meant to illustrate the significant flaw in the legislative line of succession. The placing of any official within such a line brings with it an extreme amount of responsibility, a decision that must be based on logic and ability, not age and length of service. Just as it is unfair to expect the Speaker to be ready to step into the presidency at a moment’s notice, it is illogical to expect a person who has spent upwards of four decades in the Senate to


\textsuperscript{475} These figures were compiled by the author, but much of the information can be found at: http://www.senate.gov/artandhistory/history/common/briefing/President_Pro_Tempore.htm#5.
do the same. Even those who support a legislative line of succession would be hard pressed to rationalize the strengths of placing the Pro Tempore in such an important position.

**Politics**

The possibility of a change in party control of the presidency due to succession was discussed in 1964. Even though hearings concerning the 25th Amendment took place at a time when Democrats enjoyed large majorities in both houses of Congress, the possibility of such an event was first raised during Richard Nixon’s testimony. Citing the contentious relationship between President Truman and the Republican Congress of 1947, Nixon sought to illustrate another flaw in the legislative line of succession. However, as discussed in chapter three, these well placed concerns were overshadowed by a concern of offending Speaker McCormack, and thus the legislative line was left alone.

Nixon’s concerns were ironic, as he would soon confront the very problem he warned against when he took office in January 1969. At that time, the top three positions in the line of succession were staffed by Republican Vice President Spiro Agnew, Democratic Speaker McCormack and Democratic Senator Richard Russell. After Russell, the line reverted back to Nixon’s Cabinet, beginning with Secretary of State William Rogers. Therefore, the nation found itself not only a heartbeat away from succession, but two away from a shift in party control.

Unfortunately, this situation would become the norm, not the exception. Beginning with Richard Nixon in 1969 and continuing through the Obama Administration, every president

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except Jimmy Carter has confronted an opposition led House of Representatives. In fact, in the forty-three years between 1969 and 2012, the president and Speaker have been of different parties for thirty of those years. This comes out to an astounding 70% of the time in which the person second in the line of succession would usher in a change in party control of the presidency. This is no longer a fluke of history, but a significant problem that must be addressed.477

The evidence becomes even stronger when looking at contemporary party control. Unlike in the latter half of the 20th Century when Democrats enjoyed an entrenched majority in the House, control of the lower chamber has changed hands three times between 1994 and 2010. Additionally, given the narrow Republican majority that exists within the House for the 113th Congress, the chance of another shift in party control is far from remote.

Even though party influence Congress is nothing new, partisanship within the legislative branch produces more of an impact than ever before. While this is not to say that the relationships between presidents and Speakers from opposing parties was collegial in decades past, they pale in comparison to the bitter divisions between the three most recent occupants of these offices: Bill Clinton and Newt Gingrich, George W. Bush and Nancy Pelosi, and Barack Obama and John Boehner. These three relationships were defined by an intense amount of partisan rancor from both sides, to the point where even forging a compromise on legislation

477 All of these figures were compiled by the author from the following sites- For the House: http://history.house.gov/Institution/Party-Divisions/Party-Divisions/ and for the Senate: http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm.
presented a significant challenge for those involved. As a result, the complications that could have arisen involving a transfer of power are limitless.

Given the increase in partisan animosity, there is no evidence that the relationship between a president and Speaker of opposite parties will improve anytime soon. The role of Speaker is not attained by exhibiting a desire for compromise and moderate positions. Rather, aspirants on both sides of the aisle are best served by taking strong stands on issues most important to their colleagues, issues that are often polarizing. Additionally, as exhibited by the Gingrich, Pelosi and Boehner examples, parties that are able to seize control of Congress are often able to do so by specifically running against the president and his policies. As a result, compromise and accommodation are often viewed as a sign of weakness or retreat.

The same issues arise concerning the Senate Pro Tempore. Out of the same forty-three year sample used for the House, the Pro Tempore of the Senate has been staffed by the opposition party for twenty-two of those years. This problem has confronted every president except Carter and Obama since 1969, though the composition of the Senate for Obama’s last two years in office is unknown as of this writing. This works out to an average of 51% of the time, less than with the Speaker, but still more than half. Given the inherent problems associated with including the position of Pro Tempore itself, the addition of a shift in party control is merely another piece of evidence against including it in the line of succession.

Just as with the problem of awareness, it is important to consider the events that may lead to a shift in party control via succession. In such a scenario, it is assumed that the president is either incapacitated or has died and that the vice president is either also unable to serve or that
the position is unoccupied for whatever reason. These two events by themselves mean that the
nation is facing a crisis, be it from attack, disaster, or merely a case of bad timing concerning a
vice presidential vacancy. Just as the country is reacting to whatever has transpired, they are then
informed that a new president, which history tells us is far more likely to be of the opposite
party, has taken office. If such a scenario is not enough to illustrate the problem, replace the
Speaker with a Senator in his eighties and imagine the possibilities.

Although such a scenario is obviously fictional, the facts are its chances of occurring are
not that far-fetched. For instance, had something happened to either Presidents Nixon or Ford
during the time in which the vice presidency was vacant, a party shift via succession would have
occurred. But regardless of the likelihood of such an event coming to fruition, the mere fact that
it could necessitates a change in the line of succession. Such a change is not only well within
reason, but also merely a reversion to the line established by the Succession Act of 1886.

**Which is Constitutional?**

The uneasiness President Truman had concerning potentially choosing his own successor
is both well reasoned and commendable. It is rare, and in recent decades unheard of, for a
president to seek a reduction in his authority. Additionally, it is clear the Framers did not
envision any scenario by which the president could appoint his own successor, especially given
the overarching fear of a monarchy which permeated the Constitutional Convention. However,
does a legislative line of succession resolve this issue?
In looking at Truman’s ability to appoint his own successor, we must consider the unique nature of his case. Having been thrust into the presidency following Franklin Roosevelt’s death in April 1945, Truman served another three years and nine months with no vice president. Thus the man behind Truman in the line of succession, either Secretary of State James Byrnes or George Marshall, depending on when such an event occurred, would have become president under the Succession Act of 1886. After the line was altered in the Succession Act of 1947, Speaker Sam Rayburn stood next in line until the inauguration of Alben Barkley in January 1949.

While Truman may have thought the 1947 Act resolved the problem, was elevating Sam Rayburn to the next in line truly in the nation’s best interest? At the time, the United States and Soviet Union were in the early stages of a Cold War that would define foreign policy for the next half-century. Additionally, the challenges associated with rebuilding post-World War II Europe, along with halting the spread of communism, were issues that confronted Truman on a daily basis. With this in mind, who would have been best served to step into the Oval Office if something happened to Truman? Either Byrnes or Marshall, whose responsibilities included meeting regularly with Truman to discuss such matters, or Rayburn, a Representative from Texas who first came to Congress in 1913 and whose had no duties concerning foreign policy?

In rebutting such an argument, it can be assumed Truman would cite the dangers of a president being able to choose his own successor and questions of constitutionality. However, this problem was not solved by altering the line to include a Speaker elected only by Texas’ 4th

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Congressional District. Even though Truman had not been elected directly to the presidency at this point, he had been duly elected as Vice President in November 1944. Given the firm establishment of the Tyler Precedent by this time, it is safe to assume that voters in 1944 realized that if Roosevelt died, Truman would become President. Thus Truman’s authority as President, again, based only on precedent, was nonetheless sanctioned by the American people.

However, none of this was the case for Speaker Rayburn. Far from a national election, Rayburn was elected by the citizens of Texas’ 4th Congressional District, a district that was hardly reflective of the nation as a whole. Furthermore, his election as Speaker came from merely the majority of votes of his colleagues in the House, an event in which the voters, save for electing their representative, played no role. Thus it is difficult, if not impossible, to argue that Sam Rayburn’s constitutional claim to the presidency was stronger than Truman’s Secretaries of State.

While this case study was exclusive to the Truman Administration, its basic tenets remain the same. Even with the exponential growth in America’s population, any Speaker of the House is, fundamentally, merely a representative of the people whom comprise his or her district. As a result, only a fraction of the voting public is able to pass judgment on a person who could potentially become president, a clear violation of the Framers’ intentions. On the other hand, the selection of a Secretary of State is made by a president to whom voters are aware they are entrusting a vast amount of responsibility and power. Although neither situation conforms directly to the Framers’ intentions, voters are at least able to have some impact on the selection of a Secretary of State, which cannot be said for the role of Speaker.
This point is further reinforced when we consider the inclusion of the Senate Pro Tempore. Along with age, there is also the fact that the views and ideological principles that are popular in one state are not always popular throughout the nation. For example, looking at the Senate Pro Tempore’s since 1969, the list includes three Senators, Richard Russell, James Eastland and Strom Thurmond, who at one point in their careers were avowed segregationists. This list also includes Robert Byrd, who had previously been a member of the Ku Klux Klan, though he later renounced such views. Of these Senators, both Thurmond and Byrd held their positions within this century, with Thurmond severing until 2001 and Byrd until 2010.479

Although these are extreme cases, they are indicative of the larger problem. Given how partisanship has come to define Congress in recent years, it stands to reason that any potential Speaker needs to satisfy two qualifications to be a successful: he or she must be popular with their political base and come from a safe district that allows them to keep winning reelection. As a result, the potential for a Speaker whose views reflect the more extreme elements of their party becomes likely. The same is also true of the Senate Pro Tempore, whose sole qualification for the job is the ability to keep being returned to Washington by their constituents.

A final point to consider is the will of the people, or more specifically, the will of the voters in the last election. Every four years, the nation elects a president who pledges to adhere to certain political and ideological viewpoints. The same can be said for a vice president, who voters realize could suddenly become president at any time.

479 President Pro Tempore-
http://www.senate.gov/artandhistory/history/common/briefing/President_Pro_Tempore.htm.
However, if we move beyond the vice president in the line of succession, the question then become how best to reflect the will of the nation given the circumstances. To this question, the facts firmly point to the Cabinet. Unlike the Speaker or Senate Pro Tempore, the Cabinet is guaranteed to both reflect the views of the elected president and to be aware of the issues facing the president. And even though a Cabinet official’s political views may not be identical to the president’s, they are nonetheless closer in agreement than a Speaker from the opposition party. All of these factors would help to reduce the shock and confusion that are bound to accompany any succession to the presidency.

Although Truman was justified in his concerns over appointing a successor, the passage of time and the ratification of the 25th Amendment have rendered them largely moot. First, any Cabinet nominee, particularly the Secretary of State, undergoes a significant vetting by both the Senate and, perhaps more importantly, the media. Thus it is not a position the president can merely replace without outside influence. Second, the selection of a vice presidential candidate already allows the presidential nominee to select whoever he or she wishes. Unlike in Truman’s time when a presidential candidate was dependant on the whims of party bosses at the convention, modern candidates enjoy the freedom of selecting their running mate. Ironically, the argument could be made that it has become easier to select a vice president than a Secretary of State.

The third change is the 25th Amendment, specifically, Section Two. By allowing the president to fill a vice presidential vacancy, the chances of having to move down the line of succession are greatly reduced. Therefore, attention should be focused on who is best suited to
step into the presidency at such a time. Given the evidence, it is clear that members of the Cabinet are far better prepared than members of Congress.

The Resignation Requirement

As highlighted following the nomination of Gerald Ford, another problem concerning legislative succession is the Emoluments Clause. This clause impacts both members of Congress and the Cabinet, as officials from either would have to resign their original offices before assuming the presidency. Even though this clause applies to both branches, the selection process is far more challenging to those in Congress. As a result, the potential for a constitutional crisis is dangerously apparent.

Since the Speaker, Senate Pro Tempore and Cabinet officials all must resign from their offices, we must look at the potential for such members returning to their positions. If both the president and vice president die this is not an issue, as anyone in the line would resign their office to assume the presidency for the remainder of the elected term. However, if we employ the premise of a temporary incapacitation, the problems become much clearer. As we will see, these scenarios have come very close to becoming a reality within the past forty years.

The first scenario involves a president who is temporarily incapacitated while the vice presidency is vacant. Based on the example of President Reagan’s surgery in 1985, it is assumed the president is having a surgical procedure and will be under anesthesia for a period of a few hours, followed by a period of recovery. Now, while an invocation of Section Three is the

480 United States Constitution. Article I, Section 6, Clause 2.
obvious recourse, the transfer of power is not as simple as it would be with a vice president. In this case, the Speaker would have to resign in order to serve as acting president. While it is likely any Speaker would welcome the opportunity to be president, it is just as likely that no Speaker would be willing to trade their position for a few hours as acting president. This results in the very real possibility that the Speaker would decline to serve.

The logic behind this scenario originates from the methods each office holder would face in returning to their positions. If a Speaker were to resign, he or she would be giving up both their Speakership and their seat in the House of Representatives, a seat they could return to only by means of election. Even assuming that the now former Speaker would have no difficulty winning back their seat in the next election, they would be returning to a House led by a new Speaker, and would by no means be guaranteed a return to the Speaker’s chair. As a result, it is difficult to imagine any Speaker agreeing to serve under such circumstances.

From there, the line would move to the Senate Pro Tempore, who would be faced with a similar dilemma. However, the Pro Tempore would have an easier path to returning to Congress thanks to the 17th Amendment, which permits a state’s governor to appoint a replacement.\textsuperscript{481} Granted, there is no guarantee that a governor would simply return the Senator in question, especially if they were of different parties. However, the criteria for the Pro Tempore position means that its occupant would have represented their state for a significant length of time, and thus their reappointment would appear likely given the circumstances. Yet in a closely divided Senate, a governor of an opposing party would face pressure to improve their party’s fortunes in

\textsuperscript{481} Seventeenth Amendment to the United States Constitution.
Congress, and thus a Senator could face a similar dilemma as the Speaker. In this case, the Secretary of State would be next in line.

Obviously, the Secretary would be faced with the same dilemma concerning resignation. However, he or she would also realize the path to returning to their position was far easier, since only a presidential nomination and Senate confirmation would be required. Since the Secretary would have already won nomination and confirmation, it is unlikely such a process would present a challenge. Therefore, the Secretary could resign, assume the presidency under Section Three, and then be re-nominated by the president to their previous position. While not as easy as one sentence makes it sound, it is obviously far less precarious than the options facing the Speaker or Senate Pro Tempore.

Now you are probably asking yourself, what is the problem? Since the legislative line of succession was not employed, this scenario would actually serve to strengthen the argument for restoring the Cabinet line. Also, the resignation requirement makes it less likely that members of Congress would assume the presidency, a beneficial outcome for those of us who oppose the current line of succession. However, this scenario also sets the stage for a constitutional crisis that borders on the outrageous. And unfortunately, such a danger is very real in today’s world.

**Bumping**

The process known as “bumping” is a legislative loophole that originated in the Succession Act of 1947. The Act stated that if the offices of Speaker or Senate Pro Tempore

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were unoccupied, or if those members chose not to serve, the person next in line could assume
the presidency. However, it failed to offer any remedies for what would happen in the event the
previous positions were either filled, or the office holder changed their mind, after power had
been transferred. Therefore, there are no guidelines to prevent a Speaker or Senate Pro
Tempore from deciding to assume the presidency after they had previously declined the chance.

To further illustrate the dangers of bumping, I will return to the scenario of a disabled
president and a vacancy in the vice presidency. In this scenario, the Secretary of State is now
acting president, after the Speaker and Senate Pro Tempore declined to serve. Then, during the
surgical procedure, a complication arises and the president becomes gravely ill or even
comatose. Common sense would dictate that whoever was serving as president at the time would
continue to serve until the president recovered or the elected term concluded. However, thanks to
bumping, this may not be the case.

Given the change in circumstances, it stands to reason that the Speaker and Senate Pro
Tempore may rethink their previous decisions, as the opportunity to govern is far more appealing
than temporary service. As a result, either official could demand to take the oath of office and
serve as president, and unfortunately, there would be no clear legal rationale to prevent such a
decision. Given the likelihood that the Speaker or Senate Pro Tempore would come from a
different political party, the potential for chaos is obvious.

While the chances of a disabled president and absent vice president may seem farfetched
thanks to Section Two, new realities must be considered. Since Washington, D.C. is a prime

\footnote{Amar and Amar, “Is the Presidential Succession Law Constitutional?,” 135.}
target for terrorists, the chances of such a scenario are now more likely than in decades past. This is illustrated by the attacks of September 11, 2001, when hijacked planes were thought to be headed to both the White House and Capitol building. Had either of those planes reached their intended targets, the ability of our government to function would have been severally compromised.

In a disturbing scenario, let us consider the very real chances of one of those hijacked planes crashing into the Capitol building, a scenario discussed in the Continuity of Government Commission’s final report. Had this occurred, the chances of both the Speaker and Senate Pro Tempore being either severely injured or even killed are obviously significant. As a result, the second and third positions in the line of succession would be unoccupied, and, assuming the damage to be catastrophic, would remain so for weeks and possibly months to come.

If the president and vice president were also targets of such an attack, a notion that seems likely, a constitutional crisis would be unavoidable. Assuming these four positions were vacant, the powers of the presidency would fall to either the Secretary of State, or next available Cabinet member. However, what would happen when Congress reconvened and elected a new Speaker and Senate Pro Tempore? As those positions were now filled, they would now have the authority to serve as president. A scenario of this nature could easily result in a revolving door presidency, in which a nation still reeling from attack is led by as many as three presidents in a very short period of time.

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While the 25th Amendment was envisioned as a solution to the shortcomings of the various Succession Acts, Section Two ironically serves to complicate the issue when it comes to bumping. Returning to the disaster scenario, whoever assumed the presidency would be permitted to nominate a replacement vice president as soon as they took the oath of office. However, since this nominee must be confirmed by Congress, it is all but certain that no confirmation would take place until after a Speaker and Senate Pro Tempore were selected. What would occur at that point is best left to writers of fiction, but a nation desperately in need of leadership and stability could easily be faced with a fight for the presidency.

**Legislative Succession and History**

Thankfully, these scenarios are only imagined. However, history shows that such events were not far from becoming a reality over the past half-century. By taking another look at events discussed in chapter four, it is clear the placement of congressional leaders in the line of succession could easily have resulted in chaos. Regrettably, the fundamental flaws that permitted such events remain in place as of this writing.

The first case to consider is Richard Nixon and Watergate. In October 1973, the Nixon Administration was embroiled in two scandals, as Vice President Agnew resignation occurred while the House was investigated the events of Watergate. Following Agnew’s resignation, Speaker Carl Albert, a Democrat, stood next in line for the presidency. Even though Nixon nominated Gerald Ford to fill the vacancy just two days after Agnew resigned, Ford was not
sworn-in as Vice President until December 6, 1973, a span of nearly two months. During this time, Congress was holding hearings concerning a possible impeachment of Nixon.

As detailed in chapter four, the Saturday Night Massacre quickly prompted several in Congress to suggest no action be taken on Ford until Nixon turned over tape recorded conversations pertaining to Watergate. Had this occurred, Speaker Albert would have been placed in the position of overseeing an investigation that could easily have elevated him to the presidency, much like Senator Ben Wade in 1868. Even though the House of Representatives can only pass articles of impeachment on to the Senate, the potential for charges of a conflict of interest are obvious. Additionally, an impeachment trial in the Senate would have allowed the Democratic majority to award their own party control of the presidency. Regardless of Nixon’s actions, this would have been a serious affront to the Constitutional principles of a democratic election for the nation’s highest office.

With the benefit of hindsight, we know an impeachment trial was not necessary. Yet had Congress not confirmed Ford nine months earlier, it is highly doubtful Nixon would have simply chosen to hand power over to his political opposition. The far more likely course of action would have seen Nixon continue what was by then a hopeless battle against impeachment, a process in which the country would have endured a Senate trial tainted by accusations of partisanship. Additionally, the decision by Republican leaders to suggest Nixon resign rather than continue to fight may not have occurred if power was to be transferred to Speaker Albert rather than Vice President Ford.
The final scenario involves the rumored consideration of invoking Section Four of the 25th Amendment that resulted from Nixon’s erratic behavior in the final weeks of his Administration. Even though no invocation took place, the prospect of ceding power to the opposition would only have served to make any potential invocation more unappealing. As a result, the nation would have been left with a perhaps unstable Nixon for a longer period of time. Also, it would have resulted in a longer period of time in which Nixon occupied the Oval Office with the knowledge that his chances for success were slim. All of these prospects are wrought with potential dangers.

Fortunately, Nixon’s time as President concluded in the best way imaginable given the circumstances. Despite this, we can safely assume that given Nixon’s animosity towards his political opponents, the end of his time in office would have been far more problematic if Speaker Albert were next in the line. Furthermore, the effects of a sudden transfer of power from one party to the other would doubtlessly have poisoned the political atmosphere even more, resulting in a prolonged period of political division. For all of these scenarios, there are two common denominators: all would have damaged the nation and all would have been made possible by the legislative line of succession.

**The Reagan Shooting**

Given Alexander Haig’s actions on March 30, 1981, it seems ironic to contend that his authority should have been legitimized on that chaotic afternoon. However, the reactions of the Reagan Cabinet further illustrate the problems with a legislative line of succession in a time of
crisis. As history has shown, the first instincts of those closest to the president are to put the best possible face on any possible incapacitation. These instincts are only further strengthened by the prospects of transferring power to members of Congress, especially when these members are leaders of the political opposition.

Although Reagan’s relationship with Democrats in Congress was better than Nixon’s near the end of his term, the Democratic majority in the House, led by Speaker Tip O’Neill, was nonetheless Reagan’s political opposition. In fact at the time of the shooting, Reagan was involved in a fierce battle with Democrats in the House over the centerpiece of his economic recovery plan. Thus if the prospect of transferring power to Vice President Bush was unappealing to Reagan’s Cabinet, one can only imagine how the prospects of elevating Speaker O’Neill to the presidency would have been received. While there was no discussion of this on March 30, the inability to communicate with Bush elevated such a scenario into the realm of the possible.

Despite claims that Reagan was fully in control, it is obvious that at the very least he was unable to discharge the duties of his office for a twelve hour period beginning at 2:30 that afternoon. Since John Hinckley was not part of a broader conspiracy and Soviet troops did not enter Poland, the limp along mentality was adopted without a serious problem. However, had sudden action been required, power would seemingly have been transferred to Vice President Bush after he returned to the White House, nearly four hours after the shooting. This leaves the questions of what would have occurred if sudden action was needed in the interceding four hours.
According to the 25th Amendment, had either Section Three or Four been invoked, Vice President Bush would have become acting president. However, unreliable communication equipment aboard *Air Force Two* meant conferring with Bush was essentially impossible. Therefore, if immediate action was needed, power should rightfully have been transferred to the person next in the line of succession, Speaker Tip O’Neill. Given the reluctance to be forthright concerning Reagan’s condition, the prospects of power ever being transferred to O’Neill seem non-existent.

Furthermore, the transferring of presidential power may have been equally unappealing to O’Neill. Knowing the transfer would only occur until Bush returned, as well as the difficulties in reclaiming his Speakership, it is highly doubtful O’Neill would have acceded to such a proposition. Had O’Neill declined, seventy-eight year old Senate Pro Tempore, and former segregationist candidate for president, Strom Thurmond would have been next in line. However, had Thurmond resigned, the task of filling the seat would have fallen to South Carolina Governor Richard Riley, a Democrat.

If Thurmond chose not to assume the presidency, Haig would have been next in line. Given his role in foreign policy, as well as the relatively easy requirements for returning to the State Department after he served, it is safe to assume he would have chosen to serve. Thus Haig would have run operations from the White House, a task that from all indications he had taken control of anyway. While simplistic enough on paper, the impact on the country would have been far more troubling.
To better illustrate this, we must assume the mindset of the average citizen on March 30, 1981. Within a span of less than an hour, you have heard that President Reagan was shot at, but not wounded, then wounded, and was now undergoing surgery. Given this shocking news, you look to the federal government for some semblance of stability and calm reaction to the crisis. However, you learn that while Reagan was in surgery Vice President Bush was unreachable, both Speaker O’Neill and Senator Thurmond declined to serve, and Secretary Haig has assumed the presidency. In a search for stability, it is difficult to conjure up a series of events that would provide less of a picture than a rapid dissension through the line of succession.

And while this did not take place on March 30, was the solution any better? Instead, the nation experienced a period of time in which the question of who was in charge was open to debate, in some cases, on live television. Given the choice between these two options for future cases, there is one answer: another option. And while removing Congress from the line of succession is not a solution for all of these problems, it would remove a significantly unappealing aspect of the 25th Amendment for future administrations.

**The Need for Change**

Of course, all of these scenarios are designed to highlight one aspect of the succession problem. Yet it is important to keep in mind just how close they came to becoming a reality. Would President Nixon have been wrong to avoid handing over the presidency to his political opponents? On the other hand, would Speaker O’Neill or Senator Thurmond have been wrong to forgo the chance to serve as president for a matter of hours given that the price would have quite
possibly their careers? While it is easy to criticize elected officials in hindsight, in these cases, the faults were largely structural in design.

When it comes to the president, the idea of admitting a disability or incapacitation is by itself unappealing. Accordingly, the prospects of a president or those around him freely transferring power to the legislative branch are extremely unlikely in all but the most catastrophic of cases. Add into the mix the idea of transferring power to the political opposition and you have a model that actively encourages any administration to conceal and deny, rather than be forthright with the public. This model has no benefits for the president.

As for Congress, the resignation requirement greatly diminishes the appeal of assuming the presidency for any Speaker or Senate Pro Tempore. While the opportunity to serve as president is appealing, the chance to do so for a period of hours at the possible expense of a political career is not. Ironically, what was originally viewed as a benefit for the legislative branch overlooks a number of factors which greatly reduce its appeal. This model has one clear benefit, but also a significant detriment for members of Congress.

Finally, the legislative line provides absolutely no benefit for the American people. Our electoral impact on the Speakership is limited to the voters of the Speaker’s district, which is often a homogenous bloc of voters non-reflective of the American populous. And while we as voters have no influence over the selection of Cabinet officials either, we nonetheless nationally elect a president. Therefore, this model provides no benefit for the American people.

As evidenced by Administrations from Washington to Garfield and Wilson to Reagan, those around a president seek to protect their boss. As much as we would like to think that the
best interests of the nation always prevail, we must be pragmatic and realize future administrations may not always be forthright concerning executive disability. Including members of Congress in the line of succession only serves to further encourage the strategy of concealment and limping along that has marked the long history of this dangerous issue. The best way to combat this trend is to remove the fear future administrations may associate with the 25th Amendment, and ensuring that presidential powers remain within the Cabinet is clearly a step in that direction.

There is one final argument against altering the line of succession that has not been discussed, the view that this is all much ado about nothing. Since Section Two of the 25th Amendment allows for the filling of a vice presidential vacancy, the case can be made that neither the Speaker nor Senate Pro Tempore is likely to ever assume the presidency. Invariably, such an event would require a death or incapacitation on the part of both the president and vice president, and history tells us that the chances of such a scenario are extremely unlikely. However, the problem with history is that it fails to account for unprecedented events. And unfortunately, as I will discuss in the next chapter, the chances of the legislative line of succession being invoked are higher now than at any point in our nation’s history.
Chapter Six

New Concerns for a New World
From the Outside World to Internal Medicine

The 1990s marked a shift in the study of presidential disability and succession in accordance with changes around the world. Fears of external attack began to evaporate following the collapse of the Soviet Union, especially in terms of a nuclear exchange. Additionally, facts concerning the health of past presidents began to emerge, highlighting the dangers of personal illness in the Oval Office. These factors combined to forge a new direction in scholarship that focused on the mental and physical health of the commander-in-chief.

The most disturbing fact of these revelations was how effectively past presidents were able to conceal their medical conditions from the public. As detailed in chapter two, Woodrow Wilson was clearly unable to discharge the duties of his office for the final eighteen months of his term. However, public awareness of his condition was remarkably limited, and thus the details that emerged in later years were startling to millions of Americans. Evidence concerning the cover-up of Wilson’s condition is still emerging, most notably in the release of Dr. Cary Grayson’s papers in early 2007.⁴⁸⁵

Among these letters were two that show concealing Wilson’s health from the public was not a decision made in haste. On August 19, 1915, a year before Wilson ran for reelection, Grayson sought to hide the fact that Wilson was having difficulty with his vision. In a letter to his wife, Grayson stated:

My number one patient in this house had an accident last night with one of his eyes—the good one, which is bad, now. I am hurrying off to Philadelphia with

him at six o’clock to-morrow morning to consult an eye specialist. We are going by motor. I think we can make the trip less noticeable in this way—no one but Hoover & Forster know our plans. Of course, he will be recognized in Philadelphia but not until the object of the trip is completed—then the papers will read something like this: The President made his annual visit to the oculist etc., etc.\textsuperscript{486}

Likewise on July 16, 1918, more than a year before Wilson’s debilitating stroke, Grayson detailed to his wife how he had successfully concealed the fact that Wilson had undergone a procedure to address a breathing problem.\textsuperscript{487} Considering Grayson’s desire to maintain secrecy about a quick procedure from which Wilson had already begun to recover, the prolonged cover-up following the stroke is not surprising.

Like Wilson, the true details of Franklin Roosevelt’s health during his time in office would not be revealed until decades later. After this, it became clear that Roosevelt was severely limited by his physical ailments during his final years in office, a fact unknown to the public. Yet while Wilson’s tenure in office was drawing to a close when he became ill, Roosevelt chose to run for reelection in 1944, despite the advice of his physicians.\textsuperscript{488} Following his victory,

\textsuperscript{488} Bishop, FDR’s Last Year, 9.
Roosevelt’s diminished state was apparent at the Yalta Conference in February 1945, which later prompted speculation concerning how his condition impacted his ability to negotiate.\(^{489}\)

While Wilson and Roosevelt’s Presidencies benefitted from the absence of television, its emergence during the Kennedy Administration seemed to preclude the concealing of a medical condition. However, not long after Kennedy’s death, details concerning his various medical ailments began to emerge, shocking those who had seen the seemingly vibrant Kennedy on their television screens on a daily basis.\(^{490}\) And, like his predecessors, it quickly became clear that the efforts to conceal Kennedy’s condition were part of a well coordinated plan to deceive the public.

Although public awareness of Kennedy’s Addison’s disease and extensive back problems would have alarmed the public, it seems likely that the treatments he received would have alarmed them even more. Along with steroid treatments for the Addison’s, Kennedy received pain killing injections to treat his chronic back problems throughout his Presidency.\(^{491}\) Kennedy also received treatment from different physicians, despite the dangers associated with such a practice, especially in light of the medication he was taking.\(^{492}\) In light of the Wilson, Roosevelt and Kennedy cases, it seemed that future instances of executive disability would be the result of medical ailments, not outside attack.

A prime example of this trend is found in *Managing Crisis*. Edited by political scientist Robert Gilbert, the book contains essays from both political science and medical experts. One of

\(^{489}\) McDermott, *Presidential Leadership, Illness, and Decision Making*, 106.
\(^{491}\) Ibid, 81.
\(^{492}\) Ibid, 105.
the key topics for consideration concerned the mental states of previous presidents. This issue gained new attention after November 1994, when former President Reagan revealed that he had been diagnosed with Alzheimer’s disease. Subsequently, speculation began as to whether or not Reagan had exhibited any signs of the disease while in office.\textsuperscript{493}

Unlike the Wilson, Roosevelt and Kennedy examples, determining whether or not Ronald Reagan was suffering from Alzheimer’s disease during his Presidency cannot be conclusively stated. First, the ailments of Reagan’s predecessors were not only documented by medical records, but also by staff members and close friends. Although former Chief of Staff Don Regan claimed to believe Reagan was exhibiting early signs of the disease, these claims were refuted by others within the Administration.\textsuperscript{494} Additionally, there is no known evidence of Reagan undergoing any sort of cognitive screening during his Presidency.

Another problem with making an accurate determination involves the illness in question. While Roosevelt and Kennedy’s conditions could be definitively ascertained through medical testing, diagnosing a patient with Alzheimer’s disease is not as simple. According to the Alzheimer’s Association, a diagnosis requires a physician to conduct a series of cognitive tests with the patient; for instance, asking them the date or, ironically, to name the President of the United States.\textsuperscript{495} As a result, accurately diagnosing the disease in its earliest stages can be difficult. And based on interviews and public interactions during Reagan’s final years in office, there is virtually no doubt he could have passed such preliminary testing.

\textsuperscript{493} Gilbert, \textit{Managing Crisis}, 215.
\textsuperscript{494} Annis, \textit{Howard Baker}, 213; Gilbert, \textit{Managing Crisis}, 119.
A prime example of the difficulties associated with determining Reagan’s condition can be found in a panel discussion concerning presidential disability. At a November 1995 meeting, Professor Arthur Link relayed a story in which he was amongst a group dining with Reagan in 1983. According to Link, Reagan at one point asked the group, “What would the world be like if the Second World War had actually taken place?”

Professor Link went on to state that while no one commented on the question, he believed it to be a sign of mental degeneration. Obviously, there are possible explanations for Reagan’s question. The most obvious could have been simply a misstatement, in which Reagan meant to say World War Three. Replacing the word three with two is not a cause for alarm if it were nothing more than a verbal gaffe. However, given Reagan’s later Alzheimer’s diagnosis, there is also the possibility that his statement represented a temporary state of confusion. This is not to claim that for the final five years of his Presidency Reagan was unaware that World War II had occurred, but rather reflective of the brief periods of confusion that are early warning signs of the disease.

Nearly a quarter-century after Reagan left office, the debate over whether or not he exhibited any signs of Alzheimer’s during his term continues. Given the problems associated with making a definitive diagnosis, especially in hindsight, it is unlikely the debate will ever be resolved. Much like his predecessors, Reagan’s actions and words have been closely examined by historians in a search for signs of a medical condition. However, even when something is

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discovered, we are left to wonder whether it was a sign of mental impairment, or simply a case of misspeaking.

**The Working Group**

This focus on presidential health also resulted in a remarkable example of forethought. In 1995, The Working Group on Presidential Disability was created to consider the provisions of the 25th Amendment and decide whether any changes were needed. Since no provision of the 25th Amendment had been invoked for nearly a decade, the decision to consider potential issues before they became a reality was a refreshing and sorely needed change. Along with addressing an issue few realized even existed, the Working Group also featured two very prominent participants, former Presidents Gerald Ford and Jimmy Carter. The group was also comprised of members of both the academic and medical fields, all of whom had contributed to research of the disability issue over the years.

The Working Group met three times over the course of nearly two years, in sessions chaired by President Carter in January 1995, President Ford in November 1995, and a final session at The White House in December 1996. In each of these sessions, participants discussed a wide range of scenarios concerning both the condition of the president’s mental and physical health and possible invocations of the Amendment. A great deal of attention was also paid to preventing future cover-ups, a fear that given the emerging history of past occupants of the Oval Office was quite relevant.

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497 Toole and Joynt, *Presidential Disability*, xv.
498 Ibid, vii-xi.
In the end, the Working Group produced nine recommendations concerning the 25th Amendment. These were:

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

2. The Twenty-fifth Amendment has not been invoked in some circumstances envisioned by its founders. When substantial concern about the ability of the president to discharge the powers and duties of office arise, transfer of power under provisions of the Twenty-fifth Amendment should be considered.

3. A formal contingency plan for the implementation of the Amendment should be in place before the inauguration of every president.

4. Determination of presidential impairment is a medical judgment based upon evaluation and tests. Close associates, family, and consultants can provide valuable information that contributes to this medical judgment.

5. The determination of presidential inability is a political judgment to be made by constitutional officials.

6. The president should appoint a physician, civil or military, to be senior physician in the White House and to assume responsibility for his or her
medical care, direct the Military Medical Unit, and be the source of medical
disclosure when considering imminent or existing impairment according to the
provisions of the Twenty-fifth Amendment.

7. In evaluating the medical condition of the president, the senior physician in the
White House should make use of the best consultants in relevant fields.

8. Balancing the right of the public to be informed regarding presidential illness
with the president’s right to confidentiality presents dilemmas. While the senior
physician to the president is the best source of information about the medical
condition of the president, it is the responsibility of the president or designees
to make accurate disclosures to the public.

9. The Twenty-fifth Amendment provides a remarkably flexible framework for
the determination of presidential inability and the implementation of the
transfer of powers. Its provisions should be more widely publicized and its use
destigmatized.499

At first glance, none of these recommendations is surprising or controversial and merely promote
a better understanding of the 25th Amendment. However, the troubling aspect comes not from
what these recommendations address, but from what they ignore. Specifically, there is no
mention of terrorism or of possible threats against the president and members of the succession
line.

499 Ibid, 527-536.
While the argument could be made that prior to 9/11 these scenarios were overlooked by most Americans, the timeframe in which the Working Group met precludes this excuse. On April 19, 1995, in between the group’s first and second meetings, the Alfred Murrah Federal Building in Oklahoma City was heavily damaged by a truck bombing, resulting in 168 deaths. Less than a month later, the decision was made to close off Pennsylvania Avenue to traffic in front of the White House, due to fears of a similar attack.\(^5\) The Oklahoma City bombing, along with the February 1993 truck bombing at the World Trade Center, should have at least prompted a consideration of the impacts of terrorism. Unfortunately, this did not occur.

Despite this oversight, the efforts of the Working Group deserve a great deal of praise. The forethought to study the issue before it gained relevance was a refreshing change from the ignorance that marked the early part of the century. Also, the Group’s recommendations were clearly influenced by historical instances, in particular, the recommendation to formulate a plan prior to the inauguration of a new president. This addressed a problem cited by members of the Reagan Administration involving a lack of awareness after only sixty-nine days in office.

**A Changing Enemy**

The state of world affairs has a profound influence on the disability and succession issue. The limp along mentality exhibited in the Garfield and Wilson Administrations reflected a nation unconcerned with foreign attack or invasion and thus the absence of a president for a period of time was not a serious concern. This attitude would change following the dawn of the nuclear

age, as weapons capable of unimaginable destruction were never more than a half hour from our shores. As a result, the strategy of limping along was supplanted by the knowledge that the United States must have an able bodied commander-in-chief at all times.

Like many other aspects of foreign policy during the Cold War, the desire for a functioning line of succession was driven by concerns over the actions of the Soviet Union. In the event the Soviets launched a nuclear strike against the United States, it was widely assumed that Washington, D.C. would be the first target. However, just as mutual assured destruction prevented a military engagement between the United State and Soviet Union, it also ensured that neither super power would undertake an attack against the leadership of their adversary. The rationale being that if either nation were found to be behind any attempt to harm the leadership of the other, the outcome would assuredly have been a nuclear retaliation. While no one is desperate to see a return to the deterrence theory appropriately known as MAD, the fall of the Soviet Union ushered in an uncertain future for both the world and the disability and succession issue.

Unfortunately, there is no strategy of deterrence for terrorist groups, particularly those who resort to suicide attacks to achieve their aims. While both the United States and Soviet Union went to great lengths to avoid direct confrontation, terrorist groups such as Al Qaeda seek to make their attacks as destructive and public as possible. These groups also hope to cause widespread panic and confusion, making the decapitation of government all the more appealing. As a result, there is no more attractive a target for such organizations than Washington, D.C.
Following the shootings of both Presidents Kennedy and Reagan, there were widespread fears of an international plot. Even though both would turn out to be the work of a single gunman, the immediate fear centered on a Soviet plan to decapitate our government, meaning the vice president and other government officials were also targets. Due to the potential for retaliation by whoever assumed the presidency, it would seem the assassination attempt would prove merely to be the beginning of the operation.

Much as MAD provided a morbid assurance that the nation was safe, it also provided a sort of protection for the president. The overwhelming superiority of the nation’s military forces served as the ultimate safeguard against any foreign plot against the government, as any would be aggressor realized the response would be devastating. In essence, any plot targeting the leaders of our government was tantamount to a suicide mission. Unfortunately, this strategy had one glaring flaw: it failed to defend against someone who is willing to die for their cause.

**The Terrorism Age**

Ironically, instability at the head of government was something both sides hoped their adversary could avoid during the Cold War. Immediately after the shootings of Presidents Kennedy and Reagan, the Soviet government quickly sought to reassure the United States it played no role in any plot directed against the commander-in-chief. More importantly, the Soviets did not seek to turn a time of uncertainty into a military advantage and refrained from taking any action that could be perceived as confrontational. The same strategy was adopted by the United States in August 1991, when an aborted Soviet coup set the stage for the downfall of
the Soviet government. In spite of the decades long efforts to defeat the enemy, both Cold War adversaries realized a time of uncertainty concerning who was in charge was a time for extreme caution, not exploitation.

Sadly, this is no longer the case. Terrorist groups without standing armies and vast arrays of weaponry view uncertainty and chaos as victories. As a result, an attack on the leadership of our federal government is always a highly attractive target to any terrorist group. Therefore, the dangers to the presidential line of succession are much higher today than they ever were prior to September 11, 2001.

The chaos that consumed our government both in November 1963 and March 1981 were a combination of fear, panic and suspicion. On both days, the attacks themselves would be confined to a matter of seconds, though the carnage inflicted in such brief periods of time was nonetheless catastrophic. However, as detailed in previous chapters, what followed was a period in which fears of follow up attacks and invasions would prove baseless. In other words, after the gunfire stopped, a period of relative calm followed.

These attacks were also marked by a chain of command which, while far from ideal concerning keeping the vice president informed, was nonetheless clear. When Kennedy was pronounced dead, there was no question as to who would assume the presidency, just as there was no debate over who stood next in line behind Reagan, despite Secretary Haig’s statements to the contrary. However, those events also show the government’s ability to respond in the hours after the shootings were severely limited. While this may be nightmarish for us to consider, for a potential terrorist, it is an outcome to be desired.
September 11th

This new reality has never been more apparent than on the morning of September 11, 2001. After a second hijacked airliner struck the World Trade Center, it was apparent that, in the words of White House Chief of Staff Andy Card, “America was under attack.” Along with the shocking reality of what had transpired came the fear of more attacks, and whether the targets were public or governmental institutions. Both the Capitol Building and the White House were evacuated, and while President Bush was rushed aboard Air Force One in Florida, Vice President Dick Cheney was taken to an underground bunker beneath the White House.

Unlike previous instances in which an elected official or building was the target of an attack, this was not the work of one deranged individual. As a result, every official within the line of succession became a potential target. This was reinforced by the evacuation of Speaker Dennis Hastert from the Capitol Building to Andrews Air Force Base, where he conferred briefly with Cheney before being flown to a secure location. According to his memoirs, Cheney made it a point to remain in contact with Hastert and Senate Pro Tempore Robert Byrd, as both men stood behind Cheney in the line of succession.

What occurred next was another series of communication problems between the White House and those aboard an aircraft, this time Air Force One. President Bush quickly expressed his frustration that he was unable to contact other officials, including Secretary of Defense

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Donald Rumsfeld, following the attacks. The fact that the communication equipment between the White House and the presidential aircraft had remained undependable for more than two decades was an unconscionable oversight. And unlike on March 30, 1981, the lack of available communication was more than just a nuisance.

As reports of hijacked planes flooded the White House command post, it quickly became apparent that responding Air Force fighter planes may be required to shoot down a passenger jet. According to President Bush, he gave the authorization to shoot down any suspicious aircraft to Vice President Cheney, an authorization he again provided minutes later when Deputy Chief of Staff Josh Bolton insisted such an order be confirmed. This account is for the most part confirmed by Vice President Cheney, though in his account, he suggested Bush give the order. It should be noted that the accounts of Bush, Cheney and the 9/11 Commission all cite problems with the communication equipment as contributing to the confusion during this time.

Heeding the strong advice of the Secret Service, Cheney, and other advisors, Bush agreed not to return to Washington and flew to Barksdale Air Base in Louisiana. Although he originally insisted on returning to the White House, Bush later stated that he knew his main role at the time was to ensure the continuity of government. While Bush’s diversion was later criticized, this was clearly the best course of action given the uncertainty and the obvious need for a clear chain of command. Hours later, Bush returned to the White House, while Cheney departed for a secure, undisclosed location, later revealed to be Camp David. Cheney stated that the decision

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504 The 9/11 Commission Report, 40.  
506 Cheney, In My Time, 3.  
507 Bush, Decision Points, 130.
for his trip was based on a desire to ensure the continuity of government in the event of another attack. Or, in Cheney’s words, “to make sure they didn’t get both of us.”

**The Lessons of 9/11**

Just as September 11 served as a wake-up call for various security agencies, it also reinforced the necessity of a clearly defined line of succession. As illustrated by the order to ground all aircraft and the authorization to shoot down any hijacked airliners, a clear chain of command is vital in the midst of a crisis. Additionally, to paraphrase the words of President Bush, assassinating the president would be a tremendous propaganda victory for any terrorist organization. Thus for any group whose intention is to perpetrate fear and chaos, there is no better target than our national leaders.

Although threats against prominent government officials are nothing new, the strategies and capabilities of terrorist organizations present unforeseen challenges. First and foremost is the danger of a widespread plot, as was feared in the Kennedy and Reagan shootings. As detailed in previous chapters, the capability to respond to additional attacks in the hours after those incidents was severely compromised. A repeat of this uncertainty presents a very attractive scenario for a terrorist group.

The second issue is a combination of protection and confusion. As witnessed on 9/11, those charged with protecting our national leaders sought to evacuate them to secure locations until they could decipher more information about the attack. Even though this makes sense from

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509 Bush, *Decision Points*, 130.
a security standpoint, such a procedure would invariably prevent the protectee from coordinating a response and speaking to other officials. This point is illustrated by Vice President Cheney’s refusal to leave the underground command at the White House on the morning of September 11.

According to Cheney, when it was suggested he evacuate he responded: “If we leave here and get on a helicopter to evacuate, it will be at least forty-five minutes before I can be back in touch with anyone. That’s valuable time we can’t afford to lose.”\textsuperscript{510} Given the prominent role Cheney played in coordinating the White House response in Bush’s absence, his estimation was accurate. Also, considering that United Flight 93 was just over ten minutes from reaching Washington, D.C. when it crashed, a difference of even a few minutes lost in an evacuation could have made an incredible difference.

The final issue is one of communication, specifically, the urgent need for reliable methods between those in the highest levels of government. Just as reaching Vice President Bush was nearly impossible on March 30, 1981, the 9/11 attacks revealed that few improvements had been made. While blame could be spread around for such an oversight, the bottom line is that such shortcomings are unacceptable. Given the amount of travel undertaken by members of government, the chances of their being in separate locations during an attack is highly likely, and, as I’ll discuss shortly, advisable. In such an event, these officials must be kept informed, especially since they may be called upon to assume the presidency.

Much like Senator Bayh was aided by work undertaken prior to his efforts, the framework for the evacuation and protection of our federal leaders existed long before 2001.

\textsuperscript{510} Cheney, \textit{In My Time}, 4.
Throughout the Cold War, various procedures were designed to protect members of both the executive and legislative branches in the event of a nuclear attack. And as fate would have it, two men heavily involved in such planning occupied high level positions in the Bush Cabinet. Whether this was beneficial or harmful remains debatable.

The Impact of Cold War Planning

In a March 2004 article for *The Atlantic Monthly* titled “The Armageddon Plan,” James Mann skillfully detailed preparations undertaken during the 1980s to ensure continuity in the event of a nuclear war with the Soviets. One plan called for three teams to head for separate locations throughout the country in the event of an attack. These three teams would each include one member of the Cabinet, who was prepared to assume the presidency in the event other members of the line of succession were killed. The employment of three teams was designed to ensure the plan’s success even if the Soviets were able to target one of the other teams evacuating the Washington. After arriving at their new location, the highest surviving member of the Cabinet would assume the duties of the presidency, if needed.

Mann’s article goes on to explain that simulated exercises of this plan were conducted at least once a year during the 1980s. In these exercises, three teams would depart Washington, D.C. bound for a secure location somewhere within the United States, where they would essentially begin constructing a new government. What separated these exercises from other

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512 Mann’s article contains a more in-depth account of these exercises.
tales of the Cold War era also made such planning very relevant in the aftermath of September 11, 2001: Two of the main actors in the exercises were none other than Dick Cheney and Donald Rumsfeld.

The impact of both Cheney and Rumsfeld’s participation in the simulations proved to be beneficial when a foreign attack became a reality that September morning. As mentioned, Cheney attempted to keep other members of the line of succession as informed as possible, including Rumsfeld. For his part, Rumsfeld attempted to stay in touch with the White House despite being in the Pentagon when the third airliner struck the building. Although fortunately moving down the line of succession was not necessary, it is clear that Cheney and Rumsfeld’s experience with such a scenario was beneficial.

While the forethought of contingency planners in the 1980s should be commended, there was a critical question left unanswered in such a scenario, what to do about Congress? According to the plan’s scenario, the nation’s capital has been destroyed, presumably resulting in the deaths of not only the president and vice president, but also the Speaker and Senate Pro Tempore. As these are the only two members of Congress who reside within the line of succession, the fate of other congressional members is not specified. Therefore, the Cabinet official whose position had the longest tenure of service would be elevated to the presidency.

However, while the president would have changed, the framework of our federal system would remain the same. Accordingly, Congress would be expected to reconvene as soon as possible, dependant of course on the number of representatives available to serve. If a large number of representatives were killed in the attack, each state would then be required to send
new representatives, according to both federal and state provisions. Considering the wide spread destruction resulting from such an attack, the length of time such a process would take is unknown. But, at some point, Congress would reconvene.

Faced with unimaginable death and destruction, Congress would clearly have a great deal of work to undertake. Yet one of their first responsibilities would be to choose their leadership, pursuant to Article One of the Constitution. As a result, a new Speaker of the House and Senate Pro Tempore would be selected and, due to the lack of guidelines detailed in the previous chapter, possess the authority to assume the presidency. In this scenario, a struggle for power is easily envisioned.

The article includes a quote from an unnamed source describing how the designers of the plan viewed the influence of Congress. Mann writes:

"One of the awkward questions we faced was whether to reconstitute Congress after a nuclear attack. It was decided that no, it would be easier to operate without them." For one thing, it was felt that reconvening Congress, and replacing members who had been killed, would take too long. Moreover, if Congress did reconvene, it might elect a new speaker of the House, whose claim to the presidency might have greater legitimacy than that of a Secretary of Agriculture or Commerce who had been set up as President under Reagan's secret program. The election of a new House speaker would not only take time but also create the potential for confusion. The Reagan Administration's primary goal was to set up a chain of command that could respond to the urgent minute-by-minute demands of
a nuclear war, when there might be no time to swear in a new President under the regular process of succession, and when a new President would not have the time to appoint a new staff. The Administration, however, chose to establish this process without going to Congress for the legislation that would have given it Constitutional legitimacy.  

Although there are legitimate concerns addressed in the plan, the mindset of merely ignoring Congress raises a number of questions. 

Despite the inherent problems associated with a legislative succession, the amount of forethought devoted to ensuring continuity provided a good deal of the framework for protection in the age of global terrorism. Even though the enemy had changed, certain basic tenants of protection remained the same and have presumably been incorporated since September 2001. Whether the perceived enemy was another super power or a terrorist organization, preparations were made to secure and evacuate members of the executive and legislative branches if an attack on Washington, D.C. were undertaken. Unfortunately, there was one problem that has been ignored since the end of World War Two. 

The Proximity Problem

There is no doubt Washington D.C. is the most inviting target for our nation’s enemies. The symbols of our nation are spread throughout the relatively compact city, and the damage or destruction of any one would be a tremendous victory for any terrorist organization. Yet while

513 Ibid.
the psychological damage may be severe, there is no guarantee of such an attack causing physical damage outside of the District of Columbia. Thus in considering possible targets that present the best opportunity for chaos, we must narrow our scope from monuments to individuals.

The assumption that Washington would be the first target in any attack, regardless of the perpetrator, is sound. Yet what makes our nation’s capital such an appealing target is also one of the most significant flaws concerning the presidential line of succession, specifically, everyone in the line resides within close proximity to one another. Therefore, if the city of Washington were devastated by a nuclear or chemical attack, there is a significant possibility that those comprising the line could be killed or incapacitated. For our purposes, this will be termed the proximity problem.

Unlike correcting the flaws in the legislative line, there is no simple solution to resolving the proximity problem. Since everyone in the Cabinet and Congress live and works for the most part in close proximity to the White House, there is no one agency or official who could be designated within this group. Also, given the natural inclination of a Cabinet official to maintain a close relationship with the president, the prospect of isolating a Cabinet member outside of the nation’s capital is inherently unappealing. Although this strategy is adopted any time the president address a joint session of Congress, tradition has typically meant the designated survivor stays in either the White House or their private residence during the speech. Considering these locations are all fairly close to the Capitol Building, the logic behind such a precaution is highly flawed.
The proximity problem is superbly addressed in a March 2007 article by Norman Ornstein entitled *A Better Way on Presidential Succession*. Ornstein begins by highlighting the inherent problems in the legislative line of succession, specifically, the chances of a shift in party control and the dangers of placing the longest serving member of the Senate third in the line.\(^{514}\) However, what separates the article from other works is his attention to the dangers of terrorism and how it heightens the dangers of the proximity problem. Although the reality is unpleasant to consider, the fact is such a prospect is a very real possibility in today’s world.

Citing the dangers of a small nuclear device resulting in the deaths of everyone in the succession line, Ornstein introduces the idea of the president appointing alternate successors. According to his plan, which is predicated on removing Congress from the line altogether, the president could designate successors outside of the Cabinet and Congress who do not reside in the nation’s capital. Each of these designees would require Senate confirmation and would serve in the event everyone in the succession line were killed or incapacitated.\(^{515}\) Considering that Cabinet officials undergo the same process of selection and confirmation, there is clearly a great deal of merit to Ornstein’s plan.

The dangers of such an attack crippling our federal government become even higher when considering the potential fate of Congress and the Supreme Court. Frighteningly, as of 2013, there is no mechanism in place to fill mass vacancies in either Congress or the Supreme Court. When it comes to Congress, each state would be expected to appoint replacement

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\(^{515}\) Ibid.
representatives in a timely manner, though what this time frame would be following such a
catastrophic attack is anyone’s guess. Although Congress did consider the matter in 2003, no
resolutions were reached.

Since repopulating Congress requires action by individual states, creating a uniform
solution is difficult. Norman Ornstein once again offers a potential solution, this time relying on
each state’s governor to appoint replacements following an attack.516 This plan would clearly
address the urgent need to repopulate Congress, as well as provide some semblance of electoral
input, as the duly elected governor would be responsible for the selections. At the very least, it
addresses a glaring oversight in the current level of planning.

The problems associated with replacing the Supreme Court are even more complex as
they involve both the executive and legislative branches. Assuming all three branches were
impacted by an attack, appointing replacement Justices would require nomination by a president,
whose legitimacy may be in question, and confirmation by a Congress, who may be scrambling
to find members. Additionally, since both the new president and Congress would be responding
to unprecedented events, the necessity for an independent judicial branch would be even more
important.517 Unfortunately, this is also a scenario in which our federal government is woefully
unprepared.

517 John Fortier, Jennifer Marsico, Thomas Mann and Norman Ornstein, “The Continuity of the Supreme Court: The
The likelihood of such an attack crippling all three branches of government is not only frightening to consider for obvious reasons, but also for its relative ease. Unlike during the Cold War when the threat of massive retaliation served as a safeguard, it seems the only thing preventing a terrorist organization from carrying out such an attack today is opportunity. If a group were to acquire such a weapon, they would then only need someone to carry out the attack and a target. Frighteningly, the prime target also includes the members and institutions of our federal government.

A Different Kind of Devastation

Currently, the line of succession is comprised of only eighteen people. A relatively small number given the potential importance of such a role, and a plan made all the more disconcerting given their close proximity to each other. Since decapitating the federal government was thought to be just as attractive a proposition to the Soviets, we must ask ourselves why Congress failed to expand the line during the Cold War. Although there is no definitive answer, one reason makes considerable, albeit morbid, sense – if events escalated to such a horrific point, what happened next would not matter.

Although continuity in government was an issue addressed during Cold War planning, there was an underlying premise that is not applicable to the age of global terrorism. In most scenarios concerning a nuclear exchange with the Soviets, the outcome was projected to be broad devastation. While Washington, D.C. would be the likely first target, other major cities would also be targeted for attack, just as various locations throughout the Soviet Union would be for
American missiles. Since the aftermath of such an event would find the United States in the grips of utter devastation, with tens if not hundreds of millions dead, we can assume who should serve as president would not be the primary concern for survivors.

This is not meant as an indictment of disaster planning during the Cold War. It is, however, meant to illustrate a critical shortcoming in the succession line that is closely related to the proximity problem. In this case, the very real possibility that a devastating attack on Washington, D.C. may be an isolated incident. Such an event could render the nation without a federal government at a time when one was needed more than ever.

For an example of this scenario, we return to the 9/11 attacks. On that terrible day, the death and destruction in New York City, the greater Washington, D.C. area, and Shanksville, Pennsylvania, paralyzed these areas for weeks to come. However, in spite of a tremendous amount of emotional turmoil and fear, the rest of the nation was spared. Just as targeting those responsible for the attacks presented a new challenge for our military, attempting to plan for future attacks introduced a phenomenon not considered during Cold War planning. Specifically, the possibility that one city could be heavily damaged while the rest of the nation remains unharmed.

At first this would seem to be a welcomed change. Although no attack would be the obvious first choice, the prospect of only one location suffering extensive damage would naturally be preferred to a wide spread nuclear war. However, what if such an attack were undertaken in our nation’s capital? The aftermath would find a nation in desperate need of
reassurance and leadership from its national government, a government that may no longer exist. Unfortunately, this is yet another area in which we are dangerously unprepared.

The impact of such an event can be illustrated by again using 9/11. In the hours and days after the attacks, the nation was reassured by the appearances of President Bush and congressional leaders, all of whom pledged to work together. Now imagine if on that day our federal government had been decapitated. An already reeling nation would be confronted with a constitutional crisis in which the question of who was leading the nation went unanswered.

Additionally, imagine a scenario in which Congress had to be repopulated and each state’s governor was charged with appointing representatives. Unlike the absence of partisanship following the 9/11 attacks, it is difficult to envision a scenario in which there was no partisan rancor in reshaping Congress. It is also important to note that throughout such a process, the nation as a whole would be coming to grips with the dangers of another attack somewhere else in America. This combination of partisan bickering, widespread panic, and responding to the attack itself is almost too frightening to fathom.

Alas, such a nightmare series of events could occur at any minute. As of 2013, the continuity of our government rests solely in the eighteen person line of succession, all of who live and work in and around Washington, D.C. Yet this represents immense preparation compared to the other branches of government, for which there is no suitable plan to ensure continuity. Sadly, the strategy of ignoring the problem and hoping it never occurs so prevalent with the disability issue throughout the 19th and 20th Centuries seems to have returned concerning the issue of continuity.
What About the Vice President?

Aside from the president, there is no government official impacted more by the 25th Amendment than the vice president. Along with legitimizing the Tyler precedent and allowing for the transfer of presidential duties, Section Four also charges the vice president with a pivotal role in the determination of presidential disability. By requiring the consent of the vice president and majority of the Cabinet, the Amendment guarantees that such provisions cannot be invoked against the will of the person who stands to inherit the Oval Office. However, guidelines concerning disability and removal do not apply to the office of the vice president. Thus the nation’s second highest office continues to depend on mere good fortune when it comes to such consequential issues.

For this problem, former Vice President Dick Cheney is once again a key actor. In March 2001, Cheney’s work on the continuity issue prompted him and general counsel Dave Addington to research Cheney’s potential duties concerning the 25th Amendment. Given his heart problems, Cheney and Addington were immediately alarmed by the lack of provisions concerning a potential incapacitation, an event for which there was no constitutional or legislative guidelines. Thus if Cheney were incapacitated, the only recourse for removal would be impeachment or resignation. As evidenced by the Garfield and Wilson examples, such recourses were wrought with problems.

518 Cheney, In My Time, 320.
If such a scenario were to become a reality, the complications would be far reaching. First, if President Bush were forced to transfer the duties of his office for whatever reason, he could not simply bypass the Vice President, despite his incapacitation. Such an event could only take place if Cheney willingly declined the responsibilities, an action that would be impossible in the event of total disability. Since neither the Cabinet nor Congress possessed any authority to declare a vice president disabled, what would have taken place remains a mystery.

The second problem dealt specifically with Section Four of the 25th Amendment, and was cited by Cheney as his main concern. Since the Amendment requires the consent of the vice president and majority of Cabinet, an incapacitation on Cheney’s part would have precluded any invocation of Section Four, regardless of President Bush’s condition. In this scenario, the nation could have found itself with a disabled President and Vice President, but with no recourse for removing them from office. In his memoirs, Cheney cited his history of heart disease and the last year of the Wilson Administration as the impetus for how he chose to address this critical oversight.

In a self described extraordinary step, Vice President Cheney drafted an undated but signed letter of resignation, which he entrusted to Addington. Along with the letter, Cheney added a note, dated March 28, 2001, that stated:

Dave Addington-

You are to present the attached document to President George W. Bush if the need ever arises.

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519 Ibid, 320.
520 Ibid, 321.
Richard B. Cheney

After entrusting Addington with the letter that could remove him from office, Addington decided to keep the letter in his home, citing a fear that in a time of crisis he may not be able to get to the safe in his White House office. Addington’s attention to his duties was reflected a few years later when his house caught fire, an event that, according to Cheney, resulted in Addington fleeing with only his financial documents and Cheney’s letter.\footnote{Ibid, 322.}

While Cheney’s forethought is commendable, relaying on such a mechanism in the event of a crisis is dangerously short sighted. Primarily, the legality of such a letter is an issue in which lengthy legal deliberations are easily envisioned, which is precisely the last thing needed in such a scenario. Also, the responsibility assigned to Addington placed him in a position of potentially having to interpret Cheney’s wishes in the event of a medical crisis. If medical officials were unsure of Cheney’s ability to recover, Addington would essentially be charged with determining the removal of the duly elected Vice President from office. This is never a job that should be entrusted to only one unelected official.

This potential problem was also cited by Cheney in his decision to entrust only Addington, as he feared either his family or staff acting to prevent his removal from office in the event he was incapacitated.\footnote{Ibid, 321.} And while Addington clearly acted as best he could in such an unenviable position, the pressures that could potentially be brought to bear in the event of a crisis are troubling. Additionally, if such an event had occurred at a time when the House was
controlled by the Democrats, as in the last two years of Cheney’s term, the prospects for pressure are even more frightening.

Where We Stand in 2013

The 25th Amendment provides a tremendous set of guidelines that addressed the most pressing needs of 1965. And while the Amendment’s history has not been perfect, I believe its overall record is clearly one of success, if for nothing else than due to addressing an issue that was ignored for nearly two centuries. However, support for the Amendment must not preclude drawing attention to its shortcomings.

Despite addressing issues of presidential disability and vice presidential replacement, the 25th Amendment does not address contemporary issues concerning the continuity of government. Specifically, there are no guidelines for what to do in the event Congress or the Supreme Court fall victim to an attack that in some way precludes its membership from discharging their duties. Additionally, there are no provisions concerning what to do in the event everyone in the succession line is incapacitated or killed. Some of these issues are merely a question of geography, while others involve complex constitutional dilemmas for which there are no easy answers.

Finally, there is also the question of whether or not to reform the current line of succession. Although the response to this question will not be surprising based on the content of previous chapters, simply altering the line does not solve the entire problem. All of these issues involve both our federal government as it exists today and constitutional principles that have
guided our nation since its creation. And while there may not be perfect answers to each one, the next chapter addresses several of these issues.
Chapter Seven

Recommendations for the Future:

What the Past Can Tell Us
Proposed Reforms

1. Remove Congress from the Presidential Line of Succession

As detailed in Chapter Five, the current line of succession is fundamentally flawed. The inclusion of the Speaker and Senate Pro Tempore only increases the likelihood of confusion in an already chaotic time. Additionally, historical evidence clearly shows it is more likely than not that elevating a member of Congress to the presidency would result in a change in party control. This claim is confirmed by the fact that since 1969, the ascension of the Speaker would have resulted in a dangerous shift in party control 70% of the time. Quite simply, there is no benefit to including members of Congress in the line of succession.

Along with the obvious benefits of reform, it is important to remember that altering the line of succession is not without precedent. Following its creation in 1792, the legislative succession line was altered to run through the Cabinet in 1886. Therefore, this is not a case requiring wholesale reform, but merely a return to a previously established line.

Reforming the line would also address the problem of preparedness. Unlike the Speaker or Senate Pro Tempore, the Secretary of State is well informed of all international events, and would require less on the job training in the event of a crisis. Furthermore, recent Secretaries of State have possessed either advanced military experience, such as Colin Powell, or political experience, including former presidential candidates Hillary Clinton and John Kerry. In short, it is difficult to argue that any member of Congress is better suited to assume the presidency than a Secretary of State.

523 See Chapter Five.
Finally, removing Congress from the line of succession would greatly diminish the dangers of bumping. As detailed in the Chapter Five, bumping is the procedure by which someone who was passed over in the line of succession may later choose to serve as president. This shortcoming in the current succession law allows for a scenario in which a Speaker or Senate Pro Tempore who was either unable or chose not to serve may later decide to exercise their right to assume the presidency. Obviously, such an event would not project a picture of continuity.

While the solution to the problem may be straightforward, the chances of success are not. Historical evidence indicates that the best opportunity for reform will occur when one party controls both the executive and legislative branches, thus removing partisan suspicion. The Administrations of George W. Bush and Barack Obama serve as great illustrations of this point. From January 2003 until January 2007, the line of succession behind Vice President Cheney was staffed by Republicans, and thus any changes would have made no political difference. However, between January 2007 and January 2009, the presence of Democrats in congressional leadership roles greatly diminished the chances for action.

Likewise, the first two years of the Obama Presidency, a time in which Democrats enjoyed majorities in Congress, would have permitted an easier path of reform. This opportunity was lost when Republicans took control of the House in January 2011 and Speaker Boehner was included in the line of succession. Just as Democrats would have strongly objected to the removal of Nancy Pelosi and Robert Byrd during Bush Administration, Republicans could be expected to oppose the removal of John Boehner today.
Thus two obstacles now stand in the way of reform. The first is simply attracting attention to the problem, as concern for the succession line has been virtually non-existent within the halls of Congress in recent years. Based on historical evidence, it seems the only way to secure this attention is for the issue to become one of widespread national attention, a distressing prospect for obvious reasons. Absent such an event, it is difficult to envision Congress considering the topic anytime soon.

The second obstacle is one of electoral politics. Again, the best opportunity for reform occurs when one party controls the presidency and both the House and Senate. Given the fluidity of congressional control over the past two decades, this is a situation prone to change, and thus the long term prospects are difficult to predict. However, it is easier to predict the chances of both obstacles being overcome within the same period of time, and, unfortunately, these chances appear slim.

2. *Create a Line of Succession Outside of Washington, D.C.*

Even though the structure of the succession line is of obvious importance, it is meaningless if all those who comprise it have been killed or incapacitated. Since everyone within the line currently resides in a frighteningly small area around our nation’s capital, the chances of such a disaster are greater than most would care to acknowledge. Add into the mix terrorist organizations whose stated objectives are to wreak panic and chaos, and you have a recipe for a
disaster of unimaginable proportions. As the continuity of government commission expressly stated, “Al Qaeda has shown interest in incapacitating the leadership of our government.”

This issue received some attention in the wake of 9/11, due mainly to Vice President Cheney’s notable absence from Washington on several occasions. However, no efforts were made to address the overarching problem. And while fear of Soviet nuclear attack began more than half a century ago, such a fear was predicated on the notion of a full scale nuclear war, thus reducing the attention to a continuing succession line. In essence, the mindset was if such an event happened, the survivors could devise a solution. This way of thinking is antiquated in the age of global terrorism since a terrorist attack on one city could easily be an isolated incident.

Constitutionally speaking, this is the proposal with the most complications. Despite the problems with the legislative line of succession, it still transfers power to an elected official. Additionally, since Cabinet members must be approved by the Senate, it can be argued that everyone within the line of succession has undergone some sort of electoral review. Unfortunately, all of these officials also reside in close proximity to each other.

For this reason, I support Norman Ornstein’s proposal that each administration designate individuals outside of Washington, D.C. to serve behind the Cabinet in the line of succession. All of these officials would be subject to Senate confirmation, and serve only in the event that the president, vice president and Cabinet were unable to serve. Additionally, as the Continuity of Government Commission recommended, these officials would be comprised of former

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government officials, such as Secretaries of State, Defense, and even former presidents. Along with addressing the proximity problem, a system of designated successors would also address the preparedness problem, since these former executive branch officials would possess an advanced level of experience.

Although this solution may seem to violate the principles of popular election, it is important to remember this change is merely an addition to the current model of Cabinet succession. Since Cabinet members are also nominated by the president and confirmed by the Senate, the designed successor plan does not represent a change to the system. Also, given the required incapacitation or death of higher ranking officials in the succession line, this plan would only be utilized in the most extreme of circumstances. Finally, this would also provide at least a semblance of reassurance to what would inherently be a devastated nation, as a well known official would be placed at the head of government.

It should also be noted that the designated successor plan is adopted whenever the president addresses a joint session of Congress. On these occasions, it is customary for one Cabinet member to refrain from attending the speech, thus ensuring a surviving member of the succession line is outside of the Capitol Building. However, this strategy ignores the proximity problem, as the Cabinet member in question is usually near Washington, D.C. This strategy, much like expanding the line of succession with more officials who reside in the nation’s capital, fails to address the larger issue.

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The most important aspect of this plan is that it addresses a problem that has been ignored since the end of World War II. Regardless of how many people comprise the succession line, their presence in a concentrated area precludes any real guarantee of continuity. Additionally, the emergence of terrorist threats significantly increases the chances of a compartmentalized nuclear or chemical attack within the nation’s capital. As frightening as this scenario may be, it is nonetheless a very real danger in today’s world and one that must be addressed immediately.

Much like reforming the line of succession, the designated successor plan is hindered not by controversy, but lack of awareness. Reversing this trend would require a concerted effort on the part of either the president or Congress, neither of which seems likely as of this writing. Until this mindset is altered, our government will continue to function in a manner which makes it extremely vulnerable to terrorist attack. This is due to a presidential succession line that, according to both the American Enterprise and Brookings Institutions, is inadequate in the face of catastrophic attack.\textsuperscript{527}

\section{Address the Dangers of Vice Presidential Disability}

As illustrated by Cheney’s actions, the vice presidency is dependent on personal agreements and good fortune when it comes to the disability issue. Although Section Two of the 25\textsuperscript{th} Amendment resolved the issue of a prolonged vice presidential vacancy, it is silent on what to do if the vice president is disabled. This lack of guidance, coupled with the fact that the person

next in the line of succession is frequently from the opposition party, presents a clear need for immediate reform.

The current recourse for the removal of a disabled vice president mirrors the antiquated system of filling a vice presidential vacancy, which is simply waiting for the next election. Just as a vacancy could only be filled every four years prior to 1967, the removal of a disabled vice president would likewise be accomplished by the election of a new running mate. However, given the wording of Section Four of the 25th Amendment, a disabled vice president also precludes the removal of a disabled president by the Cabinet. Therefore, any incapacitation in the vice presidency is a very dangerous problem.

The significance of this danger is best illustrated by the case of former Israeli Prime Minister Ariel Sharon. On January 4, 2006, Sharon suffered a devastating stroke that resulted in his lapsing into a coma. As of June 2013, more than seven years later, he remains in a vegetative state. Sharon was replaced as Prime Minister just days after he fell ill, in much the same way the 25th Amendment allows for the removal of an American president.

However, what if the Sharon example had befallen Dick Cheney on the same date? In this scenario, Cheney would have remained as Vice President for the next three years and two weeks, unless he resigned or was impeached. Since a vegetative state precludes any communication, deciding to resign would seem to be impossible, except perhaps for Cheney’s March 2001 letter. If, as with Woodrow Wilson, neither of these recourses was employed, Section Four of the 25th Amendment permits

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Amendment would have been rendered unenforceable for the final three years of President Bush’s second term.

Since waiting even a day to remove a disabled member of the executive branch is dangerous, the idea of waiting until the next election is unacceptable. This antiquated model of relying on good fortune and limping along is disturbing enough given how long it overshadowed the presidency in centuries past. The realization that we are still relying on such a model today is mind boggling.

Further adding to the problem is a potential shift in party control. In a scenario where the Speaker is of a different party, the potential for downplaying or even concealing an illness is exacerbated. If a vice president were unable to assume the presidency, an administration could be faced with either ceding power to their political opposition or concealing either the president or vice president’s condition in an attempt to maintain power. While we may hope that future administrations would act in the national interest, history strongly indicates otherwise. For these reasons, a mechanism must be created to address vice presidential disability.

Fortunately, the 25th Amendment provides a framework. Since Section Four allows for the removal of a president from office by a vote of the vice president and a majority of the Cabinet, I believe the same premise should be applied to the vice presidency, with one alteration. I propose the removal of a disabled vice president from office require the consent of the president and two-thirds of the Cabinet. The introduction of the two-thirds threshold provides a balance for the removal of the appeals process available to the president in Section Four. In the
case of the vice president, the decision of the president and Cabinet would not be subject to congressional arbitration.

Admittedly, this proposal may be troubling, as it provides a mechanism by which the president could effectively fire the duly elected vice president. However, two important factors must be kept in mind. First, such an action would actually require more collaboration than that of removing the president, as the latter requires only a majority of Cabinet support. Thus if the Cabinet is entrusted with the authority to remove a duly elected president from office, this would hardly be a drastic expansion of their authority.

Second, the president already possesses the authority to remove a running mate either during a campaign for the presidency, or during a campaign for reelection. Therefore, an abuse of this new mechanism is highly unlikely during a first term in office, as the president could simply select another running mate towards the end of the term. After this point, the likelihood that a president would seek to drive a vice president from office for spurious reasons is even more remote. In fact, the odds of a vice president and Cabinet members seeking to remove a president from office due to ulterior motives seems more likely than a president seeking revenge on a vice president.

Along with these changes, the removal of Congress as a potential arbitrator of a dispute is a necessary provision. Although this deprives the vice president of any means of appeal, it is necessary to prevent a situation in which the president nominates a vice presidential candidate while the office’s current occupant is fighting to regain the position. In this scenario, Congress could be charged with resolving the original dispute and confirming the replacement
simultaneously. Additionally, the current line of succession allows for a scenario in which an opposition Congress may be encouraged to rule in a disabled vice president’s favor, since a member of their own leadership would serve if the vice president were unable.

If these arguments are not convincing, considering the alternative should be enough to win over even the more ardent objector. As of 2013, the only thing separating the nation from a crisis involving a disabled vice president is the health of the vice president. Were the vice president to become incapacitated, there is a strong likelihood that nothing would be done until the next scheduled inauguration. Additionally, there could be no invocation of Section Four, a prospect that by itself warrants immediate action.

A final factor to consider is the Vice Presidency of Spiro Agnew. As evidence of his guilt began to mount, Agnew not only refused to resign, but contended that he must be impeached by Congress before he could be indicted. Although Agnew would ultimately resign, it should be noted that had he not, the only recourse available was a protracted impeachment battle. Fortunately, none of Agnew’s vice presidential successors has engaged in similar activities, but this obviously provides no guarantee for the future. However, this proposal would offer a remedy for any future instances of questionable activity on the part of a vice president.

The prospects for reform on this subject are admittedly also bleak. The lack of attention devoted to the issue of presidential disability in recent years would be considered a national outcry when compared to the vice presidential disability issue. And while Section Two of the

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25th Amendment is a much needed recourse, it also provides an illusion that disability concerning the vice presidency has been resolved. Until support for reform manifests itself, the vice presidency will find itself trapped in the same dangerous model of good fortune and limping along that defined the presidency for nearly two centuries.

4. **Ensure the Continuity of Other Branches of Government**

Despite its obvious importance during the Cold War, this is a subject that was largely ignored until after 9/11. Even though a line of succession was created for the presidency, little attention was given to repopulating either Congress or the Supreme Court. As discussed in Chapter Six, the rationale for such an oversight likely resides in the view that an all out nuclear war would render such planning irrelevant. Again, this is an antiquated mindset in a post-9/11 world.

Given the proximity problem, members of all three branches of government would be endangered by an attack on our nation’s capital. Also, due to the likelihood that a terrorist strike would be concentrated in one area, this issue is a more pressing concern in 2013 than at any point during the Cold War. In any scenario where Washington, D.C. was the target of a chemical or nuclear attack, the rest of the nation would be in desperate need of leadership. Unfortunately, there are currently no guidelines to address such a need.

Despite the shortcomings of the presidential line of succession, it is nonetheless recourse. However, succession in Congress has been completely ignored. Although each state is charged with selecting their elected representatives, the process of organizing what would be tantamount
to a national election in the aftermath of tragedy is both highly problematic and subject to delay. As a result, the nation could find itself without a legislative branch.

This is not to say there is an easy or ideal solution. The voice of the people is a fundamental principle of our democracy and must be ensured, regardless of the circumstances. Additionally, given the sharp increase in partisanship within the halls of Congress, attention must be paid to crafting a bi-partisan plan that would only be employed in a time of national crisis. While this can be problematic, depending on good fortune is no longer an option.

The same problem applies to the Supreme Court. Repopulating the Court requires both the executive and legislative branches for nomination and confirmation, respectively. And while some may argue these two branches would be more important following a devastating event, we must remember the Court’s role in arbitrating disputes between Congress and the president. This responsibility would be even more important in a time of uncertainty.

Given the inherent concern and paranoia that would accompany such an event, the presence of the Court in ensuring constitutional principles would be needed more than ever. As witnessed following events such as the attack on Pearl Harbor and the 9/11 attacks, the immediate actions of elected officials are often made in the heat of the moment. This pattern, combined with a federal government potentially comprised of members with little or no experience, presents a number of frightening possibilities. Given the vital role of the Supreme Court, ensuring its functionality must be among the first priorities following an attack.

These two issues began to receive some much needed attention in 2003, when the American Enterprise Institute and Brookings Institution combined to create the Continuity of Government Commission. The panel called for a constitutional amendment that would allow Congress to create a model for repopulating itself in the event its membership were either killed or incapacitated. Despite hearings to address this dangerous oversight, nothing substantive occurred.531

What scant attention has been paid to this issue thus far revolves around security. Both members of congressional leadership and Supreme Court Justices are offered federal protection, but obviously these services are limited. A prime example of this occurred on 9/11, when Speaker Hastert and other congressional leaders were evacuated from Washington to a secure location. Although cited as evidence of success, the question remains what would have happened if a hijacked airliner had struck the Capitol Building prior to the evacuation. While fortunately a question of what if, this scenario is indicative of the unforeseen nature of terrorist attacks.

Therefore, I recommend the creation of a mechanism for repopulating both the legislative and judicial branches of government. One possible solution would be to adopt the Ornstein plan of charging the governor of each state with selecting replacement officials following an attack. Another possible recourse would be to require each state to draft a list of potential successors to that state’s seats in Congress. In an effort to create bipartisan representation, these lists should be drawn up by each state’s legislature. Although this may not guarantee bi-partisan representation

531 Ibid, 6.
in every state, the varying levels of influence both parties enjoy throughout the country would prevent one party rule.

As for repopulating the Supreme Court, one possible solution involves selecting members from the United States Courts of Appeals. Since these Justices have already been nominated and confirmed to their positions, much of the vetting process has already taken place. Additionally, Appeals Court Justices will already be well versed in many of the issues facing the Supreme Court. Finally, this pool of possible choices is not defined by one political viewpoint or judicial philosophy.

Again, these are only some possible solutions. Obviously, there are potential shortcomings in any proposed remedy; however, addressing the overarching problem is of much greater importance. Much like the dilemma faced by Senator Bayh and his colleagues, the choice is between devising a plan that may not be perfect, but addresses critical issues, or continuing to ignore the problem. When faced with this choice, non-action is always the most dangerous course.

5. *Elevate the Department of Homeland Security in the Line of Succession*

Beginning with the Presidential Succession Act of 1886, the Cabinet line of succession was ordered by the length of service of each Cabinet agency. Therefore, the Secretaries of State, Treasury and Defense occupied the top three positions, followed by other agencies based on their year of creation. This system of ordering seemed proper until after the 9/11 attacks, when

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President Bush ordered the creation of the Department of Homeland Security. As such, the head of the agency devoted to defending our nation against terrorist attacks would seemingly be amongst the logical successors to the president in the event of such a catastrophic event. However, as of 2013, the Secretary of Homeland Security is currently last in the succession line.

Therefore, I propose elevating the Department of Homeland Security to just behind the Secretary of Defense in the Cabinet succession line. This would preclude any objections by the Secretaries of State, Treasury or Defense, as they would still be ahead of Homeland Security in the order. However, it would also acknowledge the fact that in the event of an attack, the Secretary of Homeland Security is better suited to respond than other agencies which now precede it, such as Agriculture, Education, or Veteran’s Affairs. This is not meant as a slight against these agencies nor their directors, but is merely a question of logic.

Although it may be foolish to think other agencies would have no objections to being lowered in the line of succession, it is difficult to imagine a plausible counter argument. Also, just as in the designated successor plan, such a change would only become a factor following a devastating event. Therefore, making such an alteration would seemingly be free from controversy and could be accomplished by an act of Congress. While this seems less likely as the memories of 9/11 fade, we must hope support arises for such a relatively simple, and obvious, change.

**Non-Legislative Reforms**

While legislative action is required for some of these recommendations, one flaw can be resolved through mere changes in tradition. Many customs of transferring power between
presidential administrations are dictated by precedents dating back centuries, and are thus obsolete. Additionally, there is a danger of overreaching, in essence replacing recognized flaws with new, unforeseen dangers. With this in mind, I present the following recommendations to accompany the legislative reforms mentioned above.

1. Establish Disability Guidelines Prior to Inauguration Day

This recommendation is the result of both the Reagan assassination attempt and new dangers. After leaving office, Reagan’s personal physician, Dr. Daniel Ruge, cited Reagan’s brief tenure as the reason behind Ruge’s lack of awareness concerning the 25th Amendment. This admission underscores the necessity that future administrations are familiar with the guidelines of the Amendment prior to taking office. This will help to prevent a repetition of the events of March 1981.

However, the state of the world in 2013 also necessitates additional preparations. Due to the obvious dangers faced by members of the line of succession on inauguration day, it is imperative that new safeguards be created. If a terrorist attack were to occur on such a monumental day, the impact could easily result in a prolonged constitutional crisis, due mainly to antiquated customs concerning the transition period. Due to these dangers, changes are necessary before the next scheduled transfer of power in January 2017.

The first step requires action only on the part of the president-elect’s staff. Regardless of the countless duties of any incoming administration, it is vital that guidelines concerning potential implementations of the 25th Amendment be established prior to taking office. Although
other matters may seem more pressing, the Reagan assassination attempt serves as a distressing reminder of what can result from complacency. The Reagan example, along with the fact the 9/11 attacks occurred less than eight months into George W. Bush’s term, reinforces the danger any president takes by ignoring the issue.

The second step requires cooperation between both the incoming and outgoing administrations, as well as Congress. By tradition, the president-elect announces nominations for Cabinet positions weeks before inauguration day. However, since the new Congress does not convene until the first week of January, the confirmation process is delayed. Since this process is often further delayed by partisanship and other personal controversies, final confirmation typically can occur weeks after the new administration takes office. This results in a period of time in which Cabinet level agencies are headed by acting department heads, sometimes from the previous administration.533

This dangerous model can be remedied by the Senate taking quick action to confirm at least one of the incoming administration’s Cabinet nominees. Although any nominee requires an extensive vetting process, this process can easily be accomplished for at least one nominee between the time the new Congress convenes and the president is sworn into office. Once at least one nominee has been confirmed, he or she would then not attend the inauguration, thus ensuring at least one surviving member of the new line of succession. Additionally, assuming implementation of the designated successors list, the Senate could simply confirm members of

this list, an easier accomplishment given their past governmental service. Either of these actions would be a marked improvement over the current system.

2. Avoid Medical Commissions to Determine Presidential Disability

The idea of charging multiple physicians with determining the capability of the president was first advanced by former President Eisenhower in 1964. Since then, it has been advocated by both scholars and prominent government officials, including the Miller Commission in 1988. Given the historical evidence that former presidents concealed their illnesses, as well as the knowledge that any president may be reluctant to disclose a disability, the idea is not without merit. However, there are also factors that make such a panel a dangerous proposition.

The first issue again deals with the issue of proximity, in this case, to the president. Clearly, any physician charged with determining a patient’s condition would want to examine the patient themselves, which would require that physicians of any medical board remain in close contact with the president at all times. However, as witnessed by the wounds sustained by Texas Governor John Connally in 1963, and those of James Brady, Thomas Delahanty and Tim McCarthy in 1981, being close to the president during an attack is a dangerous place. Thus, what would happen if one or more of the physicians charged with making a determination of disability were themselves wounded in an attack? This very plausible scenario would only serve to create more confusion in an already chaotic event.

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534 Ibid, 49.
The second issue involves politics, specifically, those of the physicians on the board. Given the partisan considerations that invariably accompany any declaration of disability, a physician with any discernible political connections would be subject to scrutiny in the event of any declaration. Thus any appointee would potentially be subject to a background check concerning their political views, the determination of which could then open them to charges of being influenced by politics. Given the all encompassing scrutiny that accompanies public service today, the only physician above any suspicion would seemingly be a person who has never expressed any political views. Finding such a candidate may well be impossible.

The final danger is, ironically, the very thing a medical board was conceived to prevent. As evidence shows, instances of presidential illness and disability are accompanied by confusion and fear. Thus the basic premise of a medical board is that a team of physicians, well trained to react calmly in a time of crisis, would be able to determine the condition of the president in an orderly manner. However, what if members of the board disagreed over the proper diagnosis, treatment, or likelihood of recovery? Such an event would not only contribute to the chaos, but also cast an invariable shadow over any decision concerning whether to invoke the 25th Amendment.

The premise behind the creation of a medical board is sound and there is no argument that a non-political voice would be an added benefit. However, this is a role that can best be played by either the president’s personal physician or, in case of emergency, those physicians who are called to attend to the president. Although the model of entrusting the president and his staff to weigh the nation’s best interests against those of the administration is not without danger,
the alternative is also wrought with potential complications. In this case, we must depend on the best intentions of the president and those around him.

Admittedly, there is a significant danger in reforming components of the 25th Amendment. However, all of these recommendations contain two basic tenants that I believe justify their intentions: the flaws they address desperately require reform, and they do not manipulate the essential intentions of the 25th Amendment. In other words, I believe these reforms only serve to improve upon a tremendously successful remedy.

One of the key arguments for making the guidelines that emerged in 1965 a Constitutional Amendment rather than merely an act of Congress was to preclude arbitrary changes. Since legislation can be superseded by subsequent legislation, it is easy to envision a scenario in which succession guidelines changed with each new presidential administration or Congress. The forethought of Senator Bayh and his colleagues on that issue is commendable, and thus I do not propose these changes lightly. However, a fear of the unforeseen should never prevent a desire for improvement, and it is with that in mind that I recommend these changes.

**What the Past Can Tell Us**

Judging from the six invocations of the 25th Amendment thus far, attempting to predict the circumstances of future invocations is foolish. The drafters of the Amendment could not have envisioned the events of Watergate, or that it would prompt the only invocations of Sections One and Two as of this writing. Nor could anyone have predicted that the first utilization of Section Three would be overshadowed by the Reagan Administration’s reluctance to officially declare an
invocation. Finally, who would have guessed that two most recent instances in which power was transferred, by President George W. Bush in 2002 and 2007, would be largely ignored and occur while most of the nation slept?

In spite of this, there are predictions one can make based on the extensive history of presidential disability and succession. From the attempt by Washington’s staff to summon a doctor quietly, though the efforts to conceal the conditions of Cleveland, Wilson, Kennedy and Reagan, the lesson is clear: presidents and their staff will always be reluctant to admit to a disability. And while concealing any condition is much tougher in today’s media driven society, such a cover-up could still take place. With that in mind, I offer the following three predictions.

1. **Any Declarations of Disability Will Have a Definitive Beginning and End**

   Clearly, President Reagan’s staff was fearful of admitting to a disability in March 1981. Yet while Reagan’s age and tenure in office were obvious factors, another was the lack of a clearly defined recovery point for the wounded commander-in-chief. If Section Three had been invoked, when should Reagan have resumed his duties? If the administering of anesthesia was used as the starting point, the transfer of power would have terminated as soon as Reagan awoke. However, since the impact of his injuries and the surgery clearly impacted his ability to serve, in now seems the prudent decision would have been to wait at least a day or two.

   Contrast this scenario with the invocations of Section Three. In July 1985, Reagan transferred power just before anesthesia was administered. Roughly eight hours later, Reagan reassumed his duties soon after waking up, at which point he was asked to read and sign the
letter ending the transfer of power. President George W. Bush followed the same course of action in both 2002 and 2007, signing the first letter just before being sedated and the second soon after waking up. Unlike the 1981 assassination attempt, these examples all provided a definitive beginning and end to the inability.

Although always subject to complications, surgical procedures present favorable circumstances to presidents and their staff. They provide both definitive beginning and end points, likely involving the effects of anesthesia. Additionally, they also tend to preclude the second guessing that could have accompanied a transfer of power in 1981, since the invocation is not intended to cover a period of recuperation, just the actual time of being unconscious. This theory is supported not only by the invocations of Section Three, but also by Presidents George H.W. Bush and Clinton, each of whom was prepared to transfer power if anesthesia was administered.

Based on this evidence, it is safe to assume presidents will be more likely to invoke Section Three for medical procedures than sudden injuries or illnesses. Given that the only alternative to disclosing such a procedure would be a potentially dangerous cover-up, logic would dictate that future administrations would be more forthcoming when it comes to such procedures. Additionally, the uneventful history of previous invocations removes some of the fear that inherently accompanies any transfer of power on the part of a president. Finally, given the choice between concealment and disclosure, an invocation is frankly a smart political decision.

535 See Chapter 4.
536 See Chapter Four.
2. **Political Interests Will Always Reign Supreme**

Regardless of the condition, no president wants to admit to being unable to discharge the duties of the office. Given the enormous effort required to win the presidency, this mindset shows no signs of changing. Also, as the intense media scrutiny on the presidency continues to grow, a desire to portray a specific image will grow proportionally. As a result, there can be no argument that political factors will always play a role in any determination concerning invocation of the 25th Amendment. The question is how big of a role will politics play?

History indicates the answer to this question is alarming. So far, there have been six invocations of the 25th Amendment, the numbers of which ironically coincide with their sections. The one invocation of Section One, Gerald Ford’s ascension to the presidency, was the direct result of Watergate. However, it is important to remember that Nixon’s decision to resign occurred only after congressional Republicans withdrew their support, causing Nixon to realize impeachment was inevitable. Clearly, political factors played a role.

The two invocations of Section Two, the selections of Ford and Rockefeller, were heavily dictated by political factors. As detailed in Chapter Four, Nixon’s memoirs clearly show his selection of Ford to be a concession to congressional Democrats.\(^{537}\) Less than a year later, Ford’s selection of Rockefeller was again dictated by congressional Democrats and threats to reject any nominee deemed to be a strong candidate in the 1976 election.\(^{538}\) This evidence, along with the

\(^{537}\) Nixon, *RN*, 925-928.
\(^{538}\) Ford, *A Time to Heal*, 143.
political factors that accompany any presidential nomination, all point to a highly charged process of both selection and confirmation for any future invocations.

Finally, the three invocations of Section Three vary in their political influences. The decision by Reagan and his staff to try and avoid an official invocation in 1985 reinforced the uncertainty in which they viewed the 25th Amendment as a whole. Additionally, the decision to have Reagan resume his duties immediately after waking up was based more on a desire to convey a quick recovery than the logic of a clearly infirmed Reagan reassuming office. As for the Bush invocations in 2002 and 2007, it is difficult to discern any political motives in either instance, though it does warrant speculation whether they would have occurred in a pre-9/11 world.

The largest evidence of political influence and Section Three again comes from the Reagan assassination attempt. As evidenced by the statements of James Baker, political and personal factors played the determining role in the decision not to invoke. While it is easy to criticize Reagan’s staff in hindsight, it is also important to keep in mind that any other administration may well have charted the same course of action. One overarching lesson from the history of presidential disability is that every president and his staff have given significant thought the impact of public perception. Unfortunately, we must assume this will continue in the future.

3. Changes Will Not Be Proactive
This prediction is the most disheartening. Based on the long history of ignoring the problem of presidential disability and succession until after they became a reality, the chances that proactive changes will occur seems remote. As detailed in Chapters Five through Seven, there are currently significant flaws that desperately need to be addressed, especially pertaining to the line of succession. And given the nature of today’s world, these flaws are quite dangerous.

History shows us that the only proactive changes made concerning the issue occurred in 1792. By passing the first succession act prior to a presidential death or prolonged incapacitation, Congress addressed a glaring oversight, though this did occur after Washington’s two brushes with death. From this point on, subsequent congressional action would occur only after serious risks had become reality.

The 1886 Act should be lauded for introducing the Cabinet line of succession, but, it must also be noted, was passed after four presidents had already died in office and one was incapacitated for nearly three months. Additionally, the 1947 Act, like all earlier legislation, failed to address the disability issue. Finally, we must also remember that the first piece of legislation to address these problems, the 25th Amendment, was drafted after Eisenhower’s three bouts with serious illness and the assassination of John F. Kennedy placed John McCormack next in line for the presidency.

Sadly, recent events give no reason for optimism. Despite the noble efforts of scholars such as Norman Ornstein and the Continuity of Government Commission, there has been no legislative action. Since the Commission has since disbanded, it is safe to say a significant opportunity for reform has been lost.
Therefore, I believe any changes to either the line of succession or other components of the disability issue will occur only after an event, or series of events, have given them national prominence. This model of reform is fundamentally flawed for obvious reasons, and harkens back to the method of depending solely on good fortune that defined the issue for nearly two centuries. Granted, both the president and Congress have a number of issues to address and never find themselves without work to be done. However, the recommendations outlined in the previous chapter are not only beneficial, but also relatively free from controversy and political rancor. This should make addressing them more appealing in today’s political climate.

Conclusion

The issue of presidential disability and succession has bewildered our nation since its founding. Part of the problem has been politics, as evidenced by the Succession Act of 1792. Part of the problem has been ignorance, as seen in every missed opportunity for reform between 1792 and 1965. And part of the problem has been the false comfort derived from a streak of healthy presidents, a phenomenon we are experiencing as of 2013. However, there is one overarching problem that has always prevented action when needed: there is no perfect solution.

This realization was beneficial to Senator Bayh and his colleagues, as they avoided trying to draft legislation that would address every conceivable possibility and set to work on creating broad guidelines. Personally, I also found it to be beneficial in crafting the recommendations presented in the previous chapter. However, deciding not to strive for perfection and giving up on getting as close as possible are two separate things. With that in mind, I strongly believe the
changes I have outlined need to be incorporated to address flaws in our current disability and succession laws. Unlike in 1886 or 1965, the guidelines in existence in 2013 do not necessitate wholesale change, but merely minor reform.

The 25th Amendment to the Constitution is not perfect, but it should not be amended or superseded. The guidelines it contains were a monumental step forward from the ignorance that defined the issue for one-hundred and seventy-eight years. And while there is no question our nation is better suited to respond to an instance of presidential disability or succession today then prior to 1967 that does not mean the situation is resolved.

The drafters of the 25th Amendment could not have envisioned how a break-in at a Washington, D.C. hotel would result in the first three invocations of their legislation, nor could even the wildest of imaginations have predicted the events of September 11, 2001. We should not attempt to create guidelines to respond to every conceivable scenario, but rather broad guidelines based on both logic and the lessons of history. The 25th Amendment does a tremendous job of meeting this requirement, and for this reason, it should be left as it was when ratified. However, certain minor changes are required. And for the sake of the nation, we must hope these flaws are corrected before they are transformed into reality.
Bibliography


Ackerman, Kenneth D. Dark Horse: The Surprise Election and Political Murder of President James A. Garfield. Falls Church, VA: Viral History Press, LLC, 2011.


Annis, James. Howard Baker: Conciliator in an Age of Crisis. Lanham, MD: Madison Books,
1995.


Binkley, Wilfred E. *The Man in the White House: His Powers and Duties*. Baltimore: Johns


http://search.proquest.com.proxycu.wrlc.org/hnpwashingtonpost/docview/142317176/full


Hansen, Richard H. The Year We Had No President. Lincoln: University of Nebraska Press, 1962.


"Office of the Clerk of the United States Senate." Presidential Succession.  
http://www.senate.gov/artandhistory/history/minute/Presidential_Succession.htm (accessed May 10, 2010).

"Office of the Clerk of the United States Senate." President Pro Tempore.  


Phillips, Cabell. "Presidential Disability Amendment is Voted by Senate Panel." *New York*


"Remarks by the President Upon Departure for Camp David." The White House.


