

SYMPOSIUM

THE ADEQUACY OF THE PRESIDENTIAL SUCCESSION SYSTEM IN THE 21ST CENTURY: FILLING THE GAPS AND CLARIFYING THE AMBIGUITIES IN CONSTITUTIONAL AND EXTRACONSTITUTIONAL ARRANGEMENTS

INTRODUCTION

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Inevitably, the events of the day dominate the political agenda. The issues of presidential succession have been attended to in our national history only sporadically because, at most times, the question of who succeeds the President in cases of death, resignation, or incapacity does not have immediate relevance: the President is in good health, the presumption is he will serve out the term of his office for which he was elected, and political leaders ignore succession issues as if they were of only theoretical interest. And yet, again and again, succession questions have become of the most immediate consequence in times of crisis. Strikingly, of the forty-four men who have served as President of the United States, nine were Vice Presidents who succeeded to the office.¹ Eight of those Vice Presidents took office as a result of the death of the President, and one took office after the resignation of a President.² Perhaps equally significant, with remarkable frequency Presidents have confronted disabilities that impeded their ability to serve as President. Indeed, since the adoption of the Twenty-Fifth Amendment³ in 1967,⁴ Presidents have already invoked its disability provision on three occasions.⁵ Given the terrible frequency with which Presidents fail to complete their terms of office and the frequency with which they are disabled, any ambiguities concerning presidential succession

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1. JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND EARLIEST APPLICATIONS* Appendix D (1976).

2. *Id.*

3. U.S. CONST. amend. XXV, § 3.

4. FEERICK, *supra* note 1, at xi.

5. Joel K. Goldstein, Commentary, *Akhil Reed Amar and Presidential Continuity*, 47 HOUS. L. REV. 67, 99, n.102 (2010).

and any flaws in the rules governing succession have the capacity to lead to national disaster.

In view of the profound importance of questions of presidential succession and the lack of attention paid to them, this issue of the *Fordham Law Review* is, very simply, a great public service. It presents the papers produced by *The Adequacy of the Presidential Succession System in the 21st Century* Symposium, which was held at Fordham Law School on April 16 and April 17, 2010. The Symposium took place just one week after the horrific plane crash that killed the President of Poland and a number of the top political and military leaders in Poland,⁶ an event that starkly showed the necessity of having a comprehensive system of presidential succession in place in the event of an unexpected tragedy.⁷ Sitting in the audience during the Symposium and listening to the papers presented here, I was struck by how many gaps there are in our current system and what dangers those gaps pose.

It was very appropriate that the Fordham Law Review hosted this Symposium. While the Fordham Law Review has profoundly influenced legal thought in many ways, it has had a particularly notable impact on the Twenty-Fifth Amendment. No other law review has published so much important scholarship on the issue of presidential succession. The Symposium built on that formidable legacy, and it was an extraordinary opportunity to learn about the presidential succession system, the current state of the law, and proposals for reform. The panelists brought a wealth of experience and insight, and included Fred Fielding, counsel to President Ronald Reagan and to President George W. Bush, and Benton Becker, counsel to President Gerald Ford, both of whom personally confronted succession issues; leading academics and commentators, and Dean John D. Feerick and Senator Birch Bayh, both of whom deserve special mention.

I am deeply grateful to my predecessor as Dean of Fordham Law, John D. Feerick, for his work conceptualizing and organizing this Symposium. As a young lawyer, Dean Feerick wrote what was then the leading work on presidential succession, publishing it in the *Fordham Law Review*.⁸ Shortly thereafter, President John F. Kennedy was assassinated, and Dean Feerick's superb article gained national attention as the touchstone for analysis of the succession issue. Dean Feerick then went on to, in the words of Senator Bayh, serve as the "expert guiding hand throughout the process of crafting the Amendment, obtaining its approval by Congress and ratification by the states, and implementing it for the first time."⁹ Following his work on the amendment, Dean Feerick authored two influential (and beautifully written)

6. Nicholas Kulish, Ellen Barry & Michal Piotrowski, *Polish President Dies in Jet Crash at Russian Site*, N.Y. TIMES, Apr. 11, 2010, at A1. On April 10, 2010, a Polish plane carrying the President and a number of political and military leaders crashed on the way to a memorial service at Katyn Woods, in Russia. Everyone aboard the plane was killed. *Id.*

7. Nicholas Kulish, *Amid Uncertainty, Poland Shows Political Resistance*, N.Y. TIMES, Apr. 12, 2010, at A10.

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

9. Birch Bayh, *Foreword*, in FEERICK, *supra* note 1, at ix.

books on presidential succession, one of which was nominated for a Pulitzer Prize.¹⁰ Dean Feerick has made countless profound contributions to the public good during his lifetime of service to others, and it is impossible to rank them, but his contributions to the presidential succession issue are among his greatest contributions. His work on the Symposium was a capstone of all he has done, and he made the Symposium the great success that it was.

I am also deeply grateful to Senator Bayh, one of the great legislators of our time as well as the principal architect of the Twenty-Fifth Amendment. Senator Bayh was involved in planning the Symposium almost from its outset, and his participation was critical to the Symposium's success. Moreover, in addition to speaking at the Symposium with extraordinary eloquence and power, he literally sat on stage during the panels to offer insights, and all who sat in the audience felt as if they were eyewitnesses to history.

The issue of presidential succession is, of course, not a new one. It has been with us since the Founding, and the rules governing succession have evolved significantly in the past two centuries. The Constitution addresses the possibility of the president's removal, death, impairment, or resignation in Article II, Section 1, Clause 6.¹¹ In those instances, the presidential powers are to devolve to the Vice President "until the disability be removed, or a President shall be elected."¹² This clause also expressly gives to Congress the ability to establish a statutory line of succession in the event that both the President and Vice President are incapacitated in some way.¹³

Congress has used the constitutional power to establish a statutory line of succession a number of times. Congress first addressed the issue in 1792, just after the ratification of the Constitution, with the Presidential Succession Act of 1792.¹⁴ The next two iterations of the Presidential Succession Act were drafted following events that raised concern over the system at the time. In 1886, after the death of Vice President Thomas A. Hendricks, Congress passed a new Presidential Succession Act that altered the order of succession.¹⁵ Then, in 1947, in the wake of the death of President Franklin D. Roosevelt, Congress passed the Presidential Succession Act of 1947, which is still in force today.¹⁶

10. JOHN D. FEERICK, *FROM FAILING HANDS* (1965); *THE TWENTY-FIFTH AMENDMENT*, *supra* note 1 (nominated for a Pulitzer Prize).

11. U.S. CONST. art. II, § 1, cl. 6.

12. *Id.*

13. *Id.*

14. Presidential Succession Act of 1792, Pub. L. No. 80-199, 61 Stat. 380 (codified as amended at 3 U.S.C. § 19 (2006)) (designated the President Pro Tempore of the Senate to act as president if both President and Vice President were incapacitated).

15. Act of Jan. 19, 1886, ch. 4, 24 Stat. 1 (repealed 1947) (made the Cabinet next in line behind the Vice President; the order of succession was determined by the order the cabinet departments were created. Under this system, the Secretary of State was the first in line after the Vice President.).

16. Presidential Succession Act of 1947, 3 U.S.C. § 19.

Just as the statutory alterations to the system of presidential succession came after presidential health concerns, so too did the idea of a constitutional amendment to address the gaps in the presidential succession. During his presidency, President Dwight D. Eisenhower suffered from both a heart attack and a stroke, and had additional health concerns.¹⁷ These near crises made people aware of the gaps and ambiguities in the system of presidential succession, particularly regarding the question of presidential disability.¹⁸ However, after President Kennedy was elected, momentum for action on the issue was largely derailed because of his youth and apparent health. While Senators Estes Kefauver and Kenneth Keating strove to have a proposal passed by Congress, their effort halted after the death of Senator Kefauver.¹⁹

President Kennedy's assassination served as a great impetus to address the problems and concerns with the system of presidential succession.²⁰ Senator Bayh disclosed at the Symposium that he began drafting what became the Twenty-Fifth Amendment on a plane just two weeks after President Kennedy's assassination. The proposal was introduced as Senate Joint Resolution 139 in December of 1963. In 1965, the Twenty-Fifth Amendment was proposed by Congress to the states and it was ratified in February of 1967. As I have indicated, the success of the Amendment was due in large part to the hard work of two of our panelists at the Symposium, Senator Birch Bayh and John D. Feerick.

The Twenty-Fifth Amendment has been used successfully several times since its inception, and we as a Nation owe a deep debt of gratitude to Senator Bayh, Dean Feerick, and the others who made its adoption possible. The second section of the Amendment, which addresses Vice Presidential vacancies, was used when Vice President Spiro Agnew resigned and President Richard Nixon nominated Gerald Ford to take his place.²¹ Not long after Vice President Agnew's resignation, the first section, which clarifies that the Vice President becomes President upon the death or resignation of the President, was implemented when President Nixon resigned and Vice President Ford succeeded him as President.²² The Twenty-Fifth Amendment played a crucial role in allowing for a smooth transition and reassuring the American public during the tumult of Watergate. The third section, which allows the President to transfer the

17. Rose McDermott, *Extensions on the 25th Amendment: The Influence of Biological Factors on Assessments of Impairment*, 79 FORDHAM L. REV. 881 (2010).

18. FEERICK, *supra* note 1, at 55–56.

19. *Id.* at 56–57 (Senators Kefauver and Keating were sponsoring a proposed constitutional amendment, S.J. Res. 35. Senator Kefauver died suddenly in August of 1963).

20. In addition to the concerns raised by John F. Kennedy's assassination, there were also concerns about President Lyndon B. Johnson's health, heightened by the lack of a Vice President. At the time of Kennedy's death, there were rumors that Johnson, who had had heart trouble previously, had suffered a heart attack. FEERICK, *supra* note 1, at 23. However, there was no truth to the rumors; Johnson was in good health and quickly took the presidential oath and flew back to Washington. *Id.*

21. FEERICK, *supra* note 1, at 130–33.

22. *Id.* at 160. Ford subsequently used the Twenty-Fifth Amendment to nominate Nelson Rockefeller as Vice President. *Id.*

presidential powers to the Vice President during times of disability, has been used by two different Presidents: President Reagan and President George W. Bush. Both used the transfer of power to the Vice President during medical procedures in which they were required to go under anesthesia and thus would be unable to exercise their duties.²³

As the readers of this issue will see, while the Twenty-Fifth Amendment dramatically improved our system of presidential succession and while it has played a critical role in averting crises, there are still a number of critical gaps in the system of presidential succession, and the potential for disaster remains real. The panelists at the conference identified a series of flaws in the current system of presidential succession, and they presented thoughtful ways to improve the process.

In his keynote address at the Symposium, Fred Fielding encouraged those present to address the problems with our successions system, calling the work “tremendously important to the country.” Senator Bayh echoed this sentiment in his closing comments to the Symposium. He noted with approval the people interested in the topic and encouraged them to work with the American Bar Association and other institutions to address issues that have become clear. I join with these eminent voices. Scholars and those involved in the political process must continue the discussion in this Symposium about the current state of the system of presidential succession. We must all work to address the problems with the system. Failure to do so invites disaster.

23. See William F. Baker and Beth A. FitzPatrick, *Presidential Succession Scenarios in Popular Culture and History and The Need for Reform*, 79 FORDHAM L. REV. 835 (2010); Robert E. Gilbert, *Presidential Disability and the Twenty-Fifth Amendment: The Difficulties Posed by Psychological Illness*, 79 FORDHAM L. REV. 843 (2010).