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THE PASSAGE OF THE TWENTY-FIFTH AMENDMENT:
NUCLEAR ANXIETY AND PRESIDENTIAL CONTINUITY

By

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ABSTRACT OF THE DISSERTATION

The Passage of the Twenty-Fifth Amendment: Nuclear Anxiety and Presidential

Continuity

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This dissertation is the first revisionist history of the Twenty-Fifth Amendment, which established procedures for remedying a vice presidential vacancy and for addressing presidential inability. With the development of the atomic bomb came a concomitant increase in presidential power and a strong desire for stability at the top echelon of the United States government at all times. Traditional legal histories of the amendment argue that President John F. Kennedy's assassination was both the proximate and prime factor in the development of the amendment in 1963, but they do not consider the pervasive nuclear anxiety inherent in American politics and culture during the Cold War that acquired additional urgency in the shadow of the Cuban missile crisis. Oral interviews of the amendment's architect, Senator Birch Bayh, and other key actors – as well as close scrutiny of previously unexamined archives – offer new insight that nuclear anxiety influenced every stage of the legislative process. The role of anxiety, an amorphous concept, was complicated: while it pushed the process forward overall, it led to debate about specifics. With the amendment's ratification on February 10, 1967, the nuclear anxiety of the era

became ingrained in the U.S. Constitution itself, underscoring the fact that the Constitution is a living document reflecting the exigencies of the age as the framers intended. A study of the amendment during periods of heightened international tensions reveals that while nuclear anxiety contributed to the production of the amendment, it worked to suppress the invocation of the amendment in practice. With a goal of expanding the field of legal history by examining cultural and political factors, this dissertation argues that nuclear anxiety provides another important explanation for the incorporation of the amendment in the Constitution and identifies historical patterns useful to further reform the presidential succession system.

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My dad was my soccer coach when I was a girl and on Saturday mornings when we drove through the small mountains in Ringwood, New Jersey, and passed the reservoir to the field where the game would take place, he suggested I envision making a great play or scoring a goal. When I went through this dissertation exercise to become the next "Dr. Lubot" -- my dad earned his PhD in mathematics -- I envisioned writing my acknowledgments. I am elated to finally be articulating my gratitude to those who helped me reach my goal, even if I do not get a chance to mention each and every one by name. I am honored to have had the privilege to work with such an eminent committee: David Greenberg, Richard McCormick, Jackson Lears, Paul Clemens, and Ross Baker. Both David and Dick read numerous drafts and provided cogent comments and suggestions. David, in particular, encouraged me to write long and cut. He commented on chapters that stretched to seventy pages or more and his edits ensured the best possible final product.

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My PhD is in memory of my dad, Dr. Eric S. Lubot, and dedicated to my children Emerson, Harris, and Marisol Rose. I hope they will strive to meet their goals, whatever they choose them to be. Reach for the stars.

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Introduction: An Amendment at the Crossroads of Nuclear Power and Presidential Fallibility

While the light in the White House may flicker, it never goes out. – Jack Valenti.¹

On October 22, 1962, President John F. Kennedy imposed a naval quarantine of Cuba, just days after discovering Soviet nuclear missile sites on the island. Later that evening, the president declared in a nationally televised speech that the buildup on the island, just ninety miles off the coast of Florida, was “deliberate, provocative, and unjustified.” He insisted the United States must respond “if our courage and our commitments are ever again to be trusted by either friend or foe.” As a result, marines were sent to reinforce the U.S. naval base at Guantanamo, troops were moved south, 180 warships sent to patrol the Caribbean, and B-52 bombers loaded with nuclear missiles were airborne, awaiting the president’s command.²

Birch Bayh, a young U.S. Senate candidate from Terre Haute, Indiana, watched intently as he considered how the news would affect his campaign against the Republican incumbent Homer E. Capehart, who had held the seat since 1945. The election was only a few weeks away. President Kennedy had campaigned at Indiana’s Weir Cook Airport for Bayh just three days before he was briefed about the missiles in Cuba.³ Initially,

¹ Jack Valenti, “The Unforgettable Afternoon,” *The New York Times*, November 22, 1998, w17. As quoted in Steven M. Gillon, *The Kennedy Assassination: 24 Hours After Lyndon B. Johnson’s Pivotal First Day as President* (New York: Basic Books, 2009), p. 142.

² “Spinning Out of Control: The Cuban Missile Crisis,” *American Foreign Relations: A History Volume 2 Since 1865*, Seventh Edition, Thomas G. Paterson, and J. Garry Clifford, Shane J. Maddock, Deborah Kisatsky, and Kenneth J. Hagan (Boston, MA: Wadsworth, Cengage Learning, 2010), p. 341.

³ John F. Kennedy spent an hour at the airport campaigning for Democratic candidates on October 13, 1962. He was briefed about the presence of the missiles in Cuba on October 16. Dawn Mitchell, “Indiana Reaction to the Assassination of Pres. John F. Kennedy,” *IndyStar* (November 22, 2016). <http://www.indystar.com/story/news/history/retroindy/2016/11/22/john-kennedy-assassination-jfk/94271142/>. Accessed December 21, 2016.

prospects for Bayh and others on the Democratic ticket seemed bleak. In fact, as the crisis became unbearably tense and the nation seemed uncertain about its young leader's judgment, Capehart became so sure of his reelection that he returned to his farm and business interests.

On October 28, 1962, after a tense two weeks, the Soviets began dismantling their missiles from Cuba. The two superpowers had cut a deal: Kennedy agreed to quietly remove missiles from Turkey, though no quid pro quo would be acknowledged.⁴ Nuclear war had been avoided. In the eyes of the American public, Kennedy had succeeded in forcing Soviet leader Nikita Khrushchev to stand down. The nation, and the world, breathed a collective sigh of relief. Bayh sought to capitalize on the president's newfound popularity. His campaign took out full-page advertisements that read: "Stand behind the president, vote for Bayh."⁵

Two weeks later, Bayh defeated Capehart by 10,000 votes statewide (an average of only two votes per precinct) in what some saw as a referendum on Kennedy's handling of the crisis.⁶ Bayh's upset victory over a longtime incumbent apparently did not sink in right away. During one of the first roll call votes in the Senate in January, 1963, the clerk

⁴ Premier Khrushchev ultimately ordered Soviet vessels to turn around. The military and diplomatic resolution to the crisis is detailed in Chapter 2. For the most recent histories of the Cuban missile crisis that reveal the Cuban-for-Turkish missile deal see, for example: Sheldon M. Stern, *The Cuban Missile Crisis in American Memory: Myth Versus Reality* (Stanford, CA: Stanford University Press, 2012).

⁵ Bayh recalls spending about \$465,000 on the 1962 campaign. Birch Bayh, Interviews with Bob Blaemire, 2012. Though seats were lost in the House, Democrats still retained a majority of 259-176. They gained four seats in the Senate, one of which was Bayh's. This number was reduced to a gain of only three seats by the start of the next Congress when Democratic Senator Dennis Chavez of New Mexico, who was not up for reelection, died on November 18, and was replaced by Republican Senator Edwin L. Mechem.

⁶ See, for example, traditional histories of the Cuban missile crisis such as: Robert F. Kennedy, *Thirteen Days: A Memoir of the Cuban Missile Crisis* (New York: W.W. Norton & Co., 1969). Arthur M. Schlesinger, Jr., *A Thousand Days: John F. Kennedy in the White House* (Boston, MA: Houghton Mifflin Company, 1965).

called Capehart's name, although he was no longer a member.⁷ As a very junior member of a body that prized seniority, Bayh had little power to influence policy or debates in the Senate in 1963. But Bayh's fortune took a turn for the better when a senior member, Estes Kefauver of Tennessee, died of a heart attack. Bayh stepped into the chairmanship of the Judiciary Subcommittee on Constitutional Amendments left vacant by his colleague's death.

Beyond his party allegiances to the president, Kennedy impressed Bayh for two reasons: he was a young man who had prevented a nuclear crisis from erupting suddenly, but he was also suddenly lost when, on November 22, 1963, he was assassinated in Dallas, Texas. Bayh saw a problem: the prospect of a nuclear exchange without a clear plan of succession should the president die or become disabled during, or because of, the exchange. Less than two weeks after Kennedy's assassination, the freshman senator drafted language for a constitutional amendment that sought to address the need for presidential continuity in the nuclear age.

Because the president wielded the power of the bomb, he literally had the power of life and death, something that never could have been imagined by the framers of the Constitution. Asked years later if the Cuban missile crisis and nuclear anxiety – defined here as fear of nuclear war and its consequences – was in the back of his mind as he began work on what became the Twenty-Fifth Amendment, Bayh replied: "I think it was impossible for it not to be on the *forefront*, not the back of [my] mind." The Cuban

⁷ "Senator Birch Bayh Finds Victory over Capehart Is Quickly Undone," *The New York Times* (January 14, 1963), p. 4.

missile crisis “was very much a reason” for the amendment, the author said.⁸ Bayh perceived that the framers had not anticipated the effects of nuclear weaponry on the presidency and this coupled with the fallibility of any individual president led him to conceive of the necessity for a constitutional amendment to address succession and inability issues. During the 179 years from the ratification of the Constitution through the ratification of the Twenty-Fifth Amendment, eight presidential and sixteen vice presidential unplanned transitions took place without the Constitution being changed to deal with such challenges. At the time of Kennedy's death, no formal method to appoint a new vice president in the case of the president's death or removal from office existed. Questions of presidential succession and how a president might transfer power in the case of incapacitation were on the public's mind, and, in 1963, took on additional urgency in the shadow of the Cuban missile crisis.⁹ The problem of succession also raised questions of who should succeed to the vice presidency if the vice president became the president, as well as to the precise definition of “inability.”

The Twenty-Fifth Amendment, which was ultimately ratified on February 10, 1967, in the wake of the Kennedy assassination and a period of great anxiety about nuclear weapons, addressed many of these questions. Section 1 specifically states that the vice president will succeed to the presidency, should a presidential vacancy exist. If no vice president exists at the time, the speaker of the House, followed by the Senate

⁸ Birch Bayh, Interview with Author, November 11, 2014. This definition of nuclear anxiety can be found in: Tom W. Smith, "A Report: Nuclear Anxiety," *The Public Opinion Quarterly* Volume 52, Number 4 (1988), pp. 557-75. <http://www.jstor.org.proxy.libraries.rutgers.edu/stable/2749262>.

⁹ John D. Feerick, *The Twenty-Fifth Amendment: Its Complete History and Applications*. Fordham University Press (New York: 1992), pp. 10-11. As quoted in *The Presidency: Preserving Our Institutions: The Second Report of the Continuity of Government Commission: Presidential Succession* (Washington, DC: Continuity of Government Commission, June 2009), p. 35. Both President Dwight D. Eisenhower and future President Lyndon B. Johnson suffered heart attacks in 1955.

president pro tempore, and then Cabinet officers in order of creation of the cabinet office, will succeed to the presidency. Section 2 says that the president will nominate a successor if a vacancy in the vice presidency occurs. Section 3 instructs the president to transmit a written declaration to the president pro tempore of the Senate and the speaker of the House when he is unable to discharge his duties. The vice president then will assume presidential responsibilities as “Acting President” temporarily. This section allows the president to determine when he is able to return to his duties. Section 4 states that whenever the vice president and a majority of the Cabinet decide the president is incapacitated, the vice president will assume presidential powers until the president submits a communication to the contrary. It details the procedures in the event that the vice president and the majority of the Cabinet disagree with the president’s declaration that he is again able to resume the duties of the office.¹⁰ The Twenty-Fifth Amendment was an attempt to avoid the development of a confused process in which decisions were left unmade or made by a person whose qualifications were not necessarily agreed upon.

Bayh’s insight as a member of a political body that recognized the need for presidential continuity due to this new method of warfare was echoed in American culture more generally.¹¹ Linking human fallibility to the era of nuclear destruction, *The New York Times* columnist James Reston asked on December 2, 1963:

¹⁰ The exact text of the Twenty-Fifth Amendment appears in Chapter 3.

¹¹ Much of the body of literature on anxiety around the bomb can be found outside the discipline of history. See, for example: Colin S. Gray, “Nuclear Strategy: The Case for a Theory of Victory,” in *Strategy and Nuclear Deterrence*, edited by Steven E. Miller (Princeton, NJ: Princeton University Press, 1984), pp. 23-56. <http://www.jstor.org.proxy.libraries.rutgers.edu/stable/j.ctt7zv5x.6>. Patricia A Gwartney-Gibbs and Denise H. Lach, “Sex Differences in Attitudes toward Nuclear War,” *Journal of Peace Research* 28, Number 2 (1991), pp. 161-74. <http://www.jstor.org.proxy.libraries.rutgers.edu/stable/424386>. Tom W. Smith, “A Report: Nuclear Anxiety,” *The Public Opinion Quarterly* Volume 52, Number 4 (1988), pp. 557-75. <http://www.jstor.org.proxy.libraries.rutgers.edu/stable/2749262>. Robert T. Schatz and Susan T. Fiske. “International Reactions to the Threat of Nuclear War: The Rise and Fall of Concern in the Eighties.”

Has the Congress prepared the presidency adequately for the possibilities of a violent age? Is the rule of presidential succession satisfactory for these days of human madness and scientific destruction? Or do not the men in line for the presidency – all of them, not just one or two – have to be selected and instructed much more carefully than in the past?¹²

In film, fiction, and the popular imagination, it had become common to envision various crisis scenarios of this sort. The movie *Fail-Safe*, timed for release just prior to the 1964 presidential election, depicted a U.S. president and Soviet premier collaborating to prevent a nuclear war after a mistake due to electrical malfunction sends American planes to drop nuclear missiles on Moscow. Also released in 1964, a black comedy by Stanley Kubrick called *Dr. Strangelove or How I Stopped Worrying and Learned to Love the Bomb*, is the quintessential film about a U.S. president who volunteers to launch a nuclear strike on New York after a mad U.S. general launches one on Moscow, in order to avoid nuclear Armageddon. The film ends abruptly with nuclear explosions. In the world of science fiction, author Isaac Asimov noted that writers could no longer submit manuscripts with nuclear themes to publishers because the market became so saturated.¹³ Authors, such as Tim O'Brien (*The Things They Carried*), a member of the 23rd Infantry Division in Vietnam, wrote about their personal experiences with not only war but nuclear anxiety.¹⁴

Wars had been fought in the past resulting in great numbers of casualties, but the potential for mankind to come to an end because of the actions of just one individual, the president, was now, for the first time, a very real possibility. Ironically, man's most

Political Psychology 13, no. 1 (1992): 1-29. Robert W. Tucker, "The Nuclear Debate," *Foreign Affairs* Volume 63, Number 1 (1984), pp. 1-32. See, also: Chapter 2.

¹² Birch Bayh, *One Heartbeat Away: Presidential Inability and Succession* (New York: The Bobbs-Merrill Company, Inc., 1968), p. 10.

¹³ Allan M. Winkler, *Life Under a Cloud: American Anxiety About the Atom* (New York: Oxford University Press, 1993), p. 7.

¹⁴ Tim O'Brien, *The Things They Carried* (New York: Houghton Mifflin, 1990).

advanced scientific development could send the world back to the stone age. The last presidential inability, that of Woodrow Wilson (who had suffered a stroke) occurred prior to the nuclear age and just after the first world war. Article II of the Constitution gives the president the power to conduct foreign policy. But even though foreign policy decisions came to a standstill during Wilson's inability, the war had occurred half a world away and many Americans believed, for geopolitical reasons, that the U.S. was impregnable. In an age of nuclear missiles, however, the president might be forced to decide the fate of millions in a matter of mere minutes. This time element made passage of the amendment urgent. And even if total annihilation did not occur, a nuclear attack could suddenly destabilize the American government; structural and procedural safeguards were needed to guard against that possibility.

Bayh's eagerness to develop a constitutional succession plan reflected the widespread belief that the American public and its government could no longer tolerate a potential absence at the helm during this era of nuclear apprehension. Nor could it afford a suddenly inabled, or insane president with his finger on the nuclear trigger as many of the cultural representations depicted. When Bayh telephoned his wife to confirm the news of Kennedy's assassination, she told him of the "frightening early reports surrounding the assassination.... There had been rumors of evidence that all top government leaders were in danger."¹⁵ Many Cabinet members were on a plane over the Pacific when they heard the news that the president had been shot.¹⁶ And rumors swirled

¹⁵ Birch Bayh, *One Heartbeat Away*, p. 4.

¹⁶ The plane's passenger list included: Secretary of State Dean Rusk, Treasury Secretary C. Douglas Dillon, Interior Secretary Stewart Udall, Agriculture Secretary Orville Freeman, Labor Secretary Willard Wirtz, as well as Treasury Undersecretary Henry Fowler and Council of Economic Advisors Chairman Walter Heller, other officials, and their spouses. They were travelling to an annual meeting of U.S. and Japanese Cabinet members. See Secretary Willard Wirtz's memoir: Willard Wirtz, *In the Review Mirror* (Beloit, WI: Beloit College Press, 2008).

about some larger conspiracy against the American government; in part because the Central Intelligence Agency failed to locate Soviet leader Nikita Khrushchev for more than 24 hours after the assassination.¹⁷ Hanging up the phone, Bayh realized that “at this moment, the United States had no vice president, and to make matters worse there was absolutely *no way* [italics Bayh’s] to fill the vacancy in that office.”¹⁸ In early December 1963, Bayh assembled his team, including members of the American Bar Association, and got to work on a solution to the succession and inability issues plaguing the nation.

It is clear in *One Heartbeat Away: Presidential Inability and Succession*, Bayh’s story of the amendment’s ratification, that the proximate catalyst for the draft amendment he introduced on December 12, 1963 was the Kennedy assassination. But consideration of global developments around the nuclear bomb provides a fuller account of why it was conceived at that particular time and in the specific form it would take. The bill’s journey through Congress was long and tortuous, and those who testified in favor in subcommittee hearings or expressed their support on the floor of the House and Senate, like the author of the amendment himself, often invoked the specter of nuclear war. Some senators wanted additional language written into the amendment to prepare the presidency for nuclear attack, while others wanted the amendment to be as plain as possible.¹⁹ Throughout the course of passage, congressman employed phrases such as

¹⁷ Richelson, Jeffrey T. “CIA Reactions to JFK Assassination Included Fear of Possible Soviet Strike against U.S.” *Studies in Intelligence: New Articles from the CIA’s In-house Journal*, National Security Archive No. 493, (Updated November 20, 2014), p. 3.

<http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB493/>

¹⁸ Birch Bayh, *One Heartbeat Away*, p. 6

¹⁹ Senator Robert F. Kennedy (D-NY), the slain president’s brother, wanted more specifics written into the amendment, while another powerful senator, Everett Dirksen (R-IL), argued for a much more simple version that would have simple enabled Congress to act in cases of presidential succession and inability.

“the possibility of cataclysm”²⁰ and warned that the president’s finger rested on the nuclear button.²¹ President Johnson himself urged ratification of the succession and inability amendment to avert “the potential for paralysis”²² of the executive branch and promised the passage of the amendment would “allay the future anxiety”²³ of not just Americans, but people around the world. When the amendment reached the states for ratification, state legislators asked “Is there any reason why the succession law could not be amended to cover an atomic holocaust?” and “How would the government get started again?”²⁴ Whether these lawmakers were for or against the addition of specific language in the amendment that would prepare the country for a sudden presidential transition during a nuclear war, almost every last one was in agreement that a permanent solution was needed immediately to solve the succession and inability issue. Bayh was correct in asserting that this was *the* time to pass such legislation.

Formulation of the amendment and its passage reflected the complex anxieties of the times about shifts in warfare, the role of soldiers and legislators, and especially the role of the president. Senator Sam Ervin of North Carolina stated the Twenty-Fifth Amendment was the most complicated piece of legislation Congress had attempted to

²⁰ “Statement of Senator James B. Pearson, 31-160 018,” NA, CJ, SCA, Box 8, Folder “88th Congress, PI-Hearings- Report- Mock-Up, pp. 1-22, 1964.”

²¹ Hearings Before the Committee on the Judiciary Eighty-Ninth Congress, First Session on Miscellaneous Proposals Relating to Presidential Inability. February 9, 10, 16, and 17, 1965, p. 2.
[https://babel.hathitrust.org/cgi/pt?id=uc1.\\$b654933;view=1up;seq=5](https://babel.hathitrust.org/cgi/pt?id=uc1.$b654933;view=1up;seq=5). Accessed May 26, 2017.

²² “For Release on Delivery to the Senate,” Box 3. Office Files of Bill Moyers: Special Message on Office of the President. LBJL.

²³ *Congressional Record*, Vol. 111, Part II. 89th Congress, 1st Session, p. 1460.
<http://heinonline.org.proxy.libraries.rutgers.edu/HOL/Page?handle=hein.congrec/cr1110002&id=1&size=2&collection=congrec&index=congrec/creu>. Accessed May 22, 2017.

²⁴ These quotes are attributed to Senator John Birmingham of Colorado, whom the author interviewed on February 2, 2015. See Chapter 3. Is there any reason: “Letter to Mr. H. Michael Spence from John R. Birmingham, August 26, 1965,” NA, CJ, SCA, Box 6, Folder, “PI ABA Junior Bar Conference 3 of 4, Dale Tooley File 1965 Jun-Dec.” How will the government: “Letter to American Bar Association from John R. Birmingham, August 10, 1965,” NA, CJ, SCA, Box 6, Folder, “PI ABA Junior Bar Conference 3 of 4, Dale Tooley File 1965 Jun-Dec.”

pass in his years in office to that point. (He was elected in 1954.) “We had more cooks with more zeal concerned with preparing this ‘broth’ than any piece of proposed legislation I have ever seen in the time I have been in the Senate,” he said.²⁵

Constitutional law expert and historian David Kyvig, in his book *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995*, wrote it was “the longest and most technical of all the amendments.”²⁶

It is commonly argued, as Gary Wills has in *Bomb Power: The Modern Presidency and The National Security State*, that the development of nuclear weapons “fostered an anxiety of continuing crisis” that has “altered [America’s] subsequent history down to its deepest constitutional roots.”²⁷ Yet despite the importance of the Twenty-Fifth Amendment and its emergence from a Cold War culture fraught with anxiety over nuclear war, the history of the amendment’s ratification has not been examined through this lens. Applying this filter allows for a deeper understanding of the U.S. Constitution as a living document reflecting the exigencies of the age as the framers originally intended. Conversely, no historian has thoroughly utilized a constitutional amendment to shed light on the Cold War. This dissertation strives to provide a new way

²⁵ Birch Bayh, *One Heartbeat Away: Presidential Inability and Succession*, p. 330.

²⁶ David E. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995* (Lawrence, Kansas: University Press of Kansas, 1996), p. 362.

²⁷ Wills views the advent of nuclear weapons, and the president’s power to order a nuclear attack, as crucial to the emergence of the National Security State and the ensuing burgeoning of executive power. The secret Manhattan Project he calls “the seed of all the growing powers that followed.” Ever since, he contends, the bomb has driven the steady expansion of presidential power. Certainly, if a president has the Zeus-like capacity to destroy entire nations and snuff out millions of lives instantaneously, all other powers are trivialized in comparison. When the 1946 Atomic Energy Act granted this cosmic authority solely to the president, Wills writes, “the nature of the presidency was irrevocably altered,” leading to a vast expansion of executive power in all directions, including a sprawling security apparatus to protect nuclear secrets. Gary Wills, *Bomb Power: The Modern Presidency and the National Security State* (New York: The Penguin Press, 2010), p. 1.

of looking at the Twenty-Fifth Amendment, the Constitution, and the political and cultural mood of the era.

Following this introduction, the argument unfolds over four chapters and a conclusion. *Chapter 1: Time Quickens: The History of Sudden Succession and Succession Solutions Prior to the Twenty-Fifth Amendment* provides a brief discussion of the framers' view of succession and inability issues, as well as the historiography of both statutory laws and constitutional amendments dealing with those issues. The first chapter also outlines the history of sudden presidential transitions and incapacities, and the solutions offered in their wake. When focusing on the Franklin D. Roosevelt/Harry S. Truman transition because this transition set the stage of anxiety at the beginning of the nuclear age, what becomes clear is that with the destructive power of the bomb came a concomitant increase in presidential power and interest in the line of succession. Thus, Truman and Eisenhower worked more diligently toward succession and inability solutions than their predecessors to insure that the line of succession was protected. The 1947 Presidential Succession Act and the Dwight D. Eisenhower/Richard M. Nixon letter agreement, key precursors to the Twenty-Fifth Amendment, were the results of their efforts.

The political and cultural mood of nuclear anxiety in the period between the first uses of nuclear weapons in 1945, through the amendment's ratification in 1967, is the topic of *Chapter 2: The Nuclear Paradox: Power, Fallibility, and the Twenty-Fifth Amendment*. The omnipresent and growing fear of nuclear Armageddon reached a peak in the early 1960s in a series of confrontations between the two superpowers. Fear of nuclear attack contributed to a strong desire for stability at the top echelon of government

at all times, leading to Continuity of Government plans. The anxieties about continuity of government were a symptom of the paradox of presidential power being linked to an era of nuclear power. Eisenhower's illnesses and John F. Kennedy's sudden death pointed to the contradiction that the president, who wielded the almost super-human power to bring an end to mankind, was also human and, therefore, mortal. In discussing how representations of nuclear anxiety run through, and often intersect in, pop culture and politics, this chapter provides a fuller account of why the amendment developed at this point in time.

Chapter 3: Ingraining Anxiety: The Passage of the Twenty-Fifth Amendment in the Nuclear Age analyzes the Twenty-Fifth Amendment's ratification process through the lens of nuclear anxiety. Traditional histories of the amendment argue that the assassination was both the proximate and prime factor in the development of the amendment, but they do not take into account nuclear anxiety. Witnesses' testimony and congressmen's debate during congressional hearings, backroom conversations and negotiations, and state legislators' concerns suggest nuclear anxiety played a role in every stage of the process from its drafting, through debate and passage in both houses, and ratification in the states. The role of anxiety, an amorphous concept, however, was complicated: while nuclear anxiety pushed the process forward overall, it led to debate in both houses of Congress over language, amount of detail, and time limits. For a richer understanding of the reasons behind the Twenty-Fifth Amendment's ratification, this chapter argues that nuclear anxiety must be taken into account.

Chapter 4: "A Dr. Strangelove Situation": The Twenty-Fifth Amendment in Practice builds on the implications of the amendment being ingrained in the Constitution.

After February 27, 1967 when the amendment became part of the Constitution, a new chapter in its history began. The Twenty-Fifth Amendment was invoked just six times between 1967 and 2017. During the first three invocations, all involving Sections 1 and 2 of the amendment, successful unplanned transitions occurred. But these invocations revealed gaps and vagaries in the amendment that complicate the analysis. Any history that traces the times the amendment was invoked also has to consider the times it might have been invoked, but was not. Sections 3 of the amendment, invoked only three times during the fifty years since the amendment was ratified despite numerous presidential inabilities, was designed to leave the decision to both surrender and retake powers in the president's own hands. Examination of the amendment in periods of heightened nuclear anxiety during the presidential administrations of Richard Nixon, Ronald Reagan, and George W. Bush reveals that the amendment did not work as the framers' intended because the president, in trying to present an image of strength and good health for political reasons, has not given up power willingly. Section 4 of the amendment has never been invoked due to these same political concerns. Thus, while nuclear anxiety worked to produce the amendment, it worked to suppress the invocation of the amendment in practice. Even presidents have taken it upon themselves to find solutions to the succession and inability issue, sometimes stretching the flexible boundaries of the Constitution itself.

Even more of a concern today, the nuclear anxiety of the age was a significant factor in the Twenty-Fifth Amendment's ratification. In the words of the amendment's author himself: "We needed a plan," said Bayh. "We had to make sure there was always

somebody who had his finger on the button.”²⁸ The archives and oral histories that have not been previously cited provide insight into the thought processes of lawmakers as they were caught up in historical events within the pervasive mood of nuclear anxiety. *The Passage of the Twenty-Fifth Amendment: Nuclear Anxiety and Presidential Continuity* provides a history of the Twenty-Fifth Amendment’s creation, language, ratification process, and aftereffects through the lens of Cold War nuclear anxiety, a presidential assassination transition, and the political realities of a democracy in crisis.

²⁸ Birch Bayh, Interview with Author, November 11, 2014.

Chapter 1: Time Quickens: The History of Sudden Successions and Succession Solutions Prior to the Twenty-Fifth Amendment

The drafters of the U.S. Constitution sought to envision all kinds of eventualities that might confront their new nation, but even among as gifted a group of statesmen as gathered in Philadelphia in 1787, certain potential problems went unaddressed. Prior to the ratification of the Twenty-Fifth Amendment, the Constitution did not provide for a line of presidential succession past the vice president, did not offer direction on cases of presidential inability, and left numerous related questions unanswered. To allow for a better understanding of why it took until the nuclear age to develop and ratify an amendment giving more clarity to these issues, this chapter examines the history of previous sudden succession transitions and solutions. Eight presidents have died while in office: William Henry Harrison, Zachary Taylor, Abraham Lincoln, James Garfield, William McKinley, Warren Harding, Franklin Roosevelt, and John Kennedy. Additionally, significant presidential incapacities occurred during the terms of Garfield, Grover Cleveland, Woodrow Wilson and Dwight Eisenhower. In the cases of presidential deaths, succession was clear – in accordance with Article II, Section I of the Constitution, the vice president became president. The vice presidency remained vacant because no constitutional mechanism to nominate a new vice president existed. In the case of presidents who were incapacitated for medical reasons, no provisions were in place allowing for the temporary transfer of power to the vice president. The Constitution was silent on these issues.

Prior to Kennedy's assassination, discussion of issues regarding presidential

succession and incapacity reveal an almost naïve mindset about their import. The Constitution's silence on succession and inability remained unaddressed, despite the relative frequency of presidential deaths in the 19th Century – four presidents died in office between 1841 and 1881, two by assassination – and the illnesses that left Cleveland and Wilson incapacitated. This was a mindset the nation could no longer afford after it entered the nuclear age.

The founders certainly were aware that presidents could die in office, resign, or prove to be less-than-upstanding citizens. For that reason, they included the succession mechanism in Section II of the Constitution designating the vice president as a successor should the president die, resign, or prove to be unable “to discharge the powers and duties” of the presidency. The vice president would also succeed to the presidency if the president were removed from office, and it gave Congress the power to pass a law to provide for a succession should both the presidency and vice presidency become vacant. That “officer shall then act as president ... until the disability be removed, or a president shall be elected.”¹

Why were the succession and inability issues not settled more conclusively when the Constitution was adopted? One logical conclusion is that the founders did not consider the issue to be critical to a system in which Congress, not the executive, was thought to be paramount. The presidency, after all, was relegated to Article II of the Constitution, after the section dealing with the houses of Congress. Article I promised that all members of the House of Representatives would be elected directly by the people. The notion that the president's successor should be democratically chosen would create

¹ The Constitution of the United States. Articles I and II.

tension when deciding whether or not the Cabinet or Congress was next in line for succession during debate of every major change in succession law from that point forward.²

One of the few references to succession during the Constitutional Convention was made by Alexander Hamilton. In the so-called British Plan that he proposed, Hamilton suggested that the chief executive be replaced by the president of the Senate until a successor was appointed: “On the death, resignation or removal of the governor his authorities to be exercised by the president of the Senate till a successor be appointed.”³ Rather than a fixed line of succession, the president of the Senate would take over the governor’s duties until an election replaced the chief executive or the Senate appointed a new one. This was not what Article II ultimately dictated. Hamilton’s idea that the executive be appointed for life (just as the British monarch rules for life) during “good behavior” was not incorporated into the Constitution either.

Other delegates had ideas of their own about the nature of the presidency and how succession should be handled. Two of these plans were proposed on the same day, May 29, 1787: the Virginia Plan, which the state’s governor, Edmund Randolph, put forward; and the Pinckney Plan, which was the work of South Carolina Governor Charles Pinckney. Under both plans, the legislative branch would be given the responsibility of appointing a new president.

² Akhil Reed Amar, *America’s Constitution: A Biography* (New York: Random House, 2005), pp. 15, 151, 447-53.

³ While the plan was well-received, it was not seriously considered because it was too similar to the British form of government. “The British Plan,” *The US Constitution*, http://www.usconstitution.net/plan_brit.html#f5.

The Constitution, while not focused on the chief executive, says even less about the vice president. The vice president was simply the person who obtained the next-greatest number of votes in the Electoral College and, as the president of the United States Senate, cast tie-breaking votes:⁴ It was after the tie (which took thirty-six votes to break) in the Electoral College between Thomas Jefferson and Aaron Burr in 1800 that the Twelfth Amendment was ratified, not just as a means to eliminate future ties but also to facilitate the election of a president and vice president of the same political party (an important point of consideration as the Twenty-Fifth was debated). Ratified in 1804, the Twelfth Amendment provided that in the case of death or inability the vice president shall act as president: “And if the House of Representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice president shall act as president, as in the case of the death or other constitutional disability of the president.”⁵

All matters related to the president and succession not explicitly written under Article II were left for Congress to determine. Congress began debating what officers should fill in presidential and vice presidential vacancies on December 21, 1790.⁶ On

⁴ Article I, Section 3 provided that the vice president would preside over the Senate, but allowed senators to elect a temporary chair in his absence. Akhil Reed Amar, *America's Constitution*, p. 170 fn. “Pro tempore” is Latin for “of the time.”

⁵ “From John Adams in 1789 to Richard Nixon in the 1950s, presiding over the Senate was the chief function of vice presidents, who had an office in the Capitol, received their staff support and office expenses through the legislative appropriations, and rarely were invited to participate in cabinet meetings or other executive activities.” “President Pro Tempore,” *Senate Historical Office* (United State Senate), http://www.senate.gov/artandhistory/history/common/briefing/President_Pro_Tempore.htm.

⁶ “Vacancy in the Presidency,” *Annals of Congress*, House of Representatives, 1st Congress, 3rd Session (Library of Congress), p. 1911-15. For a literature on the history of succession see, for example: Philip Abbott, *Accidental Presidents: Death, Assassination, Resignation, and Democratic Succession* (New York: Palgrave MacMillan, 2008). Wilfred E. Binkley, *The Man in the White House: His Powers and Duties* (Baltimore, MD: The Johns Hopkins Press, 1958), pp. 262-287. Edward S. Corwin, *The President: Office and Powers, 1787-1984*, 5th edition (New York: New York University Press, 1984). Richard H. Hansen, *The Year We Had No President* (Lincoln, NE: University of Nebraska Press, 1962). Laurin L. Henry, *Presidential Transitions* (Washington, D.C.: The Brookings Institution, 1960). Rose McDermott,

January 13, 1791, for example, the chief justice of the Supreme Court, president pro tem of the Senate, and secretary of State were all considered as potential successors to the presidency. In the end, the First Congress did not reach any conclusions. The issue was again considered in the Second Congress in November 1791.⁷ Because the Senate met in closed sessions until 1794, little is known about the chamber's debates, but the bill called for the president and vice president to be succeeded by the president pro tempore of the Senate and the speaker of the House. Records of the House debate, however, show that the Congress considered different officers to fill presidential and vice presidential vacancies, including the senior associate justice of the Supreme Court and the secretary of State. The secretary of State was chosen. However, the Senate rejected the House's version on February 20, 1792, and reinserted the two congressional officers. The Senate seems to have rejected the secretary of State for political reasons: Federalists dominated the Senate, and they did not want to see secretary of State Thomas Jefferson, leader of the rival Democratic-Republican faction, in the line of succession.⁸ The bill became law on March 1, 1792. This law remained unchanged for ninety-four years.⁹

Presidential Leadership, Illness, and Decision-Making (New York: Cambridge University Press, 2008). Ruth Silva, *Presidential Succession* (New York: Greenwood Press, 1968).

⁷ This bill entitled "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 the case of vacancies in the offices both of president and vice president," passed the Senate and was sent to the House. "Proceedings and Debates of the House of Representatives of the United States," *Annals of Congress*, House of Representatives, 2nd Congress, 1st Session (Library of Congress). <http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=003/llac003.db&recNum=68>. Accessed January 11, 2017.

⁸ Political factions hardened as Hamilton and Jefferson, both members of President Washington's Cabinet, disagreed over issues such as a national bank. Federalists (Hamilton) split from Democratic-Republicans (Jefferson) in the 1790s. After the failed Hartford Convention, the conclusion of the War of 1812 brought with it the end of the Federalist Party. At that point, the Federalists were no longer a national force and, throwing their weight behind policies previously supported by the Federalists (such as federal support for national infrastructure), the Democratic-Republicans began "out-Federalizing" the Federalists. The House voted on the Senate's changes the next day, approving the congressional line of succession by a vote of 31-24.

⁹ The law changed after the death of James A. Garfield made Chester A. Arthur president in September, 1881, as described in this chapter.

For the first fifty-two years, America's presidents remained healthy enough to discharge the duties of the office, but questions loomed. In *The Twenty-Fifth Amendment: Its Complete History and Earliest Applications*, John D. Feerick, who as chair of the Junior Bar Conference of the American Bar Association provided much of the legal and historical context for the amendment, presented the early efforts to solve the inability question. Feerick's work enables the reader to glean a sense of the complexity of the questions lawmakers were grappling with: If the vice president succeeded to the presidency, was he president *de jure* or *de facto*? Did the president or Congress decide who was to succeed the president and in what time frame? Who decided when the president was incapacitated, and, if relevant, when that incapacitation had ended? If the vice president succeeded to the presidency and a new vice president was chosen, if the president recovered, would the original vice president lose the vice presidency, the Senate presidency (and tie-breaking vote in the Senate), and the presidency in essentially one fell swoop?¹⁰

The first sudden presidential succession took place in 1841, when William Henry Harrison became ill with pneumonia after delivering an overly long inaugural address on an inclement March day in Washington. He died a month later, and John Tyler became the first vice president to succeed to the presidency. But opposition leaders in Congress, including John Quincy Adams, initially did not accept Tyler as a legitimate president. Adams, a congressman who had the unique distinction of having been president, argued that Tyler should hold the title of "Acting President" or should remain vice president in name while discharging the duties of the office of the president. Although the Cabinet,

¹⁰ John D. Feerick, *The Twenty-Fifth Amendment: Its Complete History and Earliest Applications* (New York: Fordham University Press, 1976).

followed by the Senate and House, approved Tyler's accession, Tyler's enemies sneeringly referred to him as "His Accidency." In a special session, the Twenty-Seventh Congress passed the Wise Resolution (named after Representative Henry A. Wise of Virginia who introduced the legislation). It confirmed that Tyler would not only be performing the duties of the president, but would be called "President," and would receive the president's salary. The concept that the vice president would fulfill the role as president in its entirety and not merely as "Acting President" would be called the "Tyler Precedent." Without issue, the Tyler precedent was followed twice in the next fifty years, first by Vice President Millard Fillmore when President Zachary Taylor died on July 9, 1850, having contracted a fatal intestinal disorder from eating bad cherries at a July 4 ceremony, and second by Andrew Johnson following Abraham Lincoln's assassination on April 15, 1865.

The first of these two sudden successions took place relatively swiftly and smoothly. Vice President Millard Fillmore was aware of Taylor's illness and immediately upon Taylor's death the Cabinet began addressing Fillmore as "The President of the United States."¹¹ He was sworn in at noon on July 10, 1850. The members of the Cabinet then tendered their resignations, which the new president accepted. He replaced them with individuals he felt would act as salves against the growing sentiment of sectionalism. The sectionalism reached a breaking point after Lincoln's election during the secessionist winter of 1860-1861 (when the states of South Carolina, Mississippi, Florida, Georgia, Alabama, Louisiana and Texas seceded from the Union).

¹¹ John D. Feerick, *From Failing Hands: The Story of Presidential Succession* (New York: Fordham University Press, 1965), p. 162.

As Lincoln's name did not appear on the ballot in ten southern states, Confederates made the argument that he did not represent all Americans; however, Lincoln's murder remains pertinent to the succession question even today. This is primarily because it was part of a larger plot to kill others in the line of succession. A group of four Confederate sympathizers intended not only to kill the president at Ford's Theatre, but also to murder Vice President Andrew Johnson at Kirkwood House and Secretary of State William Henry Seward at his home on April 14, 1865. Seward, who was already bedridden due to an accident, was stabbed several times but recovered. (Initial reports suggested he, too, had died and a conspiracy to assassinate many top government officials was suspected. In his papers, Treasury Secretary Salmon P. Chase stated that callers to his home told him that Seward had been assassinated and additional security had been placed around "all the prominent officials under the apprehension that the plot had a wide range."¹²) George Atzerodt, the man charged with the task of murdering Johnson, changed his mind when seated at the bar of the Kirkwood House and fled to Maryland. Johnson remained unharmed.¹³

Less than three hours after Lincoln died on April 15, 1865, Johnson was sworn in as the seventeenth president of the United States. But during his presidency he warred with Republicans in Congress (he was a Democrat), and they impeached him in 1868. The Senate ultimately acquitted Johnson by just one vote, with senators very much aware

¹² Salmon P. Chase and John Niven, "April 14, 1865," *The Salmon P. Chase Papers*. Vol. 1 (Kent, Ohio: Kent State University Press, 1993), Samuel Chase, p. 528-29.

¹³ For an example of initial reports of Seward's death, see *The Alabama Beacon*. "Glorious News. Lincoln and Seward Assassinated!" *The Alabama Beacon* (April 21, 1865). <http://rememberinglincoln.fords.org/node/192>. Accessed September 15, 2015. Chase quote: Doris Kearns Goodwin, *Team of Rivals: The Political Genius of Abraham Lincoln* (New York: Simon & Schuster, 2005), p.738. Ford's Theatre holds a number of primary sources related to Lincoln's assassination and its aftermath. See "Lincoln's Assassination," <https://www.fords.org/lincolns-assassination/>.

that succeeding him would have been a political opponent, Radical Republican Senate president pro tempore Benjamin J. Wade, who had voted to convict Johnson of high crimes and misdemeanors. After this acquittal, Johnson noted the obvious problems with “placing the president pro tempore in the line of succession because he would therefore be ‘interested in producing a vacancy.’”¹⁴

These events did prompt some reconsideration of the line of succession. The 1792 Act dictated that members of Congress were next in line of succession after the vice president, but after Lincoln’s assassination and Johnson’s impeachment, Johnson himself called for changing the line of succession to Cabinet members to prevent Congress from using its impeachment powers to position one of its own members in the presidency. Congress chose not to act on the matter and the issue of succession blended into the background while the nation focused on Reconstruction efforts to heal the wounds inflicted by the Civil War.

Twelve years later, however, the nation faced another crisis of succession brought about by an assassin’s bullet – this time the shooting of James Garfield on July 2, 1881 as he walked to a rail station in Washington D.C. in the company, among others, of his secretary of war, Robert Todd Lincoln, the murdered president’s son. The attack on Garfield, who had been sworn in only four months earlier, not only raised the issue of succession, but also the issue of incapacitation, as Garfield clung to life for eighty days following the shooting. A wave of shock and horror passed over the American people, most of whom had fresh memories of Lincoln’s murder. “The astonishment following the

¹⁴ “President Pro Tempore,” *Senate Historical Office* (United State Senate), http://www.senate.gov/artandhistory/history/common/briefing/President_Pro_Tempore.htm.

startling announcement deepened into disbelief,” said the *New York Times*, “and the people seemed paralyzed with the horror of the moment.”¹⁵

Vice President Chester A. Arthur’s hesitancy to assume the presidency during the months when Garfield lay dying in Long Branch, N.J., (where, it was hoped, the sea air would help him recover) was freighted with political considerations. The Republican Party was fractured. Arthur was a member of the Party’s Stalwart wing that opposed President Hayes’ Reconstruction policy. (The Stalwarts named their opponents within the Party the “Half Breeds,” suggesting they were not fully Republican.¹⁶) Arthur’s nomination as vice president was meant as a peace offering from the Half Breeds who supported Garfield.

The man who shot Garfield, Charles J. Guiteau, was apprehended carrying a letter addressed to the White House in his pocket. The letter read “I did it and will go to jail for it. I am a Stalwart, and Arthur will be president.”¹⁷ Although no one seriously believed Arthur was part of the plot, the Stalwart wing of the party stood to gain from Garfield’s assassination. Garfield’s only official act during his eighty days of agonized incapacitation was the signing of an extradition paper. His doctors prevented him from performing any kind of work. Secretary of State James A. Blaine, a Half Breed like Garfield, prepared a paper on presidential disability in August 1881, arguing that since no provisions for succession existed, Arthur should assume the presidency. Arthur, fearful of being labeled a usurper, made it clear that he would do no such thing. When Garfield’s condition deteriorated at the end of August, *The New York Times* reported that he had no

¹⁵ “A Great Nation in Grief: President Garfield Shot by an Assassin,” *The New York Times* (July 3, 1881).

¹⁶ The Stalwarts opposed the Half Breeds’ embrace of civil service reform, among other issues.

¹⁷ “A Great Nation in Grief: President Garfield Shot by an Assassin,” *The New York Times* (July 3, 1881).

intention of going to Washington.¹⁸ He succeeded to the presidency only after Garfield died on September 19, 1881, in New Jersey.

In the interim, the Cabinet tried to execute Garfield's duties but they could not, by law, complete most of them: foreign affairs were utterly neglected, for example. Arthur continued to express concern over the succession process in messages to Congress. When Arthur assumed the presidency, the offices of vice president, president pro tempore of the Senate, and speaker of the House were vacant.

Garfield's incapacitation and death raised key questions about the succession act of 1792. What if Arthur died?¹⁹ The leadership in Congress was in flux. In one of his first acts as president, Arthur convened a special session of the Senate on October 10, 1881, to elect a new president pro tempore. But even this routine procedure was complicated. Three vacancies in the Senate had been filled by Republicans who were supposed to be sworn in by the president pro tem. Without those Republicans, the Senate was in Democratic hands and would elect one of their own as president pro tem. With them, the Senate was evenly divided. Republicans submitted a resolution that would have allowed the new senators to be sworn in before a new president pro tem was elected. The resolution was defeated; a Democrat, Thomas F. Bayard, was chosen as president pro tem, and so was next in line should Arthur die in office. The new Republicans were sworn in on October 12, 1881. The following day, an independent senator, David Davis

¹⁸ "Anxiety Dispelling Hope: The President in a Very Critical Condition," *The New York Times* (August 26, 1881).

¹⁹ Unknown to anyone at the time, and buried in a *New York Times* tribute to Arthur upon his death in 1886, was the fact that Arthur had prepared for the eventuality of his death prior to the convening of the October 10 session by writing a proclamation calling the Senate into special session to elect a president pro tem. He placed the document in a sealed envelope addressed to the "President in Washington." If he, too, died before the Senate met in special session, a mechanism would exist to choose a successor. "Voice to Sorrow," *The New York Times* (November 21, 1886).

of Illinois, unseated Bayard as president pro tem. Speaker of the House, the position of next in line to the presidency after the president pro tem, remained vacant until December because the House was not scheduled to convene. A Republican speaker of the House (Warren Keifer of Ohio) was elected on December 5, 1881, more than two months after Garfield's passing.

The other questions (which remained unanswered) were posed by Arthur himself in messages to Congress starting in 1881. These included: What was meant by “inability”-- was it physical or mental? Did the duration and the extent of the inability matter? What expert, or group of experts, would determine whether or not the president was disabled? Who would choose these experts? Did the president have a say in whether or not he was disabled and when his disability came to an end? If the vice president did succeed to the office, how long would his term last? Would the president, once his inability ended, be allowed to resume his duties as president? Could the vice president then return to his vice presidential responsibilities?²⁰

Just four years later, the vice presidency was again vacant under President Grover Cleveland, when Vice President Thomas Hendricks died in office. Anxiety over Hendricks' death in 1885, after less than a year in office, renewed the focus on succession law. Cleveland had grown close to Hendricks and had given him more responsibilities than previous vice presidents. Cleveland's first message to Congress on December 8, 1885, cited the public's anxiety over the vice president's death and other vacancies in the line of succession as reasons for a need to make changes to the law. He stated:

²⁰ Chester A. Arthur, “First Annual Message (December 6, 1881),” Transcript. Miller Center (University of VA), <http://millercenter.org/president/arthur/speeches/speech-3560>. Accessed January 6, 2017.

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. The 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, have caused public anxiety and a just demand that a recurrence of such a condition of affairs should not be permitted.²¹

Cleveland's message prodded Massachusetts Senator George Frisbie Hoar to reintroduce a bill (S. 471) that substituted Cabinet officers for the Senate president pro tempore and the speaker of the House in the line of succession. Hoar began his plea to fellow Senators by charging that the "present arrangement is bad" as it was adopted because of the "jealousy entertained toward Mr. Jefferson by the leading Federalists of the first [presidential] administration." He then argued that the Senate president was not the appropriate official to assume the presidency because "he is not elected with reference to his fitness for executive functions," but rather "he is chosen for his capacity as legislator and debater." Hoar pointed out that, because the pro tem "ha[d] little or no executive experience," with just one exception, no president pro tem had run for president.²²

In addition to changing the order of succession, the 1886 Act also provided for presidential inability. The officer next in line would act as president until the disability of the president or vice president was removed or a new president was elected. Although no time frame was set for a presidential election, the act set a time frame of twenty days for

²¹ Grover Cleveland, "First Annual Message (December 8, 1885)," Transcript. Miller Center (University of VA), <http://millercenter.org/president/cleveland/speeches/speech-3755>. Accessed January 6, 2017.

²² The exception Hoar was referring to was Lewis Cass, who served as secretary of War under President Andrew Jackson and secretary of State under President James Buchanan. The Democrats ran Cass in 1848, but he lost to Zachary Taylor. Hoar elided mention of John Tyler, the only Senate president pro tempore (March 1835) to become president. U.S. Congressional Documents Volume 17 (49th Congress Special and 1st Session), p. 180-82. <http://heinonline.org.proxy.libraries.rutgers.edu/HOL/Page?handle=hein.congrec/cr0170001&id=1&size=2&collection=congrec&index=congrec/crmm>. Accessed January 9, 2017.

Congress to meet should it be in recess at the time of the president's death, resignation, removal or inability (as it had been when Garfield died). The Act of 1886 was unique in that it finally addressed inability.

Ironically, though, when the moment came to apply the 1886 law, the president – Cleveland – chose to ignore it in an attempt to address the nation's worst economic crisis to date. Suffering from oral cancer, Cleveland underwent an operation to remove part of his jaw onboard a friend's yacht, the *Oneida*, during the summer of 1893, the first year of his second non-consecutive term. The operation required that he be completely anesthetized. His jaw was replaced by a false one at his summer home in Buzzard's Bay, Massachusetts. He took a second cruise on the *Oneida* to undergo further surgery for the removal of additional tissue. Rather than make the news public and provide for someone to assume his presidential duties while he was unconscious, Cleveland chose to swear his doctors to secrecy. He believed his influence would swing a congressional vote to repeal the Sherman Silver Purchase Act of 1890, an act that he blamed for causing the financial depression. President Cleveland called Congress into special session on June 30. When Congress convened on August 8th, he addressed the "existence of an alarming and extraordinary business situation involving the welfare and prosperity of all our people" that had caused him to call the extra session "to the end that... present evils might be mitigated and dangers threatening the future might be averted. He emphasized that "every day's delay in removing one of the plain and principal causes of the present state of things, enlarges the mischief already done and increases the responsibility of the government for its existence."²³ Because the doctors' work was successful, Cleveland's

²³ "Grover Cleveland Special Session Message, August 8, 1893," *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/index.php?pid=70711>.

artificial jaw allowed him to speak clearly (not that most Americans would have noticed in this era before mass broadcasts). The president's call to convene Congress and the start of the special session served as bookends to his surgery. Historians such as Allan Nevins credit Cleveland's presence for the repeal of the Sherman Anti-Trust Act.²⁴ But Cleveland's actions did nothing to provide a solution to the question of presidential disability.

The issue persisted. William McKinley's vice president, Garrett Hobart, died in 1899, and the office remained vacant until McKinley and his new running mate, Theodore Roosevelt, were sworn in for McKinley's second term on March 4, 1901. Six months later, on September 6, McKinley was shot in Buffalo, N.Y. He lingered for eight days, and at times appeared to be improving. Roosevelt left for a planned vacation in the Adirondack Mountains three days later. But McKinley soon took a turn for the worse – gangrene was poisoning his body – and Roosevelt was summoned to return from his vacation. The president died on September 14 while Roosevelt was en route by train. He was sworn in as president when he arrived in Buffalo. He requested McKinley's Cabinet members to remain at their posts to help him as he sought to reassure the nation and provide a semblance of continuity. McKinley was the third president to be murdered in less than a half-century: many Americans, then, had living memories of three presidential assassinations, two of which (Garfield and McKinley) led to a prolonged period of presidential disability before the victims died. In that same period, two vice presidents had died, leaving the office vacant.

²⁴ Allan Nevins won a Pulitzer Prize in 1933 for his biography on Grover Cleveland. See Allan Nevins, *Grover Cleveland: A Study in Courage*, Volumes I and II, Fifth Edition (New York: Dodd, Mead & Company, 1933).

During Roosevelt's term, the president led the federal government in embracing the new activism of the Progressive Era and Washington continued to claim its place on the world stage – Roosevelt won a Nobel Peace Prize for brokering an end to the Russo-Japanese war in 1905. Under Roosevelt, the president did not merely preside, he acted. As biographer John Milton Cooper, Jr., remarked “from the beginning, Roosevelt differed in his energy and his imaginative grasp from others who sought to uphold the existing order in the United States.”²⁵ When Roosevelt handed over the presidency to his friend and protégé William Howard Taft on March 4, 1909, it was a different institution than that which Roosevelt himself inherited upon McKinley's death. As President Woodrow Wilson would later say of Roosevelt, whom he called “an aggressive leader” that had “made Congress follow him,” Roosevelt had shown “it was not necessary to amend the Constitution to bring about a closer relationship between its elected branches; rather, the task was to use the existing powers of the executive more fully.”²⁶

Under Wilson, who succeeded Taft in 1913, the president's powers and influence on the world stage continued to grow, culminating in his outsized role as the conscience of the Allied powers in the aftermath of World War I. According to economist John Maynard Keynes, who was part of the peace delegation, Wilson, the first sitting president to venture beyond the territorial United States, “enjoyed prestige and moral influence throughout the world unequalled in history.”²⁷ Wilson was a key player in negotiating the Treaty of Versailles, and it was he who advocated for the founding of what became the

²⁵ John Milton Cooper, Jr., *The Warrior and the Priest: Woodrow Wilson and Theodore Roosevelt* (Cambridge, MA: The Belknap Press of Harvard University Press, 1983), p. 33.

²⁶ Sidney M. Milkis and Michael Nelson, *The American Presidency: Origins and Development, 1776-1993*, Second Edition (Washington, D.C.: CQ Press, 1994), p. 238.

²⁷ John Maynard Keynes, *The Economic Consequences of the Peace* (New York: Penguin Books, 1995), p. 38.

League of Nations. But many Americans, some disillusioned by war, others seeing political advantage, opposed American membership in the League. Wilson, nearing the end of his second term, embarked on a nationwide tour to drum up support for the Treaty and the League. During this critical time, on September 26, 1919, Wilson suffered a severe stroke at age sixty-two and was incapacitated. The White House, largely through his personal physician, Dr. Cary T. Grayson, attempted to manage the perceptions of the president's ability. *The New York Times* first reported that Dr. Grayson had suggested that the president end his tour and return to the White House rather than "a health resort." Initially, the fact that he was returning home rather than to a hospital was enough proof for the press to believe that the inability would be brief; *The Times* declared it was "sufficient indication that the present indisposition is in no way threatening, and that in a few days it will probably have disappeared."²⁸ Yet in more news on the president's condition the next day, the paper noted that he was not conducting official business (in favor of rest): he was "forbidden to discuss the Treaty struggle."²⁹ The doctor updated *The Times* on October 6, calling Wilson's condition "encouraging." The October 6 article also reported that Secretary of State Robert Lansing had called the Cabinet together that morning to discuss the president's illness and that the president's private secretary, Joseph Tumulty, had denied the rumor that Vice President Thomas R. Marshall might be requested to take over the president's powers and duties.³⁰

Vice President Marshall opted not to fight for the presidency. Instead, Woodrow Wilson's wife, Edith Bolling Wilson, and Dr. Grayson, ran the government in Wilson's

²⁸ "The President's Illness," *The New York Times* (September 27, 1919).

²⁹ "Wilson Returns to Washington Worn and Shaken," *The New York Times* (September 28, 1919).

³⁰ "Cabinet Meets, Lansing Presiding," *The New York Times* (October 6, 1919).

name, controlling and curtailing access to the president. (Of the latter, Wilson biographer A. Scott Berg wrote that “Dr. Grayson would literally have his hand on the president’s pulse and, thus, on the well-being of the world.”³¹) Nicknamed “the Presidentress,” the First Lady was quoted stating she did not make decisions in the realm of public affairs, but she did decide “what was important and what was not.”³² By acting as his steward, she believed she was furthering his wishes by helping him retain the powers and duties of the presidency.³³ Further, by restricting Wilson’s contact with others, they were “following the medical thinking of the time about treating stroke patients,” according to Cooper. But speculation in newspapers across the country suggested Wilson was too ill to carry out his presidential responsibilities. On October 12, for example, *The New York Times* published a letter to a constituent from Senator George H. Moses of New Hampshire revealing the Senator’s opinion that even if Wilson did live “he [would] not be any material force or factor in anything.”³⁴ Though some Americans were publicly calling for action, Grayson continued to argue that no legal matters were pressing.³⁵

Wilson’s inability launched debates in Congress, mainly about how to, and who would, determine whether an inability existed. Even before Wilson’s major stroke, in the summer of 1919 when the president attempted to lobby senators to support the treaty, it

³¹ A. Scott Berg, *Wilson* (New York: G.P. Putnam’s Sons, 2013), p. 277.

³² Feerick, *From Failing Hands*, p. 162. The public was unaware of the fact that Edith Bolling had at least some prior knowledge of world affairs. Wilson’s courtship of her included allowing her to read important policy statements. For more on her introduction to confidential papers, see Cooper, Jr., *The Warrior and the Priest*, p. 294.

³³ John Milton Cooper, Jr., in *Woodrow Wilson: A Biography* argues that it was not the fact that staying on as president would help him recover, which had been the prevailing school of thought. Cooper, Jr., *Woodrow Wilson*, p. 536.

³⁴ “Reports Wilson Suffered Shock: New Hampshire Senator Expresses Pessimistic Opinion,” *The New York Times* (October 12, 1919).

³⁵ Complicating the inability issue, one of Wilson’s doctors, neurologist Francis X. Dercum of Philadelphia, suggested resigning the presidency would remove Wilson’s desire to live, thereby killing him. Feerick, *From Failing Hands*, p. 173.

had become “discernable to others,” according to Berg, that the president was experiencing “mental decline.”³⁶ Now, separate proposals included allowing the Supreme Court and secretary of State to make the disability determination. Hearings were held in the House Judiciary Committee but no further action was taken. The Republican-led Congress did not take action against Wilson, a Democrat, for fear of both Democratic reprisals and voter backlash. Tumulty wrote to Mrs. Wilson in mid-December listing at least a dozen items that required the president’s immediate action, but the White House continued to be “awash in denial,” and the “opacity” around the president’s illness led to rumors that increased in both negativity and number.³⁷ As Cooper stated “Not surprisingly, the one person who does not seem to have contemplated [resigning] was Wilson himself.”³⁸ President Wilson did not want to give up his powers.

The period of presidential inability ended with the inauguration of Wilson’s Republican successor, Warren Harding, in 1921. The tensions of wartime, combined with Wilson’s inability and failure to secure the League of Nations, paved the way for what Harding famously called a “return to normalcy.” But if Harding returned the nation to a more tranquil, less anxious age, the seemingly eternal problem of presidential succession remained acute. Harding died in office on August 2, 1923 at the age of fifty-seven after an extensive speaking tour. He suffered from heart trouble: a heart dilation was misdiagnosed as acute indigestion. Vacationing in Vermont, the vice president, Calvin Coolidge, was sworn in as president by his father, a notary public. To soothe the nation’s

³⁶ Berg, *Wilson*, p. 616.

³⁷ Berg, *Wilson*, pp. 657, 662.

³⁸ Cooper continues, “Just a few times during the rest of his presidency would he mention resigning, and those would be months after he suffered the stroke and had begun to recover” Cooper, Jr., *Woodrow Wilson*, p. 535.

qualms, the new president immediately began addressing the public via radio and holding press conferences twice a week. By the time Congress reconvened in December 1923, Coolidge had already been serving as Commander in Chief for a third of a year and had quelled anxiety over the Teapot Dome scandal, which implicated Harding's secretary of the Interior, Albert Fall. (Fall resigned and spent a year in prison.)

The next major reconsideration of succession rules occurred during the Great Depression and the long winter of 1932-33 when the Twentieth Amendment, moving the president's inauguration from March 4 to January 20, was ratified on January 23, 1933. The intention of the amendment was to put an end to lame duck Congresses and presidents.³⁹ Until that point, new members of Congress would have to wait thirteen months before being sworn in and those that had been voted out were without mandates to take action. In addition to shortening the interregnum between old and new administrations, the amendment provided a complicated plan should the president-elect die before inauguration day.⁴⁰ The amendment could have been tested just three weeks after it was ratified had bullets struck their mark: president-elect Franklin Roosevelt was fired on during a visit to Florida – the bullets missed FDR, but mortally wounded Chicago Mayor Anton Cermak, who was standing near Roosevelt's car. The public's response to the fact that Roosevelt survived a close call was positive, strengthening the president-elect's image at a time when the country's economy was in a disastrous condition. *The Washington Post* reported that “the whole affair brought a tremendous response from the American public” as evidenced by the number of encouraging

³⁹ David E. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995* (University Press of Kansas), p. 274.

⁴⁰ Please see Chapter 3 for Section 3 of the Twentieth Amendment.

telegrams the president-elect had received.⁴¹ More generally, the amendment authorized Congress to legislate on matters of presidential transitions.

The final sudden presidential succession before the nuclear age took place on April 12, 1945, when Franklin Roosevelt died in Warm Springs, Georgia, of a cerebral hemorrhage. Roosevelt's death shocked the nation, and while it abruptly transformed Harry Truman from a relatively unknown and brand-new vice president to a wartime president, the transition may not have taken the new president completely by surprise. After hearing an unsubstantiated rumor in February 1945 that the president had died at sea onboard the *U.S.S. Quincy* (en route to Washington from the Yalta Conference), Truman wrote in his *Memoirs* that he was "shocked" by Roosevelt's haggard appearance and evident weakness upon his return to the Capitol.⁴² Roosevelt's deterioration in 1944 and early 1945 was evident to most people who were close to him.⁴³ He looked frail, had lost weight, and his hands shook during his brief 550-word inaugural address on January 20, 1945.⁴⁴

Truman was on Capitol Hill when House Speaker Sam Rayburn told him the president's press secretary, Steve Early, had telephoned that the vice president was

⁴¹ "Roosevelt Describes Attempt on His Life," *The Washington Post* (February 17, 1933).

⁴² Harry S. Truman, *Memoirs: Year of Decisions*, Volume 1 (Garden City, NY: Doubleday & Company, 1955), p. 2. In his article of June 24, 1957, Truman later elaborated on this point, stating that until Roosevelt's return from Yalta, he thought presidential incapacitation was "an academic problem in history." ⁴² Harry S. Truman, "Truman Proposes Disability Panel," *The New York Times* (June 24, 1957).

⁴³ Cardiologist Howard Bruenn diagnosed Roosevelt with congestive heart failure as a result of chronic high blood pressure in March 1944. See Joseph Lelyveld, *His Final Battle: The Last Months of Franklin Roosevelt* (New York, Alfred A. Knopf, 2016), p. 308.

⁴⁴ Franklin Roosevelt's 1945 inaugural address was the second-shortest in history, second only to George Washington's 130-word second inaugural. Truman was only with Roosevelt a few times between his nomination and the election, but when lunching together in August 1944, Truman could not help noticing the president's frailty: "his hand trembled so much when he tried to pour cream into his coffee that most of it spilled into a saucer." Further, on March 1, 1945, FDR delivered his last speech to Congress. "Attentive onlookers" noticed that he lost his place in the text, filled in with unscripted text, and repeated himself. Lelyveld, *His Final Battle*, pp. 200, 298. For someone so experienced in delivering public speeches, this was indicative not of nervousness, but of mental confusion.

wanted at the White House. The matter seemed urgent as Early had told him to enter through the main Pennsylvania Avenue entrance, rather than the east entrance he went through for private meetings with the president.⁴⁵ Truman ran through the Capitol's basement back to his office to get his hat, and then, with his driver, fought his way through rush hour traffic to the White House, without any Secret Service protection. When he arrived in the private quarters of the White House, Eleanor Roosevelt informed him that the president was dead.⁴⁶

Within two hours and twenty four minutes of FDR's death of a massive cerebral hemorrhage, Truman was sworn in and, shortly thereafter, informed of the existence of the bomb. The nation's leaders gathered in the Cabinet room of the White House – including Secretary of State Edward Stettinius (now next in line of succession), Speaker of the House Sam Rayburn, and House Majority Leader John McCormack – in a show of support, to keep the gears grinding on the wheels of democracy. After the swearing-in ceremony, Truman asked the Cabinet to remain. Secretary of War Henry Lewis Stimson, the most senior member, stayed behind when they were dismissed, informing the new president that a matter of the utmost urgency – a new explosive device on unbelievable power – must be discussed. Roosevelt had not taken his vice president into his confidence about the Manhattan Project, in part because it would have been atypical for the vice president to enjoy the president's confidence on top secret national security matters in the early 1940s. Roosevelt also did not reveal the existence of the atomic bomb because,

⁴⁵ According to Joseph Lelyveld, House Speaker Sam Rayburn said that “Truman knew exactly what to expect.” Truman had muttered “Jesus Christ and General Jackson,” upon hanging up the phone with Early. As quoted in See Lelyveld, *His Final Battle*, p. 331.

⁴⁶ It took him a moment to compose himself before replying “Is there anything I can do for you?” She responded, “Is there anything *we* can do for *you*? For you are the one in trouble now.” Truman, *Memoirs*, p. 5.

although he knew his health was failing, “like virtually all his predecessors... he didn’t care to be reminded of the hovering Reaper.”⁴⁷

On the opening day of the United Nations Conference, the twelfth day of his presidency, Truman read a fifteen-page memo drafted by Stimson⁴⁸ that briefed him on the development of the atomic bomb. Stimson purposefully designed the memo to be alarmist. Rather than a focus on ending the war, it contained phrases such as “modern civilization might be completely destroyed” because of the existence of the bomb.⁴⁹ Nuclear anxiety was evident within the administration.

The nuclear question and presidential succession were very much on Truman’s mind during the tumultuous events following his sudden ascension to the presidency. Truman wrote in his *Memoirs* that he “already had in mind the idea of recommending to Congress a change in the order of succession in case the vice president, as well as the president, were to die in office” but that “legislation” would “take time.”⁵⁰ On April 16, Truman’s first message to Congress centered only on his vow to continue Roosevelt’s policies. It was well received by Congress (and the 16,500,000-strong radio audience). An opinion piece in *The Wall Street Journal* concluded, “At least we have manifested to all the world, friends and enemies alike, that our national foundations are still sound at bottom.”⁵¹ Senator Claude Pepper of Florida told *The New York Times* that Truman was a

⁴⁷ The vice president was given a statutory national security role with the establishment of the National Security Council in 1947. President Jimmy Carter increased the responsibilities of the vice president and gave him an office in the West Wing in the late 1970s. Lelyveld, *His Final Battle*, p. 332.

⁴⁸ “Henry Stimson to Harry S. Truman,” April 24, 1945. Harry S. Truman Library and Museum. https://www.trumanlibrary.org/whistlestop/study_collections/bomb/large/index.php. Accessed January 6, 2017.

⁴⁹ David McCullough, *Truman* (New York: Simon & Schuster, 1992), p. 289, 376, and 378.

⁵⁰ Truman, *Memoirs: Year of Decisions*, p. 23.

⁵¹ Thomas F. Woodlock, “Thinking it Over,” *The Wall Street Journal* (April 25, 1945).

“worthy heir to President Roosevelt in both foreign and domestic policy,”⁵² and Majority Leader McCormack said assuredly that the new president was “well equipped to steer the ship of state.”⁵³

Government officials interviewed by the press had high hopes for the new president, but when world leaders heard the news about Roosevelt, some Truman’s leadership capabilities and whether or not the transition would be a Supporters in Congress made statements to the media suggesting that Truman, a senator, was one of them and would ensure the nation’s stability. For example, Senator Robert F. Wagner of New York announced that although the nation was in mourning, America “pledges its loyalty to our new leader who grasps the torch of our destiny and holds it unafraid.”⁵⁵ Yet, General Dwight D. Eisenhower, the supreme commander of Allied forces in Europe, “was depressed” at the prospect of a Truman presidency as the war neared its conclusion.⁵⁶ And Churchill, years later, would apologize for his first thoughts on Truman’s succession. He “confessed” that at Potsdam he held Truman “in very low regard,” that he “loathed” Truman succeeding Roosevelt, but that he had “misjudged [Truman] badly.” He then credited Truman “more than any other man,” as having “saved

⁵² “Congress Acclaim Won by Truman,” *The New York Times* (April 17, 1945).

⁵³ William T. Peacock, “Truman Goes to Hill, Wins Unanimous Pledge of Aid,” *The Washington Post* (April 14, 1945).

⁵⁴ *The New York Times* wrote “those who have long associated with the president pay great tribute to his sincerity and honesty of purpose.” Lewis Wood, “Turn to Right Seen: New President’s Friends Say Legislative Branch Will Have Large Role,” *The New York Times* (April 13, 1945). These individuals included friends from Missouri such as Eddie McKim, who was scheduled to play poker with him the night of Roosevelt’s death, as well as Rayburn who assured reporters that Truman “would make a good, sound president” and added “I have complete faith and confidence in him.” Supporters in Congress: C.P. Trussel, “Congress to Hear Truman Monday,” *The New York Times* (April 14, 1945).

⁵⁵ C.P. Trussel, “Congress to Hear Truman Monday,” *The New York Times* (April 14, 1945).

⁵⁶ McCullough, *Truman*, p. 349.

Western civilization.”⁵⁷ Ultimately, the transition from Roosevelt to Truman was reminiscent of the abrupt change from Lincoln to Johnson. In both cases the deceased president had led the nation through uncertain, difficult times with positive results.

Roosevelt’s death brought attention yet again to the troubling succession question. One issue was the matter of who would be next in line of succession. The office of the vice president was vacant and next in line was Secretary of State Stettinius, who did not think much of the new president.⁵⁸ Truman thought that neither Stettinius nor Byrnes should have been next in the line of succession.⁵⁹ In fact, he believed that it was undemocratic for Cabinet secretaries to be placed directly behind the vice president in the line of succession (as had been the case since 1886) because the public does not have a say in Cabinet appointments (as per Article II, Section II of the Constitution which provides that Cabinet secretaries are appointed by the president and confirmed by the Senate).⁶⁰

⁵⁷ The fact that Truman’s accession was a good omen in the eyes of the Nazis, illustrates that the enemy believed Roosevelt was a more formidable opponent. The news of Roosevelt’s death broke in Germany on Friday the 13th: Nazi propaganda minister Joseph Goebbels called Fuehrer Adolf Hitler personally to tell him “it was a turning point written in the stars.” British Foreign Secretary Anthony Eden telegraphed Prime Minister Winston Churchill that Truman seemed “honest and friendly.” Nazis: McCullough, *Truman*, p. 345. Winston, Churchill, *The Second World War*. Vol. VI: *Triumph and Tragedy* (London: Penguin Books, 2005), p. 484. Low regard: “The Presidency: The World of Harry Truman,” *Time* (January 7, 1973). <http://content.time.com/time/magazine/article/0,9171,910501,00.html>

⁵⁸ Truman’s association with Tom Pendergast’s political machine in Kansas City certainly did not recommend him to Washington denizens. Stettinius regarded the new president as little more than a small-town hack. He saw the transition from Roosevelt to Truman as similar to that of Woodrow Wilson giving way to Warren Harding in 1921, with “cheap courthouse politicians taking over.” McCullough, *Truman*, p. 349.

⁵⁹ Truman decided to replace Stettinius with James F. Byrnes, a former U.S. Supreme Court justice and U.S. senator from South Carolina, as soon as Stettinius’ work was done at the United Nations Conference in San Francisco. Four people held the position of secretary of State during Truman’s presidency: Edward R. Stettinius ((November 1944) April 1945 – June 1945), James F. Byrnes (July 1945 – January 1947), George C. Marshall (January 1947 – January 1949) and Dean Acheson (January 1949 – January 1953).

⁶⁰ On May 9, 1945, Postmaster General James A. Farley, in a speech in Pennsylvania, criticized this fact as “undemocratic.”

On June 19, 1945, Truman delivered a “Special Message to Congress on Succession to the Presidency,” recommending that Congress legislate on the succession issue. Truman stated that he agreed with the provisions of the 1792 Succession Act that placed the Senate president pro tempore and the speaker of the House next in line to the presidency after the vice president. He pointed out that no federal officer was elected by the entire electorate besides the president and vice president. The speaker of the House, who was elected by the voters in his district and also chosen to preside over the House by a vote of all the representatives of the country, would be the closest replacement. He therefore recommended reversing the order of the 1792 Act, which placed the Senate president pro tempore third and the speaker of the House fourth, to make the speaker third, ahead of the president pro tem.

The U.S. Senate Historical Office suggested that an “institutional factor” may have influenced his decision to place the speaker ahead of the president pro tempore. By the time Truman was considering succession issues, the position of president pro tempore had become mostly ceremonial, with no real role in passing legislation or exerting leadership in the chamber. The majority leader had become a more apt parallel to the speaker of the House.⁶¹ However, the position of Senate majority leader was created by the parties, as opposed to the president pro tempore which is a constitutionally created position. The U.S. Senate Historical Office added to their assessment that “it is likely that specific personalities also played a role in Truman’s thinking.”⁶² The Historical Office

⁶¹ “President Pro Tempore,” *Senate Historical Office* (United State Senate), http://www.senate.gov/artandhistory/history/common/briefing/President_Pro_Tempore.htm.

⁶² “President Pro Tempore,” *Senate Historical Office* (United State Senate), http://www.senate.gov/artandhistory/history/common/briefing/President_Pro_Tempore.htm.

was alluding to Truman's good friend and confidante, Sam Rayburn, the speaker of the House, whom Truman may have wished to see next in line to the presidency.⁶³

In the "Special Message to Congress," Truman, in addition to recommending that the speaker be third in the line of succession, also said that he was uncomfortable with the idea that the president could choose his successor. He stated, "by reason of the tragic death of the late president, it now lies within my power to nominate the person who would be my immediate successor in the event of my own death or inability to act. I do not believe that in a democracy this power should rest with the chief executive."⁶⁴ In the interim, however, he believed it was his "duty" to choose a secretary of State "with the proper qualifications" should Truman himself die in office.⁶⁵ Shortly after the president's message to the 79th Congress, on June 29, 1945, a bill (H.R. 3587,) providing for the line of succession in the order the president had suggested passed the House. But it failed in the Senate. Opponents argued that the speaker of the House and Senate president pro tempore were not "officers" of the government within the parameters of Article II, Section I, Clause 6 of the Constitution.⁶⁶

On February 5, 1947, Truman sent a message to the 80th Congress, reaffirming his message of June 19, 1945, and insisting Congress act immediately on the succession issue.⁶⁷ Acting Attorney General Douglas W. MacGregor submitted a letter to the

⁶³ McCullough, *Truman*, p. 357.

⁶⁴ "Special Message to Congress on Succession to the Presidency," (June 19, 1945), Truman Presidential Library. <https://trumanlibrary.org/publicpapers/index.php?pid=70&st=&st1=> Accessed December 29, 2016.

⁶⁵ Truman, *Memoirs*, p. 23.

⁶⁶ They cited the 1798 Senate impeachment case against Senator William Blount of Tennessee who had argued that his commission was from the state of Tennessee, not the federal government, and he was therefore not a "civil officer of the United States." The Senate had agreed with Blount and dismissed the articles of impeachment. Supporters of the succession bill pointed to a 1916 Supreme Court case, *Lamar v. US*, which held that members of Congress were "civil officers" within Article II, Section IV.

⁶⁷ Truman's speech was reprinted in June 1947. "House of Representatives – Thursday, July 10, 1947," Volume 93, 80th Congress, 1st Session, *Congressional Record* 8618 (1947), pp. 8620-21.

Congressional Record, which attested to the constitutionality of the president's proposed succession plan. In the letter, he argued Article II, Section I referred to members not just of the executive, but of the legislative and judicial branches as well.⁶⁸ Further support for their legitimacy as "officers" included the fact that many of the framers of the Constitution were among the legislators who passed the 1792 Act which designated the Senate president pro tem and the speaker as "officers" next in the line of succession.⁶⁹ The House Judiciary Committee agreed with the Attorney General's findings. Meanwhile, the Senate passed S. 564 on June 27, 1947. These developments paved the way for congressional passage.⁷⁰

On July 18, 1947, Truman signed the new presidential succession act repealing Sections I and II of the January 19, 1886 act. Putting Congress next in the line of succession revived potential problems that the presidency might switch political parties midterm. But that concern apparently did not bother Truman, who was concerned with the constitutionality of Cabinet succession. The president successfully pushed Congress to adopt his succession proposals even after the 1946 midterm elections, when Republicans took control of both houses of Congress, meaning that under the legislation, Republican Speaker Joseph W. Martin of Massachusetts would be next in line if Truman

⁶⁸ MacGregor also argued that the Blount case was not applicable.

⁶⁹ "House of Representatives – Friday, June 27, 1947," Volume 93, 80th Congress, 1st Session, *Congressional Record* (1947), p. 7768-70.

⁷⁰ The bill passed: "provid[ed] for the performance of the duties of the office of president in case of the removal, resignation, death, or inability both of the president and vice president" (July 9, 1947). Serial Set Vol. No. 11121, Session Vol. No. 4. 80th Congress, 1st Session. H. Rpt. 817. http://infoweb.newsbank.com.proxy.libraries.rutgers.edu/iw-search/we/Digital/?p_product=SERIAL&p_theme=sset2&p_nbid=C4EM4DALMTQ4MzM4MTIyOC40QDM0MTE6MT0xMjoxMjguNi4yMTguNzI&p_action=doc&p_queryname=10&p_docref=v2:0FD2A62D41CEB699@SERIAL-1215DBF64D7DE350@-11F5FDB46C3DED80@5. Accessed January 2, 2017.

died.⁷¹ (The measure passed 50-35, with all but three Democrats voting as a bloc against the legislation.)

The succession and inability issue returned in 1955 when President Dwight Eisenhower suffered a heart attack. Vice President Richard M. Nixon unofficially took on many presidential duties. Although Eisenhower found respite at the Truman Little White House in Key West and recovered quickly, he suffered from health scares on two more occasions (an operation to relieve ileitis on June 9, 1956, and a stroke on November 25, 1957) that revived the issue. On the eve of the president's 66th birthday (October 14, 1956), *New York Times* columnist Harrison E. Salisbury made note of the fact that Democratic Nominee Adlai Stevenson had referred to Eisenhower as "the aging president" and suggested Richard Nixon would likely succeed him before his term had ended.

The president's birthday coincided with a statement by Dr. Lawrence H. Snyder of the American Association for the Advancement of Science that "continuance of hydrogen tests could lead to nuclear war or 'universal death,'" giving Salisbury the opportunity to add in the same article that the Democratic Nominee "regard[ed] the question of the hydrogen bomb as perhaps the gravest that confronts mankind."⁷² Another *New York Times* contributor Robert McKinney, also observed that Americans were tying presidential transitions to the bomb stating, "one of the strangest of the startling developments during the presidential campaign was the American public's being asked to

⁷¹ All of Truman's proposals, with the exception of a special election, were incorporated in the bill passed in 1947. Among those voting in favor were Representative Lyndon B. Johnson of Texas and Senator John W. McCormack of Massachusetts. Feerick, *From Failing Hands*, p. 208.

⁷² Harrison H. Salisbury, "Stevenson Makes Eisenhower's Age a Campaign Issue," *The New York Times* (October 14, 1956).

give judgment on national atomic policies.”⁷³ Into the fall, Democrats tried to use Eisenhower’s health—and Nixon’s possible ascent to the White House, where he would have his finger on the nuclear button—as a campaign issue.

That year, Eisenhower directed Attorney General Herbert Brownell, Jr., to draft a plan to deal with a temporary presidential inability. In January 1957, after the election, work began again, and after seeking the advice of the Cabinet as well as individuals outside of Washington, Brownell proposed a constitutional amendment. The proposed amendment had four sections. The first stated that if the president were to be removed from office, die or resign, the vice president would take over the president’s duties until the president’s term had expired. The second said that the president would declare any inability in writing, at which time the vice president would take over the president’s duties as “Acting President.” The third allowed the vice president to solicit the approval of a majority of the heads of executive departments who were members of the Cabinet if he felt the president was disabled but the president had not declared his own inability in writing. The last gave the president the power to declare when his inability had ended.⁷⁴

Originally, Brownell’s proposal was to be sent to Congress alongside a special message from the president urging its passage. But Rayburn cautioned that, if word were to spread to the American public that the president wanted Congress to consider an amendment, the people might become alarmed about his longevity. Instead, Brownell testified before a House Judiciary Special Subcommittee on the Study of Presidential

⁷³ Robert McKinney, “Peaceful Atoms to Stop War,” *The New York Times* (December 9, 1956).

⁷⁴ See, for example: “Dwight D. Eisenhower, 42- The President’s News Conference, March 5, 1958,” *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/index.php?pid=11315>.

Inability. The subcommittee held hearings considering a number of joint resolutions.⁷⁵ The sticking point was a section allowing the president himself to declare when his inability had ended. One of the sharpest critics of Brownell's proposal, Republican Representative Kenneth Keating of New York, suggested a ten-member inability commission to make the determination of presidential inability, while House Judiciary Chairman Emanuel Celler, a New York Democrat, wanted to leave the matter for the vice president and president alone to decide.⁷⁶ Former Presidents Hoover and Truman both weighed in. Hoover argued that the Cabinet should decide whether or not a president was disabled.⁷⁷ Truman, in a letter to *The New York Times*, proposed a seven-member commission composed of members of all three branches of government. This commission would choose a panel of medical experts "drawn from the top medical schools of the nation." If the medical board determined that the president was incapacitated, and a two-thirds majority of both houses of Congress agreed with the experts' findings, the president would be replaced by the vice president for the remainder of the president's term. Notably, even if the president experienced a complete recovery from his illness, he

⁷⁵ These House Resolutions are only discernable in the hearing report by the letters "A," "B," "C," "D," and "E." "Presidential Inability," *Hearings Before Special Subcommittee to Study Presidential Inability of the Committee on the Judiciary House of Representatives Eighty-Fourth Congress Second Session on Problem of Presidential Inability April 11 and 12, 1956*, Serial No. 20 (Washington: United States Government Printing Office, 1956).

[http://congressional.proquest.com.proxy.libraries.rutgers.edu/congressional/result/pqpresultpage.gispdfhitspanel.pdf?link/\\$2fapp-bin\\$2fgis-hearing\\$2f8\\$2f0\\$2f5\\$2f8\\$2fhrg-1956-hjh-0006_from_1_to_127.pdf/entitlementkeys=1234|app-gis|hearing|hrg-1956-hjh-0006](http://congressional.proquest.com.proxy.libraries.rutgers.edu/congressional/result/pqpresultpage.gispdfhitspanel.pdf?link/$2fapp-bin$2fgis-hearing$2f8$2f0$2f5$2f8$2fhrg-1956-hjh-0006_from_1_to_127.pdf/entitlementkeys=1234|app-gis|hearing|hrg-1956-hjh-0006). Accessed January 9, 2017.

⁷⁶ "Presidential Inability," *Hearings Before Special Subcommittee to Study Presidential Inability of the Committee on the Judiciary House of Representatives Eighty-Fourth Congress Second Session on Problem of Presidential Inability April 11 and 12, 1956*, Serial No. 20 (Washington: United States Government Printing Office, 1956).

[http://congressional.proquest.com.proxy.libraries.rutgers.edu/congressional/result/pqpresultpage.gispdfhitspanel.pdf?link/\\$2fapp-bin\\$2fgis-hearing\\$2f8\\$2f0\\$2f5\\$2f8\\$2fhrg-1956-hjh-0006_from_1_to_127.pdf/entitlementkeys=1234|app-gis|hearing|hrg-1956-hjh-0006](http://congressional.proquest.com.proxy.libraries.rutgers.edu/congressional/result/pqpresultpage.gispdfhitspanel.pdf?link/$2fapp-bin$2fgis-hearing$2f8$2f0$2f5$2f8$2fhrg-1956-hjh-0006_from_1_to_127.pdf/entitlementkeys=1234|app-gis|hearing|hrg-1956-hjh-0006). Accessed January 9, 2017.

⁷⁷ "President's Duties." In *CQ Almanac 1956*, 12th ed., 08-590-08-591. Washington, DC: Congressional Quarterly, 1957. <http://library.cqpress.com.proxy.libraries.rutgers.edu/cqalmanac/cqal56-1350139>.

would not, according to the former president's proposal, be allowed to resume his duties.⁷⁸

During these hearings, the fear of an atomic attack was openly voiced. Democratic Senator John J. Sparkman of Alabama testified on the heightened importance of planning for possible presidential inability or sudden transitions (in both the executive and legislative branches) in case of disaster such as atomic attack. Celler prodded Starkman: "In this atomic age nobody knows what might happen."⁷⁹ Sparkman responded, "I have in mind where, Mr. Chairman, the possibility of an atomic attack on the Capitol for instance where it would not be feasible to make the [inability] determination here but perhaps in some other part of the country." At this point, Keating joined the questioning, stating that "for quite a time" he "had in mind" legislation that would reference an "atomic attack wiping out one-third of the Congress." He suggested Congress "put [its] own house in order" by providing for a congressional succession plan before considering the president's inability. Sparkman admitted that he "shudder[ed] at the optimism in thinking of just one-third of the Congress being destroyed." He then said, "I might remark, rather facetiously, that I notice in the program for vacating the Capitol that the Congress is to be left here." Keating retorted, "Yes, we are expendable." Sparkman then replied,

I have seen, and I am sure members of this committee have seen, the time when one single well-placed bomb could virtually wipe out the government. I have seen both houses of Congress, the

⁷⁸ Harry S. Truman, "Truman Proposes Disability Panel, *The New York Times* (June 24, 1957).

⁷⁹ "Presidential Inability," *Hearings Before Special Subcommittee to Study Presidential Inability of the Committee on the Judiciary House of Representatives Eighty-Fourth Congress Second Session on Problem of Presidential Inability April 11 and 12, 1956*, Serial No. 20 (Washington: United States Government Printing Office, 1956).
[http://congressional.proquest.com.proxy.libraries.rutgers.edu/congressional/result/pqpresultpage.gispdfhitspanel.pdf?link/\\$2fapp-bin\\$2fgis-hearing\\$2f8\\$2f0\\$2f5\\$2f8\\$2fhrg-1956-hjh-0006_from_1_to_127.pdf/entitlementkeys=1234|app-gis/hearing|hrg-1956-hjh-0006](http://congressional.proquest.com.proxy.libraries.rutgers.edu/congressional/result/pqpresultpage.gispdfhitspanel.pdf?link/$2fapp-bin$2fgis-hearing$2f8$2f0$2f5$2f8$2fhrg-1956-hjh-0006_from_1_to_127.pdf/entitlementkeys=1234|app-gis/hearing|hrg-1956-hjh-0006). Accessed January 9, 2017.

chief executive and all of the Supreme Court and all of the Cabinet members together at one time.... I think all these matters ought to be considered, and it is high time that we were making some decision.

Despite it being “high time,” the subcommittee did not reach an agreement.

After Eisenhower’s stroke in 1957, Estes Kefauver, now chair of the Senate Judiciary Subcommittee on Constitutional Amendments, reintroduced Brownell’s proposal with new language that would resolve any disagreement between the president and vice president on when the inability had officially ended. Brownell expressed his “great appreciation” that the subcommittee was “seriously considering” his proposal “as a part of realizing we are in an atomic age.”⁸⁰ On March 3, 1958, Eisenhower released a memorandum calling for the president to inform the vice president when he became disabled; if he was unable to do so after a reasonable amount of time, the vice president would assume the duties of the presidency as “Acting President” until the inability ended. As with the Brownell proposal, the president would decide when this occurred. (These are often referred to as “the letter agreements.”) Notably, the consensus between the administration, members of the subcommittee and expert witnesses seemed to be that there was a need for an amendment to solve the inability issue.⁸¹

Brownell’s article, “Presidential Disability: The Need for a Constitutional Amendment,” in the December 1958 edition of *The Yale Law Journal* underscored the

⁸⁰ Brownell made this statement on April 1, 1957, during another Special Subcommittee on Presidential Inability Hearing. This sense of urgency allowed a resolution similar to Brownell’s proposal to pass the subcommittee; yet, it did not make it to a full floor vote. “Presidential Inability,” *Hearing Before the Special Subcommittee on Study of Presidential Inability of the Committee on the Judiciary House of Representatives Eighty-Fifth Congress First Session on Problem of Presidential Inability April 1, 1956* Serial No. 3 (Washington: United States Government Printing Office, 1955). [http://congressional.proquest.com.proxy.libraries.rutgers.edu/congressional/result/pqpresultpage.gispdfhitspanel.pdf?link/\\$2fapp-bin\\$2fgis-hearing\\$2f8\\$2fa\\$2fb\\$2fa\\$2fhrg-1957-hjh-0003_from_1_to_40.pdf&entitlementkeys=1234app-gishearing|hrg-1957-hjh-0003](http://congressional.proquest.com.proxy.libraries.rutgers.edu/congressional/result/pqpresultpage.gispdfhitspanel.pdf?link/$2fapp-bin$2fgis-hearing$2f8$2fa$2fb$2fa$2fhrg-1957-hjh-0003_from_1_to_40.pdf&entitlementkeys=1234app-gishearing|hrg-1957-hjh-0003). Accessed January 9, 2017.

⁸¹ The author agrees with John Feerick’s assessment. See Feerick, *The Twenty-Fifth Amendment*, p. 55.

importance of the fact that America had entered the atomic age. “The realization has grown among thoughtful people that our very survival in this age may rest on the capacity of the nation’s chief executive to make swift and unquestioned decisions in an emergency,” it began. “Now that the issue is so forcefully upon us, with our future existence possibly depending on the forethought that we exercise in resolving it, failure to take proper steps to answer promptly the constitutional question would be the height of irresponsibility.”⁸²

Others, too, began to weigh new nuclear peril heavily, such as Lawyer Richard H. Hansen who wrote *The Year We Had No President*. In this scholarly work dedicated to President Eisenhower “the first president to take positive action on presidential disability,” Hansen detailed Brownell’s proposed amendment as well as the history of past presidential inabilities for a collegiate audience. In a foreword to the book, Kefauver argued that “the demands of the nuclear age upon the office of president require that the discharge of its duties never be in suspension or uncertainty.”⁸³ From his position in Congress, Kefauver would continue to pursue succession and inability legislation.

Presidents Truman and Eisenhower both pushed for new succession and inability law with more purpose than their predecessors. The new emphasis on these laws during the Truman and Eisenhower eras by members of Congress and scholars, and particularly by the presidents themselves, is a reflection of the nuclear anxiety of the age. As the 1960s arrived, the incandescent tensions peaked: the political rhetoric of Cold War

⁸² Herbert Brownell, Jr., “Presidential Disability: The Need for a Constitutional Amendment,” Vol. 68. No. 2. *The Yale Law Journal* (December 1958), p. 1.

⁸³ Hansen was among those who testified in 1963, prior to President Kennedy’s assassination, in favor of a succession and inability amendment. Please see Chapter 3 for further detail. Richard H. Hansen, *The Year We Had No President*, (Lincoln, NE: University of Nebraska Press, 1962), p. vii.

leaders became more bellicose, the arms race ensued, and the superpowers threatened proxy wars in all corners of the globe, some of which had the potential to become nuclear. As the world appeared less stable, the need for a strong, competent leader at the helm increased. Congress began in earnest to find a more permanent solution to presidential succession and inability issues.

Chapter 2: The Nuclear Paradox: Power, Fallibility, and the Twenty-Fifth Amendment

From the nation's founding until the 1950s, questions of presidential succession had frequently tapped into deep-seated anxieties about the durability of democratic government, and specifically whether it could withstand the threats posed by disruptive, unplanned changes to the nation's highest office. Following the United States' use of atomic bombs against Japan at the end of World War II, however, those anxieties took on a new gravity. "Merely by existing [nuclear weapons] have already set off chain reactions throughout American society and within every one of its institutions,"¹ stated the *Bulletin of Atomic Scientists*. The *Bulletin of Atomic Scientists* recognized that nuclear anxiety had become a staple of American popular and political cultural overnight, but also that it was difficult to quantify. In response, they designed the Doomsday Clock in 1945 as a gauge of how close mankind is to destroying itself, with midnight being the apocalypse. The president had the Zeus-like power to destroy entire nations and snuff out millions of lives with the press of a button in an instant; all other powers were trivial by comparison.² The 1946 Atomic Energy Act granted this cosmic authority solely to the president.

After the development of more powerful bombs by both superpowers and a method to deliver them, with the launch of Sputnik in 1957, nuclear anxiety had begun to spur government officials in both Congress and the Eisenhower administration to find a

¹ Robert Karl Manoff, "The Media: Nuclear Security vs. Democracy," *Bulletin of the Atomic Scientists* (January 1984), p. 29, as quoted in Paul Boyer, *By the Bomb's Early Light: American Thought and Culture at the Dawn of the Atomic Age* (Chapel Hill: University of North Carolina Press, 1994), xvii.

² The Single Integrated Operation Plan allowed for the president to make a split-second decision that would set off a reaction down the chain of command launching one or more nuclear warheads. Because the president need only to give his assent and the entire plan was set in motion, it seemed as though just the push of a single button would bring the world to an end.

solution to the presidential succession and inability problem that had been elusive since the Constitution's ratification. The fear of a nuclear attack, this time against the U.S., became a pervasive undercurrent in American politics and culture, evident in presidential speeches and political advertisements, as well as in popular films, books, and songs. Public discourse was filled with concern for the need for a competent leader in control of the nuclear button. Finding a solution to the centuries-old problem was becoming a necessity.

Nuclear anxiety flourished even more intensely after the assassination of John F. Kennedy in 1963, and the specter of a nation without firm leadership during a time of nuclear crisis ultimately provided the impetus to resolve the issue. The Cold War, specifically the decade from 1961-1971, saw more total amendments debated than any era since the nation's founding.³ What the historian David Kyvig called the "extraordinary eruption of Article V activity"⁴ suggests that leaders recognized that the world was changing radically and quickly. The Constitution needed to account for those changes. The destructive power of the bomb meant that these leaders now were required to make decisions that would affect the world on an order of magnitude greater than any previously seen.

The nuclear issue set the sudden transition from John F. Kennedy to Lyndon Johnson apart from other unexpected presidential successions in the past. Although seven other presidents had died while in office, Kennedy was the first to die instantaneously,

³ Only the 1860s and 1910s were comparable.

⁴ David E. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995* (Lawrence, Kansas: University Press of Kansas, 1996), p. 349.

fatally wounded by an assassin's bullet.⁵ Garfield clung to life for about ten weeks, Lincoln survived overnight, and McKinley remained alive for five days. But Kennedy's immediate death — coupled with Johnson's presence in the same motorcade where JFK was shot, rendering him potentially vulnerable as well — highlighted the long-standing concern that the passage of power to the vice president might not always run smoothly. The presidential assassination had resulted in a sudden transfer of power to a vice president whose own health was subject to question.

For this reason, traditional histories, such as that of Kyvig, have argued that the Twenty-Fifth Amendment, though a product of “long-standing concerns about presidential disability and succession,” was most immediately “a reaction to the assassination of President John F. Kennedy.”⁶ Media reports, accounts of interactions among decision-makers, and intergovernmental correspondence reveal the varied but often interconnected fears relating to concerns stemming from Kennedy's murder: fantasies that the assassination was part of a wider conspiracy, perhaps waged by Soviet or ultra-right-wing groups; a dislike of Johnson, leading to depictions of him as a usurper; and doubts about Johnson's capabilities to lead.

As discussed by most historians, these disparate anxieties, tensions, and worries suggest Bayh drafted the Twenty-Fifth Amendment largely in response to Kennedy's assassination. Yet the assassination does not fully explain the amendment's sinuous journey through Congress and its ratification almost four years after Kennedy's death in 1967. For a more complete account, the climate of nuclear anxiety evident in

⁵ Steven M. Gillon, *The Kennedy Assassination: 24 Hours after Lyndon B. Johnson's Pivotal First Day as President* (New York: Basic Books, 2009), p. 357.

⁶ Kyvig, *Explicit and Authentic Acts*, p. 357.

culture and politics from 1945, the advent of the atomic bomb, through 1967 must be factored into the ratification of the Twenty-Fifth Amendment. The development of increasingly powerful weapons heightened tensions between the superpowers while political rhetoric fed off of, and contributed to, nuclear anxiety. Civil defense planning emerged as a buffer against those fears. In the midst of the growing nuclear anxiety, Eisenhower's brief illnesses and Kennedy's sudden death exposed the paradox that the president was at once both powerful and fallible. In response, continuity of operations plans and the Eisenhower/Nixon and Kennedy/Johnson letter agreements give evidence that presidents were working to ensure the line of presidential succession against the threat of a disruption at the highest levels of government leadership. These factors taken in the context of an overriding nuclear anxiety would eventually result in ratification of the Twenty-Fifth Amendment.

In 1945, the first superficial cultural representations of Hiroshima and Nagasaki such as the new "atomic cocktail" made of Pernod and gin appeared to celebrate America's victory in the Pacific⁷ – yet even these festive representations of U.S. power demonstrated that the awesome power of the bomb, once detonated, was never far from Americans' thoughts. Any lightheartedness on the topic soon gave way, as one sociologist wrote at the time, to an intrinsic, paralyzing anxiety.⁸ The first images of the destruction caused by the bomb were grainy photographs in *Life* magazine on August 20,

⁷ Allan M. Winkler, *Life Under a Cloud: American Anxiety About the Atom* (New York: Oxford University Press, 1993), p. 27.

⁸ William Fielding Ogburn "Sociology and the Atom" as quoted in Paul Boyer, *By the Bomb's Early Light*. William Fielding Ogburn, "Sociology and the Atom," *American Journal of Sociology*, 51 (January 1946), p. 269. Paul Boyer, *By the Bomb's Early Light: American Thought and Culture at the Dawn of the Atomic Age* (Chapel Hill: University of North Carolina Press, 1994), p. 12.

1945.⁹ But the sense of foreboding was implanted in the nation's psyche by John Hersey's gruesome account of the human suffering published in the August 31, 1946 issue of *The New Yorker*.¹⁰ Hersey's articles were developed into a best-selling book, *Hiroshima*, and depicted scenes too horrible to imagine such as dress fabric motifs permanently imprinted onto women's bodies and the burned skin of children hanging from their faces.¹¹ The destructive possibilities of this new weapon were immediately portrayed on film for a popular audience. That year, for example, the Truman White House officially approved the script of a Metro-Goldwyn Mayer (MGM) studios production depicting the bombing of Japan. The title, *The Beginning or the End*, was provided by the president himself in an early interview.¹² "Make your film, gentlemen, and put this message into your picture – tell the men and women of the world that they are at the beginning, or the end," Truman said.¹³ It was meant to suggest that the world was at a tipping point because of the harnessing of atomic energy.

Nuclear anxiety below the surface was sometimes belied by Americans' attempt to give the appearance of living an ordinary life.¹⁴ Post-World War II Levittowns and

⁹ "War's Ending: Atomic Bomb and Soviet Entry Bring Jap Surrender," *Life* (August 20, 1945), pp. 25-31. https://books.google.com/books?id=hkgEAAAAMBAJ&pg=PA17&source=gbs_toc_r&cad=2#v=onepage&q&f=false. Accessed July 14, 2017.

¹⁰ John Hersey, "Hiroshima," *The New Yorker* (August 31, 1946). <http://www.newyorker.com/magazine/1946/08/31/hiroshima>. Accessed July 14, 2017.

¹¹ John Hersey, *Hiroshima* (New York: Alfred A. Knopf, 1946).

¹² Originally scripted as a scientist's attempt to explain the rationale of the bomb, it quickly became patriotic propaganda about Hiroshima. Nagasaki was omitted from the storyline. The jingoism was mixed with misinformation and a typical Hollywood romance.

¹³ As quoted in Toni Perrine, *Film and the Nuclear Age* (New York: Taylor & Francis, 1998).

¹⁴ The tension around the bomb and radioactive fallout soon began revealing itself in cultural outlets throughout the world. Having experienced mass destruction first hand, the Japanese produced feature films with nuclear terror as a main theme, such as *Godzilla: King of the Monsters* in 1954. Many popular science fiction and horror films of that year, such as *Them!* and *Creature From the Black Lagoon*, followed suit, depicting mutants or monsters unearthed by the bomb or borne of the radioactive fallout that threatened the continuity of mankind. Robert Jay Lifton and Greg Mitchell, *Hiroshima in America* (New York: Harper Perennial, 1995), p. 361.

Sloan Wilson's 1955 book, *Man in the Grey Flannel Suit*,¹⁵ made into a movie in 1956, neatly summarize the decade as one of consensus and conformity. Yet, this disconnect was neatly captured at the end of the decade, when *Life* added an element of levity to the topic of nuclear anxiety by publishing an article on newlyweds who decided to spend their honeymoon in their new bomb shelter.¹⁶ With perils awaiting at every turn and strict conformity enforced in the workplace, the new suburban home was designed to be a place where a male breadwinner could relax and, if possible, put aside the anxieties of the age, including the ever-present fear of the bomb.

But the popularity of nuclear doomsday plots demonstrated that Americans were not successful in their attempts to put aside their deep-seated nuclear anxiety. Science fiction author Isaac Asimov noted that nuclear doomsday plots became so numerous by this time that editors began to refuse manuscripts without so much as a glance.¹⁷ Authors were not just giving voice to their nuclear anxiety, but living it. Tim O'Brien, author of the Vietnam war novel *The Things They Carried*, revealed that CONELRAD tests (Control of Electromagnetic Radiation, a form of emergency radio broadcasting devised during the Truman administration that produced a tone for fifteen seconds) struck such a chord of fear in him as a child that in 1958 he converted his ping-pong table into a fallout shelter.¹⁸ Todd Gitlin, social scientist, activist, and author of *The Sixties: Years of Hope*,

¹⁵ Sloan Wilson, *Man in the Grey Flannel Suit* (New York: Da Capo Press, 2002).

¹⁶ Anthropologist Margaret Mead similarly suggested that "specially chosen members of society and some newlyweds be rotated between bomb shelters so that society would be preserved in the event of an attack." Honeymoon in bomb shelter: Elaine Tyler May, *Homeward Bound: American Families in the Cold War Era* (New York: Basic Books, Inc., 1988), p.3. Margaret Mead: Kenneth D. Rose, *One Nation Underground: The Fallout Shelter in American Culture* (New York: New York University Press, 2001), p. 13.

¹⁷ As quoted in Winkler, *Life Under a Cloud*, p. 7.

¹⁸ Winkler, *Life Under a Cloud*, p. 127.

Days of Rage, pointed out that he grew up among the first generation of Americans “to fear not only war but the end of days.” He added:

Under the desks and crouched in hallways, terrors were ignited, existentialists were made. Whether or not we believed that hiding under a school desk or in a hallway was really going to protect us from the furies of an atomic blast, we could never quite take for granted that the world we had been born into was destined to endure.¹⁹

As the bombs tested became more powerful, and the tests themselves more numerous, Gitlin’s existential crisis was reflected in films about the fear of fallout, not just a direct hit. Nevil Shute romanticized what nuclear war and fallout might do to relationships between men and women in the 1957 novel *On The Beach*. Shute imagined a post-apocalyptic world only a few years into the future, and it (and the 1959 film adaptation) ended with the complete destruction of mankind.²⁰ Films such as *Godzilla: King of the Monsters!* (1956), *The Amazing Colossal Man* (1957), and *The 4-D Man* (1959) and *Man With the X-Ray Eyes* (1963) all treated the concept of atomic-mutation monsters, individual isolation, and the unsuccessful search for meaning.²¹ Song lyrics also contained this theme. In May 1963, Bob Dylan released his song “A Hard Rain’s a-Gonna Fall.”²² Although Dylan has said it was not his intention, his fan base associated the lyrics with the fear of nuclear fallout.²³

¹⁹ Todd Gitlin, *The Sixties: Years of Hope, Days of Rage* (New York: Bantam, 1987), p. 22-23. As quoted in Robert Mann, *Daisy Petals and Mushroom Clouds: LBJ, Barry Goldwater, and the Ad That Changed American Politics* (Baton Rouge, LA: Louisiana State University Press, 2011), p. 13.

²⁰ *On The Beach* was a best-seller for decades after its publication.

²¹ In the Americanized 1956 version of the 1954 Japanese release *Godzilla*, some of the nuclear material was cut to balance the competing concerns that portraying the destruction of Japanese cities might offend American veterans of the Pacific war with the fact that the growing popularity of the atomic-monster genre meant the inclusion of such scenes would generate more revenue. Perrine, *Film and The Nuclear Age*, p. 92 and p. 137.

²² Recorded in December 1962, he wrote it in the summer, prior to the October missile crisis.

²³ Dorian Lynskey, *33 Revolutions Per Minute: A History of Protest Songs, From Billie Holiday to Green Day* (New York: HarperCollins Publishers, 2011), p. 56.

Between 1961 and 1964, what seemed like an endless stream of works captured the nation's anxiety that events would spiral out of control toward a nuclear apocalypse. The 1961 novel *The Bedford Incident* depicted a naval game between the destroyer USS Bedford and a Soviet submarine that ended with the accidental torpedoing of the Soviet sub, and a nuclear explosion.²⁴ In 1961, a Hollywood hit, *Voyage to the Bottom of the Sea*, emphasized "nuclear retribution as the expression of God's displeasure."²⁵ The movie featured deranged leaders who battled with the question of accepting the inevitability of nuclear war.

After the sudden Kennedy – Johnson transition in 1964, films continued to focus on the terror of uncontrollable events but centered even more closely on the human weakness behind the power of the bomb. *Fail-Safe* portrayed a fictional U.S. president and Soviet premier attempting to reach an equitable solution after a technological error leads American planes to be sent to drop nuclear bombs on Moscow. Bill Moyers, a key developer of Johnson's 1964 presidential campaign message, persuaded the producers of *Fail-Safe* to release the film in October 1964, just prior to the presidential election with the intention of employing this fear to swing the vote in Johnson's favor.²⁶ The film served to remind those who watched of the ever-present danger of nuclear warfare and perhaps subconsciously served as a connection between the movies and the political campaign ads on television that emphasized nuclear anxieties. Although this film did not portray a psychotic president with his hand on the nuclear button – as would have been

²⁴ Perrine, *Film and The Nuclear Age*, p. 138.

²⁵ Perrine, *Film and The Nuclear Age* p. 137.

²⁶ Mann, *Daisy Petals and Mushroom Clouds*, p. 78.

most ideal for the Johnson campaign – it reminded Americans that even with a responsible president at the helm, events could culminate in nuclear disaster.

That year, the power of the bomb in the hands of a mentally disabled leader was the theme of the Stanley Kubrick's black comedy *Dr. Strangelove or How I Stopped Worrying and Learned to Love the Bomb*. *Dr. Strangelove* is the archetypal movie about a U.S. president who volunteers to launch a nuclear strike on New York after an insane U.S. general launches one on Moscow, in order to avoid additional nuclear reprisals.²⁷ The film ends abruptly with nuclear explosions that presumably cause the destruction of both New York and Moscow. The dark humor may have been entertaining, but it gave Americans a different perspective from which to consider their president's competency, and his nuclear policies.²⁸ The fact that *Dr. Strangelove* is listed on the National Film Registry of the Library of Congress underscores the plot's enduring cultural significance.²⁹

Pop cultural anxieties regarding the ability of the president who had his finger on the nuclear trigger mirrored political reality when, as early as Eisenhower's first presidential campaign in 1952, Truman expressed the opinion that Eisenhower was unfit to be trusted with the nation's atomic arsenal due to his advanced age. This argument was perhaps not

²⁷ Historians such as Garrett Graff argue that *Dr. Strangelove* was modeled after General Curtis LeMay who retired from the Air Force the following year. Others, such as Robert Weisbrot, suggest that mathematician and physicist Herman Kahn, who wrote *On Thermonuclear War*, was the inspiration for the mad general. See Garrett M. Graff, *Raven Rock: The Story of the U.S. Government's Secret Plan to Save Itself – While the Rest of Us Die* (New York: Simon & Schuster: 2017), p. 200. See also Robert Weisbrot, *Maximum Danger: Kennedy, the Missiles, and the Crisis of American Confidence* (Chicago, Ivan R. Dee, 2001), p. 27.

²⁸ Winkler, *Life Under a Cloud*, p. 178.

²⁹ Further, a 1965 British film, *The War Game*, hit home in the U.S.: it won an Academy Award for best documentary in 1966 despite the fact that it was a British work of fiction, not a true American documentary.

one Truman was in position to make, given that he was six years older than his eventual successor. But in an October 4, 1952, speech in Oakland, CA, Truman called Eisenhower “a sad and pathetic spectacle,” whose potential victory was a “danger to national security.”³⁰ The next presidential election, in 1956, was the first during the nuclear age in which a candidate’s mental ability was called into question. Democratic presidential candidate Adlai Stevenson, who had lost to Eisenhower in 1952, tied Eisenhower’s health issues and Vice President Richard Nixon’s mental fitness to increasing anxiety over nuclear war. After charging that Eisenhower’s “part-time conduct” as president had produced the “crises in world affairs,” Stevenson argued that putting Nixon in charge of the Republican Party (which was “inevitable” due to Eisenhower’s “age” and “health”) was dangerous.³¹ Stevenson questioned the nation: “Do you want this man as Commander in Chief to exercise power over peace and war?” and “Do you want to place the hydrogen bomb in his hands?”³² *New York Post*’s Max Lerner also cited Nixon’s mental state as one of a three-pronged set of problems as to why Eisenhower and Nixon should not be re-elected. The Soviets’ successful detonation of the hydrogen bomb and Eisenhower’s health concerns (the ileitis and his most recent heart attack – he was recuperating at the Truman Little White House during the winter of 1955-1956) were the other two.³³ In a nationally televised speech the night before the election, Lerner, one of

³⁰ “Texts of Addresses by the President in San Francisco and Oakland,” *The New York Times* (October 5, 1952).
<http://search.proquest.com/hnpnewyorktimes/docview/112375514/92F5F56E6DE5486CPQ/6?accountid=13626>. Accessed January 29, 2017.

³¹ Harrison E. Salisbury, “Stevenson Holds President Lacks ‘Energy’ for Job,” *The New York Times* (November 4, 1956). (Note: “crises in world affairs” are Salisbury’s words, the rest are Stevenson’s.)

³² *Ibid.*

³³ Eisenhower suffered heart attacks, developed Crohn’s disease, underwent surgery for a bowel obstruction, and, as his Cabinet was aware, developed aphasia due to a stroke. See, for example, “Nation Again Weighs Its President’s Future,” *The New York Times* (June 10, 1956).

the nation's most renowned columnists, predicted Eisenhower would not live through a second term and that Nixon would not be a reliable successor because he had neither the competence nor presence of mind required for split-second decision-making in the nuclear age. "I recoil at the prospect of Mr. Nixon as ... guardian of the hydrogen bomb," Lerner said.³⁴ Voters, deciding they did not want to switch teams in the middle of a decade laden with anxiety, reelected Eisenhower.

This ongoing anxiety about presidential inability led Eisenhower and Nixon to sign a letter agreement, released to the public on March 3, 1958 under the specter of the arms race. The agreement provided that in the event of presidential inability, the president would inform the vice president (if possible) and the vice president would serve as Acting President, exercising the powers and duties of the office until the inability had ended. If the president was incapacitated to the point where he could not inform the vice president, the vice president would be empowered to make the call that the president was inabled and assume the president's responsibilities. In either case, the president reserved the sole right to determine when his inability had ended and he could reassume presidential powers and responsibilities.

In addition to concern over Eisenhower's illnesses, the rapid pace of the arms race and the development of ever-more powerful bombs increased Americans' fear that civilization would come to an abrupt end.³⁵ With the development of the thermonuclear bomb – tested on November 1, 1952, three days prior to Eisenhower's victory – the

³⁴ David Greenberg, *Nixon's Shadow: The History of an Image* (New York: W.W. Norton & Company, 2003), p. 62.

³⁵ Kyvig, *Explicit and Authentic Acts*, p. 356.

magnitude of potential destruction changed. This new bomb utilized the same fission reaction in atomic explosions to start a fusion reaction which could create a blast that was a thousand times more powerful and measured in megatons. The first successful explosion by the U.S. created a ten-megaton blast. The likelihood that humans would not survive a nuclear war increased, and the magnitude of public anxiety grew to new heights. Despite countless wars throughout history, the underlying, inherent assumption of the continuity of the human race had never been questioned. This assumption began to fade, if not disappear, with the fission bomb and further eroded with the development of the fusion bomb. The continuity of the presidency could suddenly be linked to the continuity of human life.

During the immediate post-war years, only the U.S. had such weapons; then, in 1949, much to Americans' alarm, the Soviets developed an atomic bomb much sooner than U.S. scientists had predicted. The Doomsday Clock stewards placed the hands at three minutes to midnight. With this development, the possibility for a catastrophic war was no longer an abstraction. Any heightening of tensions between the two former allies could lead inexorably to a nuclear exchange with horrifying consequences for the entire planet. In fact, a 1950 Gallup poll found that a majority of Americans thought the U.S. was "now actually in WWII."³⁶ Further, it was only a matter of time before the Soviets would match the U.S. by testing a thermonuclear weapon, and that is precisely what

³⁶ Marc Trachtenberg, *History and Strategy* (Princeton, N.J.: Princeton University Press, 1991), p. 109. In 1951, *The New York Times* reported that "a representative with access to secret intelligence" stated that the Soviets could bomb "twenty-to-thirty" American cities "at any time." Another Representative, Democrat Henry M. Jackson of Washington, told the newspaper that the Soviets were "stockpiling atom bombs at an alarming rate" and are "'trying their mightiest' to surpass the United States in the life-or-death atomic armaments race." See "Soviet Could Atom-Bomb 20 Cities, House Hears," *The New York Times* (October 10, 1951).

happened August 12, 1953. The hands of the Doomsday Clock reached two minutes to midnight.

The sudden increase in the world's nuclear arsenal, and the realization that the superpowers now had the power to destroy the world many times over, changed domestic political rhetoric. Sensing the mood of the country – specifically America's discomfort at the prospect of living “on the brink” – Eisenhower made an effort to convey cohesive leadership at the top, by instructing aides not to attribute any comments to him that might be construed as favoring a nuclear confrontation, or to make any public statements themselves along those lines.³⁷ That year, Eisenhower delivered a speech that became known as “The Chance for Peace,” in which he suggested that weapons and food for the populace were mutually exclusive: “Every gun that is made, every warship launched, every rocket fired signifies, in the final sense, a theft from those who hunger and are not fed,” he said.³⁸ In December 1953, Eisenhower followed-up with his more well-known “Atoms for Peace” speech at the United Nations General Assembly. In a draft of the speech, he stated that the potential for nuclear war had caused him, much to his chagrin, to speak an entirely new language: “the language of atomic warfare.”³⁹ The president described the tension as follows: “two atomic colossi are doomed malevolently to eye

³⁷ Matthew Connelly, Matt Fay, Giulia Ferrini, Micki Kaufman, Will Leonard, Harrison Monsky, Ryan Musto, Taunton Paine, Nicholas Standish, and Lydia Walker, “ ‘General, I Have Fought Just as Many Nuclear Wars as You Have’: Forecasts, Future Scenarios, and the Politics of Armageddon,” Volume 117, Number 5, *The American Historical Review* (Washington, D.C.: Oxford University Press, December 2012), p. 1445.

³⁸ “‘The Chance for Peace’ Address Delivered Before the American Society of Newspaper Editors, April 16th, 1953,” Dwight D. Eisenhower Presidential Library, Museum and Boyhood Home. https://www.eisenhower.archives.gov/all_about_ike/speeches/chance_for_peace.pdf. Accessed December 10, 2015.

³⁹ See Draft #5 on November 28, 1953. “Atoms for Peace Draft,” [C.D. Jackson Papers, Box 30, “Atoms for Peace - Evolution (5)”; NAID #12021574] available at Dwight D. Eisenhower Presidential Library, Museum and Boyhood Home. https://eisenhower.archives.gov/research/online_documents/atoms_for_peace/Atoms_for_Peace_Draft.pdf. Accessed January 30, 2017.

each other indefinitely across a trembling world.” He suggested that no power would be the victor if nuclear warfare erupted.⁴⁰ He wished to move from the “dark chamber of horrors into the light.”⁴¹ Americans would remember the more popular, and positive, words of the final version delivered on December 8: the president was “determined to solve the fearful atomic dilemma” by ensuring that “the miraculous inventiveness of man would not be dedicated to his death, but consecrated to his life.”⁴² The speech led to U.S. agreements with thirty-nine nations to develop nuclear energy for peaceful purposes. But tensions remained elevated, especially after the U.S. detonated a 15 megaton thermonuclear weapon, code-named CASTLE BRAVO, killing twenty-six Japanese men aboard the *Lucky Dragon* trawler that had been downwind of the blast.⁴³

These tensions around “the fearful atomic dilemma” persisted through the end of the decade. In October 1957, the Soviets sent Sputnik into orbit: this “inventiveness” heightened anxieties about nuclear conflict and removed America’s presumed technological edge. The Soviets’ success raised the possibility of an arms race in space – a race in which the Soviets had the upper hand. With powerful rockets, the Soviets could reach U.S. cities with nuclear warheads. Physicist and historian Spencer Weart wrote that the launch of Sputnik was a “turning point” for Americans, the moment when the prospect of possible annihilation struck home. He explained the reason for the alarm: “unstoppable missiles had seemed like something for a remote science fiction future,” but

⁴⁰ “Atoms for Peace Draft,” [C.D. Jackson Papers, Box 30, “Atoms for Peace - Evolution (5)”]; NAID #12021574] available at Dwight D. Eisenhower Presidential Library, Museum and Boyhood Home. https://eisenhower.archives.gov/research/online_documents/atoms_for_peace/Atoms_for_Peace_Draft.pdf. Accessed January 30, 2017.

⁴¹ Ibid.

⁴² “Atoms for Peace Speech,” Dwight D. Eisenhower Presidential Library, Museum and Boyhood Home. https://www.eisenhower.archives.gov/research/online_documents/atoms_for_peace.html. Accessed December 10, 2015.

⁴³ Graff, *Raven Rock*, p. 49.

now the distant possibility had become very plausible.⁴⁴ As the decade drew to a close, events seemed to spiral towards the ultimate catastrophe. These included the Soviet capture of a U-2 plane and its pilot Gary Powers on May 1, 1960, which put a halt to the planned summit talks in Paris scheduled to begin on May 16, and the hope of a nuclear armament agreement there.

These heightened fears and uncontrollable events resulted in a flurry of civil defense preparedness.⁴⁵ The first nationwide civil defense drills were held during the Eisenhower administration. As part of the scenario, 12 million Americans “died” in a mock nuclear attack. The consensus among government officials was that the drill had progressed smoothly.⁴⁶ A 1955 National Security Council (NSC) study painted a bleaker image: the study predicted that if a nuclear war should occur three years in the future (1958), total economic collapse would result and two-thirds of Americans would need medical attention.⁴⁷ Following another drill, dubbed “Operation Alert Eisenhower,” on July 25,

⁴⁴ See Spencer Weart, *Nuclear Fear: A History of Images* (Cambridge, MA: Harvard University Press, 1988). Eisenhower immediately put B-52 bombers on twenty-four hour alert. After tensions with the U.S.S.R. increased with the Berlin crisis, 12 B-52's remained airborne at all times. The Defense Advanced Research Projects Agency (DARPA), created in 1958, was another response to the Sputnik launch.

⁴⁵ Many wealthier Americans chose to build private bomb shelters, which provided endless commercial possibilities. *Life* magazine began ranking different models, though Consumers Union would later publish a report that concluded that “no shelter a consumer could afford to build was ‘acceptable.’” The private sector also took precautions. For example, Roberts Dairy Company of Omaha, Nebraska, announced a plan to build a bomb shelter for two hundred cows. Along the same vein, the Department of Agriculture released a publication called *Bunker-Type Fallout Shelter for Beef Cattle*. Private bomb shelters: Winkler, *Life Under a Cloud*, p. 129. Cow shelters: Kenneth D. Rose, *One Nation Underground: The Fallout Shelter in American Culture* (New York: New York University Press, 2001), p. 5.

⁴⁶ However, one retired military officer observed that the Soviet Union's recent development of the hydrogen bomb had “outstripped the progress made in our civil defense strides to defend against it.” “First nationwide civil defense drill held - Jun 14, 1954,” history.com (A & E Television Networks, 2015). http://www.history.com/this-day-in-history/first-nationwide-civil-defense-drill-held?et_cid=76233566&et_rid=1210010236&linkid=http%3a%2f%2fwww.history.com%2fthis-day-in-history%2ffirst-nationwide-civil-defense-drill-held

⁴⁷ “Diary Entry by the President,” January 23, 1956, *Foreign Relations of the United States, 1955-1957*, p. 187-188.

1956, officials again informed the president that all had gone as planned. But Eisenhower reminded his advisors that in the event of a real nuclear attack, the people being evacuated “will be scared, will be hysterical, will be absolutely nuts.”⁴⁸ The earlier “duck and cover” government propaganda – a memorable slogan that reminded school children to duck under their desks and cover their heads in the event of a nuclear attack – had changed to a strategy of “run like hell,” according to the *Bulletin of Atomic Scientists*.⁴⁹ Eisenhower believed that 1956 Federal Highway Act, officially called the “National System of Interstate and Defense Highways,” would provide evacuation routes, but even they would become clogged with traffic.

The president’s expanded U.S. Strategic Air Command (SAC) played a major role in the civil defense preparations. Adhering to the cliché that the best defense is a good offense, SAC’s planning for nuclear war included going on the offensive once attacked, which almost guaranteed mutually assured destruction (MAD). SAC also advocated for the development of even stronger weapons, such as the Titan II. Tested in 1959, the Titan II intercontinental ballistic missile became part of the Strategic Air Command in 1963. Ten stories tall, it had the explosive power of nine million tons of TNT (the equivalent of 700 Hiroshima bombs).⁵⁰

⁴⁸ A copy of this declassified memo can be found at “The Eisenhower Ten: The Expanded Cabinet Meeting on Civil Defense,” <http://conelrad.com/atomicsecrets/secrets.php?secrets=e18>. The fact that Eisenhower held a Cabinet meeting on July 25, 1956 between 2:35 p.m. -3:40 p.m. “following [the] operation alert period” is substantiated by his appointment book, available online: “Presidential Appointment Books,” Dwight D. Eisenhower Presidential Library, Museum and Boyhood Home, https://www.eisenhower.archives.gov/research/online_documents/presidential_appointment_books/1956/July_1956.pdf. Accessed January 27, 2016.

⁴⁹ “A Hard Look at Civil Defense,” *Bulletin of the Atomic Scientists* 12 (Nov. 1956) p. 346. As quoted in Winkler, *Life Under a Cloud*, p. 117. A report entitled “Deterrence and Survival in the Nuclear Age,” presented to Eisenhower in late 1957, argued that the government needed to expedite civil defense measures. “If we fail to act at once,” it declared, “the risk, in our opinion, will be unacceptable.” Clarfield and Wiecek, *Nuclear America*, p. 167-68 as quoted in Winkler, *Life Under a Cloud*, p. 119.

⁵⁰ Further, the recently declassified SAC Atomic Weapons Requirements for Study for June 1959, produced in June 1956, revealed that SAC pushed for a “60 megaton bomb, the equivalent of over 4,000 Hiroshima

Hand-in-hand with the development of these advanced nuclear bombs and civilian contingency planning came a new military subspecialty: Continuity of Government (COG) and Continuity of Operations Planning (COOP).⁵¹ Preserving the nation's chain of command and allowing for a semblance of continuity in the event of a nuclear attack clearly were top priorities for the government. That had been true since the Truman administration, when refurbishment of the White House included the addition of a bomb shelter in the basement. The decision to add these tunnels was made early in the Korean conflict, when the possibility that it might erupt into a Third World War seemed very plausible.⁵² Truman was told the shelter would withstand a direct hit. Funding in the amount of \$868,000 was provided immediately by Congress, no questions asked.⁵³

But if those in the line of presidential succession were unreachable, or rendered unfit or found dead, Eisenhower devised both a secret, and an official, plan for presidential continuity. Evidence exists that the Eisenhower administration put in place a plan for private business leaders to become deputized in a national emergency to take over the government, for pay in whatever currency was being used after a nuclear attack.⁵⁴ Eisenhower also drew up more official plans for a "National Defense Executive

atomic bombs." The Report's most striking revelation was that Soviet civilian targets were detailed: a violation of international law. William, Burr, "U.S. Cold War Nuclear Target Lists Declassified for First Time," National Security Archive Electronic Briefing Book No. 538 (December 22, 2015), <http://nsarchive.gwu.edu/nukevault/ebb538-Cold-War-Nuclear-Target-List-Declassified-First-Ever/>

⁵¹ Ted Gup, "The Ultimate Congressional Hideaway," *Washington Post Magazine*, 31 May 1992.

⁵² David McCullough, *Truman* (New York: Simon & Schuster, 1992), p. 881. Secret Service ushered Vice President Dick Cheney into these tunnels during the September 11, 2001 attacks and President Obama had the shelter upgraded during his first term, as detailed by Garrett M. Graff in his new study of Continuity of Government plans. Graff, *Raven Rock*, p. 399.

⁵³ Graff, *Raven Rock*, p. 58. Then the government secretly began building a shelter, "Mount Weather," under the Greenbrier Resort in the Allegheny Mountains of West Virginia that could hold the entire Congress and Supreme Court. During the Eisenhower years, Raven Rock, an alternate Pentagon just over the Pennsylvania border from Maryland, also become operational. Mount Weather and Raven Rock are the core of COG to this day. See Graff, *Raven Rock*, p. 52.

⁵⁴ Reacting to Kennedy's handling of the Bay of Pigs fiasco, Eisenhower called in advisors to discuss an extra-legal shadow government should an absence, or perhaps further weakness, at the helm occur. See

Reserve,” in the form of Executive Order 10660. The Executive Reserve was comprised of individuals from both the civilian economy and from government who would be trained to take over positions in the executive branch in the event of an emergency.⁵⁵

Preparing for a potential nuclear attack was a topic that roused voters’ fears during the 1960 presidential campaign. In a campaign speech in September 1960, Kennedy underscored one of the central paradoxes of foreign policy in the nuclear era: to maintain peace, America had to prepare for war.⁵⁶ In other words, the government developed larger numbers of nuclear weapons with increasingly greater powers of destruction as deterrents to their usage. And with the increase in power came an increase in anxiety. Further, Kennedy claimed that the Eisenhower administration had allowed the Soviet Union to “far out-produce the United States in nuclear technology” causing a “missile gap.”⁵⁷ His rhetoric, combined with a carefully crafted image of youth and good health, was just persuasive enough for voters: Kennedy won the presidential election by fewer than 120,000 popular votes.⁵⁸

Nuclear policy was also a main focus of the transitional meetings between the outgoing president and his young successor. Kennedy was visibly disturbed during his first nuclear policy briefing by the chairman of the Joint Chiefs, General Lyman

Graff, *Raven Rock*, p. 92. See also Nancy Gibbs and Michael Duffy, *The President’s Club: Inside the World’s Most Exclusive Fraternity* (New York: Simon & Schuster, 2013), p. 139.

⁵⁵ “To the Honorable Robert F. Kennedy, Attorney General, from Arthur B. Focke, General Counsel, July 14, 1964,” LBJL, National Security-Defense (GEN ND 1-1 Non-Military Use of Aircraft 11/22/63), Box 3, Folder “ND 2 Civil Defense 11/22/63-9/23/64).

⁵⁶ “Speech of John F. Kennedy, Civic Auditorium, Seattle, Washington,” (September 6, 1960), John F. Kennedy Presidential Library and Museum. <http://www.presidency.ucsb.edu/ws/?pid=25654>. Accessed July 14, 2017.

⁵⁷ “*Milestones: 1961-1968: The Limited Test Ban Treaty, 1963*,” Office of the Historian, Department of State. <https://history.state.gov/milestones/1961-1968/limited-ban>.

⁵⁸ Kennedy garnered 34,226,731 votes to Richard Nixon’s 34,108,157.

Lemnitzer. And during their final transition meeting on January 19, 1961, Eisenhower discussed the crucial and quick decision Kennedy might need to make to avert a nuclear war and introduced Kennedy to the man with the nuclear “football.” Kennedy would travel in the company of this staff member holding a briefcase with nuclear codes, and would carry with him a laminated card that would delineate his choices – to activate missile silos, for example – in the event of a nuclear confrontation.⁵⁹

A smooth, calm transition was paramount but fears about nuclear apocalypse, already high due to events at the end of the 1950s, continued to rise. Kennedy’s rhetoric played a role. He mixed dark language such as a promise to “defend freedom in its hour of maximum danger,” with the inspiring language his Inaugural Address became known for among later generations of Americans.⁶⁰ And just three days later, the U.S. came close to a nuclear disaster when a B-52 carrying a nuclear bomb crashed in North Carolina.⁶¹ Similar nuclear near misses proved that nobody, not even the president, had complete control over the bomb, and that a need existed for the government to develop new policies and laws to anticipate every possible contingency.

⁵⁹ Graff, *Raven Rock*, p. 99.

⁶⁰ Weisbrot, *Maximum Danger*, p. 40.

⁶¹In fact, a series of “broken arrows” – when thermonuclear bombs were either accidentally detonated or lost – had taken place in the late 1950s. In this case, a faulty (low-voltage ready-safe) switch saved the Eastern seaboard from a bomb that carried a destructive yield greater than that of the bombs that hit Hiroshima and Nagasaki combined. The incident was reported in the press at the time, but mention of the fact that the second nuclear bomb “fired three of four arming mechanisms and deployed the parachute designed to slow its descent to optimum blast altitude” was not reported. The National Security Administration continues to declassify information on this event, the latest reveals that their explosive yield was 3.8 megatons. Those dropped on Hiroshima and Nagasaki were .01 and .02 megatons respectively. North Carolina near miss: M. Alex Johnson, “One cheap switch saved US from nuclear catastrophe in 1961, declassified document reveals,” *NBC News*. usnews.nbcnews.com/_news/2013/09/21/20608882-one-cheap-switch-saved-us-from-nuclear-catastrophe-in-1961-declassified-document-reveals?lite. Declassification of near misses: Emma Lacey-Bordeaux, “Declassified report: Two nuclear bombs nearly wiped out North Carolina,” *CNN*, June 12, 2014, <http://www.cnn.com/2014/06/12/us/north-carolina-nuclear-bomb-drop/index.html>.

The concern that Kennedy was a foreign policy neophyte added to Americans' feelings of insecurity. His opponent, Nixon, had raised the issue during the campaign, and just a few months into Kennedy's tenure, the new president was presented with a plan to invade the Bay of Pigs in Cuba that tested his mettle. The CIA told Kennedy the plan had been sanctioned by Eisenhower, who had significantly more experience in foreign affairs. But on April 19, 1961, after three days of fighting, the invaders surrendered. In a memo, the president's brother, Robert Kennedy, wrote that the president "felt very strongly that the Cuba operation had materially affected ... his standing as president and the standing of the United States in public opinion. We were going to have a much harder role in providing leadership."⁶² Although the fiasco did not end in a nuclear confrontation, it led Kennedy to worry that Americans and other world leaders would question his ability to steer the ship.⁶³

Further eroding confidence in his leadership, Kennedy's struggle with foreign leaders continued less than two months later, on June 3 and 4, at a conference in Vienna with Soviet Premier Nikita Khrushchev. At the conference, Khrushchev informed Kennedy that the U.S.S.R. would sign a treaty with East Germany that would abrogate the post-war agreement allowing U.S. access to West Berlin. When Kennedy expressed his regret in leaving the conference in a manner that conveyed to the world that the two nations were moving closer to war, Khrushchev responded that it was the U.S. that was threatening to start a world war, not the U.S.S.R., and that "It was up to the U.S. to decide whether there will be war or peace." Kennedy replied, "Then, Mr. Chairman, there will

⁶² "RFK 6/1/61 memo" as quoted in Michael R. Beschloss, *The Crisis Years: Kennedy and Khrushchev 1960-1963* (New York: Edward Burlingame Books, 1991), p. 143.

⁶³ See Jim Rasenberger, *The Brilliant Disaster: JFK, Castro, and America's Doomed Invasion of Cuba's Bay of Pigs* (New York: Scribner, 2011).

be war. It will be a cold winter.”⁶⁴ Kennedy arrived home extremely shaken with the thought that he might be *the* president to start a nuclear war.⁶⁵

The public was aware that the threat of nuclear war was building throughout the summer of 1961, particularly over Berlin. A Gallup Poll from 1961 showed that fifty-three percent of Americans believed another world war would occur within five years.⁶⁶ Kennedy addressed the American people at 7 p.m. on the evening of his return to Washington from Vienna, June 6, 1961, stating the results of the conference negotiations, though frank, were unsuccessful with regard to ending nuclear tests and proliferation.⁶⁷ James Reston of *The New York Times* covered the lack of agreement between the superpowers, describing Kennedy’s mood as “solemn.”⁶⁸

Then, elevating tensions, Khrushchev compared American troops in a divided Berlin to “a bone stuck in the throat”⁶⁹ and threatened war if the U.S. would not retreat from the divided city.⁷⁰ On August 13, 1961, with tanks facing each other, East German troops began building a barbed-wire-and-concrete wall that came to symbolize East-West divisions through the remainder of the Cold War.⁷¹ When interviewed on *Meet the Press* in September, Robert Kennedy stated that his brother was prepared to use nuclear

⁶⁴ As quoted in Robert Dallek, *An Unfinished Life: John F. Kennedy 1917-1963* (New York: Little, Brown and Company, 2003), p. 413.

⁶⁵ Pierre Salinger, *With Kennedy* (Garden City, NY: Doubleday, 1966), p. 255.

⁶⁶ This is the highest percentage since the early stages of the Korean War. American Institute of Public Opinion. *The Gallop Poll*, 1738. As quoted in Rose, *One Nation Underground*, p. 8.

⁶⁷ “Kennedy’s Address to the Nation on His Talks in Europe,” *The New York Times* (June 7, 1961).

⁶⁸ James Reston, “Vienna Talks End: Meeting Closes with Hard Controversy, Kennedy Solemn,” *The New York Times* (June 5, 1961).

⁶⁹ “The Berlin Wall: Blockade and Crisis,” *History.com*, <http://www.history.com/topics/cold-war/berlin-wall>. Accessed February 1, 2016.

⁷⁰ In response, Kennedy declared that West Berlin was crucial to the free world, doubled draft calls, mobilized 150,000 reservists, and increased the defense budget.

⁷¹ The East German troops began building at the behest of Walter Ulbricht, the Communist leader of East Berlin, under the direction of Khrushchev. Ostensibly, this was to keep Westerners out; in reality, it was to keep East Berliners in. East Berlin was hemorrhaging brain power.

weapons “if it came to that.”⁷² The media continued to report that nuclear anxiety was at a high and America’s very survival was at stake. In a series of articles in *The Washington Post*, staff writer John M. Goshko wrote that “scholars of a future civilization may try to reconstruct the story of a nation once known as the United States of America.” If the people “perish[ed] in the devastation of nuclear warfare,” they might find that the answers “began to take shape during the year 1961,” he warned.⁷³ Ultimately, the president chose not to respond militarily to construction of the wall. The aftermath of the Berlin crisis led Kennedy to employ darker language in his speeches about the potential for a nuclear apocalypse.⁷⁴ On September 25, 1961, Kennedy delivered his “Sword of Damocles” speech in front of the United Nations, pointing out that at this critical juncture, the fate of mankind was on his shoulders as well as those of Khrushchev: “The events and decisions of the next ten months may well decide the fate of man for the next ten thousand years.”⁷⁵ He suggested that humanity was hanging by a thread that could be cut by a nuclear sword of Damocles by “accident, miscalculation, or by madness.”⁷⁶ Testing fate, the Soviets exploded what is still the most powerful bomb detonated in history, the “Tsar Bomba,” (which had a yield of 58 Megatons of TNT) just one month after Kennedy’s speech.

⁷² Rose, *One Nation Underground*, p. 8.

⁷³ Josh M. Goshko, “National Survival Linked to Massive Shelter Plan,” *The Washington Post* (October 4, 1961).

⁷⁴ For a discussion on how the wall transformed the Cold War and Kennedy’s rhetoric, see Lawrence Freedman, *Kennedy’s Wars: Berlin, Cuba, Laos, and Vietnam* (New York: Oxford University Press, 2000), pp. 72-110.

⁷⁵ “Address by President John F. Kennedy to the UN General Assembly,” *Department of State* (September 25, 1961), <http://www.state.gov/p/io/potusunga/207241.htm>. Accessed November 20, 2015.

⁷⁶ The Sword of Damocles is a Greek anecdote linking power with anxiety. Kennedy’s speech was reminiscent of Jonathan Edwards’ fire and brimstone sermon “Sinners in the Hands of An Angry God” when the minister cried that God holds the sinner over the pit of hell, dangling above a cauldron like a spider by a single thread. “Address by President John F. Kennedy to the UN General Assembly,” *Department of State* (September 25, 1961), <http://www.state.gov/p/io/potusunga/207241.htm>. Accessed November 20, 2015.

But it was during the Cuban missile crisis of October 1962 that Americans came closest to facing nuclear catastrophe.⁷⁷ Kennedy was not taken completely by surprise when Indiana Senator Homer E. Capehart and others suggested the existence of missiles ninety miles off the coast of Florida.⁷⁸ Although the Soviets had never placed missiles in other countries before, not even those bound by the Warsaw Pact, U.S. intelligence agencies had been gathering evidence since the summer.⁷⁹ The president went to great lengths to quell public anxiety and keep a sense of calm and order during and after the crisis. He stuck to his official schedule as much as possible; had his advisors pack into one car to get to the White House to avoid notice by the press and public; and requested under the premise of “national security” that *The New York Times* hold a story about the brewing crisis. On the day President Kennedy chose to announce the presence of missiles in Cuba to the American public on television, he kept most of his allies and enemies well informed. Many congressmen were angered, however, when they heard the news of the president’s decision to invoke a quarantine, rather than a military strike, to dismantle the missiles: they felt that Kennedy’s decision was too passive. But, as historian Sheldon M.

⁷⁷ For traditional histories of the Cuban missile crisis see, for example, Robert F. Kennedy, and Arthur M. Schlesinger. For revisionist histories, see, for example, Michael R. Beschloss and Garry Wills. For post-revisionist accounts, see Michael Dobbs and Ernest May and Philip Zelikow. For a post-post-revisionist or “new” history, see Sheldon Stern. Beschloss, *The Crisis Year*. Michael Dobbs, *One Minute to Midnight: Kennedy, Khrushchev, and Castro on the Brink of Nuclear War* (New York: Alfred A. Knopf, 2008). Robert F. Kennedy, *Thirteen Days: A Memoir of the Cuban Missile Crisis* (New York: W.W. Norton & Co., 1969). Ernest R. May and Philip D. Zelikow, *The Kennedy Tapes: Inside the White House During the Cuban Missile Crisis* (Cambridge, MA: The Belknap Press/Harvard University Press, 1997). Arthur M. Schlesinger, Jr., *A Thousand Days: John F. Kennedy in the White House* (Boston, MA: Houghton Mifflin Company, 1965). Sheldon M. Stern, *The Cuban Missile Crisis in American Memory: Myth Versus Reality* (Stanford, CA: Stanford University Press, 2012). Garry Wills, *The Kennedy Imprisonment: A Mediation on Power* (Boston, MA: Little, Brown, & Co., 1982).

⁷⁸ Lawrence Freedman, *Kennedy’s Wars: Berlin, Cuba, Laos, and Vietnam* (New York: Oxford University Press, 2000), p. 168.

⁷⁹ The presence of intermediate-range nuclear warheads so close to the U.S. gave the Soviets not only increased accuracy, but first-strike capability. As the crisis intensified, Secretary of Defense Robert McNamara estimated that if these missiles were used against the U.S., the number of deaths would have been roughly proportionate to that of the Civil War, when out of a total population of 31 million, 600,000 had died. See Henry Chamberlain, “A Leader’s Role,” *The Wall Street Journal* (October 26, 1962).

Stern argues in a new account, *The Cuban Missile Crisis in American Memory*, the president believed that “nuclear weapons had altered the very meaning of war itself, and everything – anything – had to be done to avert a nuclear apocalypse.”⁸⁰ On October 27, 1962, the nadir of the crisis, smoke emanated from the Soviet Embassy as the Soviets began burning their archives: this seemed a definitive indicator to many that nuclear war was imminent.

Senator Capehart’s opponent in the 1962 general election, Birch Bayh, the eventual author of the Twenty-Fifth Amendment, recalled his, and the nation’s, relief when the Soviet ship *Gronzy* turned around at the quarantine line and the crisis came to a peaceful end. Bayh said, “We went through a period of almost a week where we didn’t know if we’d be blown up or not. And that was the first sign that the [Soviets] might not go forward on this and they took whatever missiles they had out of there and so those were scary times.”⁸¹

Though nuclear war was averted, conclusions to the Berlin and Cuba events did not make Americans more comfortable about the prospects of nuclear war. “We must recognize that the peace of nuclear terror cannot endure for long,” physicist Ralph E. Lapp wrote in the *Bulletin of the Atomic Scientists* in April 1963. Lapp pointed out that 18 years had passed since an atomic bomb had been detonated during wartime, but “the tempo of the arms race has intensified greatly during the past two years,’ increasing the danger of nuclear war.”⁸² Slowing the unnerving pace of the clashes between the superpowers seemed to be beyond even the leaders’ control.

⁸⁰ Stern, *The Cuban Missile Crisis in American Memory*, p. 16.

⁸¹ Birch Bayh, Interview with author, November 11, 2014.

⁸² Ralph E. Lapp, “The Strategy of Overkill,” *Bulletin of the Atomic Scientists* (April 1963): 4-11. As quoted in Mann, *Daisy Petals and Mushroom Clouds*, p. 10.

Ruminating on how close the nation had come to the brink of war and unable to secure a test-ban treaty – both superpowers had detonated nuclear tests in the summer and fall as the missile crisis unfolded⁸³ – Kennedy worked to restart his relationship with Khrushchev.⁸⁴ In a news conference on March 21, 1963, the president gave voice to his fears: “Personally I am haunted by the feeling that by 1970... there may be 10 nuclear powers instead of 4.” He warned that as many as twenty-five nuclear powers might exist by the year 1975.⁸⁵ Then, on June 10, 1963, Kennedy signaled a shift in his administration’s stance towards the Soviet Union. Delivering a speech that was months in the making at an American University commencement ceremony, Kennedy said, “We have no more urgent task” than to talk of peace. Remarkably, he emphasized that for all of the differences between West and East, both sides shared a great deal in common. “We all inhabit the same planet. We all breathe the same air,” he said. “We all cherish our children’s future. And we are all mortal.” The president announced that he, Khrushchev, and British Prime Minister Harold Macmillan would begin talks to bring nuclear testing to an end.⁸⁶ The speech led up to the signing of the test-ban treaty in Moscow on August 5, 1963.⁸⁷

⁸³ Stern, *The Cuban Missile Crisis in American Memory*, p. 90.

⁸⁴ See Ted Sorensen’s *Kennedy* for a discussion of Kennedy’s attitude toward war and how he was “acutely” aware of the fact that governing in the nuclear era had changed the stakes. Theodore C. Sorensen, *Kennedy* (New York: Harper & Row, 1965), p. 512.

⁸⁵ “The President’s News Conference,” March 21, 1963, *The American Presidency Project*, www.presidency.ucsb.edu/ws/index.php?pid=9124.

⁸⁶ “Commencement Address at American University, June 10, 1963,” John F. Kennedy Presidential Library and Museum. <https://www.jfklibrary.org/Asset-Viewer/BWC7I4C9QUmLG9J6I8oy8w.aspx>. Accessed February 1, 2017.

⁸⁷ Kennedy signed the treaty into U.S. law on October 7, 1963.

Although Kennedy had asked Congress to appropriate 200 million dollars to build or upgrade fallout shelters and other civil defense measures a year earlier, the Cuban missile crisis also had highlighted how woefully unprepared America was for a first strike, leaving Americans scrambling for security.⁸⁸ After the Cuban crisis, *The Washington Post* noted nearly twenty million copies of “The Family Fallout Shelter,” a thirty-two page pamphlet, had been distributed by civil defense officials since its publication two years earlier.⁸⁹ In Union County, NJ, *The Minuteman* magazine announced a milestone had been reached on December 29, 1964: 1,000,000 NJ shelter spaces had been stocked.⁹⁰ On August 3, 1965, just a month after S.J. Res. 1 (the Twenty-Fifth Amendment) passed both houses of Congress, the Director of the Office of Emergency Planning, Buford Ellington, noted in a memo to White House chief of staff W. Marvin Watson that he had approved 8,000 brochures, updating the ones that had gone out to the public eighteen months prior.⁹¹ Ellington stated that “ordinarily” this “would not have

⁸⁸ In a nationally-televised speech after the Berlin crisis requesting the congressional funding, the president also requested the participation of all Americans at the federal, state, city, and individual levels. The speech was televised on July 25, 1961. Drew Pearson, “Kennedy Will Call for Shelters,” *The Washington Post* (July 20, 1961).

⁸⁹ For example, *The Washington Post* reported that a N.J. resident, Arthur V. Wynne, had written to the Office of Civil Defense Mobilization for advice on how to construct one in his basement, stating that Wynne’s “attitude is typical” because of the grim possibility of war over Berlin. These pamphlets were distributed by civil defense officials in bulk shipments to state and local government offices. By request, one could receive a pamphlet on proper shelter-building in brick rather than concrete. The paper added that government assistance to build shelters was available in the form of home improvement loans insured by the Federal Housing Administration. Edward Cowan, “Interest in Fallout Shelter Increases Since Berlin,” *The Washington Post* (August 12, 1961).

⁹⁰ “County of Union Civil Defense and Disaster Control, Received January 9, 1965 Central Files,” LBJL, National Security-Defense (EX ND 2 9/24/62), Box 4, Folder “ND 2 Civil Defense 11/22/63- 4/19/66.” As for other state planning measures: In a memorandum for the president on the briefing of governors dated May 15, 1964, Office of Emergency Planning (OEP) Director McDermott reported that forty-nine states “[had] already adopted some or all of the legislative measures which we proposed to preserve state and local governments in an emergency, but much remains to be done.” “Memorandum for the President from Edward A. McDermott,” LBJL, EX FE 10-3 National Motto, Box 14, Folder “FE 11 National Emergency.”

⁹¹ Memorandum to W. Marvin Watson August 3, 1965 from Buford Ellington Director Office of Emergency Planning,” LBJL, National Security-Defense (EX ND 2 9/24/62), Box 4, Folder “ND 2-1 Civil Defense Plans.”

been worthy of bringing to [the chief of staff's] attention except in view of the general climate."⁹²

At the federal level, by the 1960s, the plans for presidential protection were more flexible and sophisticated than they had been in the past. In the event of advanced notice of a nuclear attack, the 2857th Test (Helicopter) Squadron would land on the White House lawn, force their way in to the White House shelter, provide the president with a radiation suit, and evacuate him.⁹³ Aides who received pink identification cards – such as speechwriter Ted Sorensen and staff member Kenny O'Donnell – would accompany the president to any one of a number of shelters which would serve as command posts.⁹⁴ OEP Director Buford Ellington listed instructions for continued communications with those in line for the presidency designed to be printed in small books for "Presidential Successors."⁹⁵ The books described the "Central Locator System and the way in which the White House can be reached from points within the United States and abroad,"⁹⁶ according to a memo from OEP director Buford Ellington to aide Bill Moyers. This sort of detailed communications planning for a sudden succession was another indication that the anxieties of the nuclear age were forcing the issue of succession.

The possibility that the president of the United States might be incapacitated at a critical moment in the nuclear age haunted President Kennedy. As early as the summer of

⁹² Ibid.

⁹³ Dobbs, *One Minute to Midnight*, p. 310.

⁹⁴ It is assumed the Supreme Court would have been relocated to Mount Weather as stated above; however, a recent work suggests a contingency plan was arranged with a hotel, the Grove Park Inn, in Asheville, North Carolina. David Krugler, *This is Only a Test: How Washington D.C. Prepared for Nuclear War* (New York: Palgrave Macmillan, 2006).

⁹⁵ "Memorandum for Honorable Bill B. Moyers, from Buford Ellington, Director, May 14, 1965," LBJL, Office Files of Bill Moyers, Box 3 (1340), Folder "Office Files of Bill Moyers: Special Message on Office of the President."

⁹⁶ Ibid.

1961, with Cuba and Berlin looming as potential triggers for a nuclear exchange, Kennedy had sought guidance from his brother, Robert Kennedy, about how to proceed if he were to become incapacitated. In response, Robert Kennedy sent a memo on August, 10, 1961, noting that the nation and the world were in “an age marked by crisis.”⁹⁷ He said that he was responding to his brother’s request for his opinion “on the construction to be given to the presidential inability clause of the Constitution: Article II, Section I, Clause 6.”⁹⁸ The Attorney General assured his brother that the letter agreement between Eisenhower and Nixon, drafted by former Attorney General Herbert Brownell, was above board, concluding that the understanding of March 3, 1958, was “in keeping with the Constitution, and that the precedent set by it could appropriately be followed by” the Kennedy administration.⁹⁹ Robert Kennedy wrote that he, his immediate predecessors, and “the great majority of scholars,” confirmed the contents of the letter agreement: whenever possible, the president should inform the vice president of an inability, if that were not possible, the vice president could determine whether inability exists; and the president alone would determine when that inability was over. The Attorney General’s opinion had an impact: that same day, the White House issued a press release announcing that Kennedy and Johnson had “agreed to adhere to the procedures identical to those which former President Eisenhower and Vice President Nixon adopted with regard to any questions of presidential inability.”¹⁰⁰ Though they agreed to follow the pattern of their

⁹⁷ “Letter to the President from Robert F. Kennedy, Attorney General,” NA, CJ, SCA, Box 4, Folder “88th-Kefauver, PI Correspondence Aug 1961- June 1963.”

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ “Immediate Release August 10, 1961, Office of the White House Press Secretary,” NA, CJ, SCA, Box 4, Folder “88th-Kefauver PI Aug 1961-1963.”

predecessors, the letter agreements did not have the same authority as a constitutional amendment.

That the issue was raised at all suggests just how anxious even the youthful Kennedy was about ensuring the orderly transfer of power during a nuclear age. No president or vice president in U.S. history had come to such a public agreement over the issue of presidential inability before Eisenhower and Nixon.¹⁰¹ That they publicly acknowledged the possibility of an incapacitated president suggests that the conversation about the need for a clear chain of command had become urgent in the nuclear age, when minutes mattered.

Though sometimes mixed with politics, this planning at, and for, every level of society speaks to an intrinsic desire for a measured transition of power in a time of crisis. And it underscores the fact that the anxiety surrounding the potential use of nuclear weapons was omnipresent. By the time of the Kennedy assassination, the topic of survival was infusing average Americans' day-to-day conversation, even at mundane events like cocktail parties and P.T.A. meetings.¹⁰²

Amid this heightened anxiety and preparation for the end of times, on November 22, 1963, John Kennedy was assassinated by Lee Harvey Oswald in Dallas, Texas. When Kennedy was pronounced dead in Parkland Hospital at 1 p.m. CST, the first sudden transfer of power in the nuclear age began to unfold behind the scenes as the nation, and

¹⁰¹ In, *Six Crises*, Nixon explained that the intent behind the letters, in Eisenhower's mind, was "on solving the practical problem of giving his vice president the authority to act immediately in a [nuclear] crisis, if necessary." Richard M. Nixon, *Six Crises* (Garden City, NY: Doubleday & Company, Inc.) p. 178.

¹⁰² "Civil Defense: A Place to Hide," *Time* (December 18, 1950).
<http://content.time.com/time/magazine/article/0,9171,858974,00.html>. Accessed February 13, 2017.

the world, reacted in horror and disbelief.¹⁰³ Complications ensued: more than half of Kennedy's cabinet was on a plane over the Pacific Ocean, headed to Japan. Rumors circulated that Johnson had been shot or had suffered a heart attack.¹⁰⁴ These were plausible, as Johnson had already experienced a heart attack in 1955, and was part of the motorcade in Dallas, in a car behind the one carrying the president.

Kennedy's death highlighted the succession problem that had existed since the nation's founding: no method to appoint a new vice president in the case of a presidential death or resignation existed. But while the dilemma was old, the circumstances were new: the bomb and the anxieties of the nuclear age made this sudden transition entirely different than the others. Nuclear weapons had irrevocably altered the nature of the presidency and underlined the need for a clear line of succession. But the Constitution had no answer for the dilemma of John Kennedy in the emergency room at Parkland, not yet pronounced dead but clearly dying and unable to carry out his duties.¹⁰⁵

The Kennedy/Johnson letter agreement of August 10, 1961 was the guiding rule should the president become incapacitated. It stated that in the event of presidential inability, not only would the vice president wish to have the support of the Cabinet, but he must confirm the legality of taking office with the Attorney General. LBJ and the president's brother, Robert Kennedy, had a poor relationship laced with mistrust.¹⁰⁶ Even

¹⁰³ Father Oscar L. Huber performed last rites at 12:50 p.m. That Kennedy was officially declared dead at 1 p.m. is the last line of Richard Reeves' work, *President Kennedy: Profile of Power*. Richard Reeves, *President Kennedy: Profile of Power*, (New York, Simon & Schuster, 1994), p. 662.

¹⁰⁴ Cabinet en route to Japan, an hour west of Hawaii: Gillon, *The Kennedy Assassination*, p. 83. Johnson reported to suffer severe heart attack: Gillon, *The Kennedy Assassination*, p. 101.

¹⁰⁵ In fact, Kennedy was dead by the time his car reached the hospital, but doctors attempted to resuscitate him before officially declaring him dead.

¹⁰⁶ This relationship of mistrust began, as Robert Caro in *The Passage of Power* contends, during their first encounter when RFK refused to greet Johnson with the customary salutation "Leader," and stand and shake his hand in the Senate Office Building in January 1953. It continued, for example, when RFK visited the LBJ ranch to go shooting, was knocked down by the kick of the gun, and LBJ derided him for it. Robert Caro, *The Years of Lyndon Johnson: The Passage of Power* (New York: Alfred A. Knopf, 2012), p. 61-63.

before the assassination, issues existed around a temporary transfer of power to Johnson. Would RFK, if his brother were disabled, try to withhold some of the powers of the presidency from Johnson? Or, even worse, would he govern in his brother's name, as Edith Bolling Wilson and Dr. Carry T. Grayson did when Wilson was incapacitated earlier in the century?

Johnson, therefore, refused to leave Parkland Hospital without knowing if President Kennedy was alive or dead. Remarkably, Ken O'Donnell, Johnson's liaison to the president, Roy Kellerman, the head of President Kennedy's security detail, and Shift Supervisor Agent Emory Roberts, all knew the president was dead, but failed to inform Johnson,¹⁰⁷ which they should have done for reasons of national security. Johnson was forced to make an uncomfortable telephone call to Robert Kennedy to suggest that he immediately assume the presidency, in part because the assassination was thought to be part of a larger conspiracy.¹⁰⁸

Both the public and the Central Intelligence Agency (CIA) worried that Moscow or Havana might have arranged to have Kennedy killed. Soviet leadership, through the media, had quickly issued a bulletin that denied involvement with Oswald and declined responsibility for the president's death, placing it on ultra-right-wing extremists within the U.S. instead.¹⁰⁹ Yet, general rumors of a conspiracy circulated due to the fact that

See also Jeff Shesol, *Mutual Contempt: Lyndon Johnson, Robert Kennedy, and the Feud That Defined a Decade* (New York: W.W. Norton & Company, 1997).

¹⁰⁷ Numerous conflicting accounts of when Johnson learned of Kennedy's death exist. Johnson told the Warren Commission that Kenny O'Donnell and Roy Kellerman told him at 1:20 p.m. Emory Roberts said he was the person that informed Johnson he was now president at 1:13 p.m. Steven Gillon suggests that the latter account is correct, and Johnson pushed back the clock by seven minutes so that he did not look over-eager to assume the presidency. Gillon, *The Kennedy Assassination*, pp. 107-10.

¹⁰⁸ Richelson, Jeffrey T. "CIA Reactions to JFK Assassination Included Fear of Possible Soviet Strike against U.S." *Studies in Intelligence: New Articles from the CIA's In-house Journal*, National Security Archive No. 493, (Updated November 20, 2014), p. 2.

<http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB493/>

¹⁰⁹ Ibid., p. 4.

Oswald was once a Soviet citizen, had attempted to apply for Cuban citizenship, and was a self-avowed Communist sympathizer. These fears were heightened when the CIA failed to locate Khrushchev for 24-48 hours afterwards.¹¹⁰ According to intelligence expert Jeffrey T. Richelson, the CIA surmised that Khrushchev had either gone to a secure location in anticipation of an American reprisal, or he was preparing an attack on the U.S.¹¹¹ Through the end of November and beyond, the agency still did not rule out a conspiracy, foreign or domestic.¹¹² And any foreign involvement in the president's death might have become a *casus belli* for the United States.¹¹³

The night of Kennedy's death, the new president was concerned that the assassination had been part of a Communist plot against the U.S., and that nuclear war might ensue.¹¹⁴ "What raced through my mind was that, if they had shot our president, driving down there, who would they shoot next?" he told press aide Bill Moyers in a

¹¹⁰ Richelson, "CIA Reactions to JFK Assassination Included Fear of Possible Soviet Strike against U.S." *Studies in Intelligence: New Articles from the CIA's In-house Journal*, p. 3.

¹¹¹ Later declassified documents suggest that CIA director John A. McCone was not concerned about a Communist conspiracy because signals intelligence had revealed that Kennedy's murder had shocked Soviet and Cuban leaders. David Robarge, "DCI John McCone and the Assassination of President Kennedy," *Studies in Intelligence*, Vol. 57, No. 3 (September 2013), Approved for release 2014/09/29. http://nsarchive.gwu.edu/NSAEBB/NSAEBB493/docs/intell_ebb_026.PDF

¹¹² Richelson, "CIA Reactions to JFK Assassination Included Fear of Possible Soviet Strike against U.S." *Studies in Intelligence: New Articles from the CIA's In-house Journal*, p. 3.

¹¹³ David Robarge, "DCI John McCone and the Assassination of President Kennedy," *Studies in Intelligence*, Vol. 57, No. 3 (September 2013), Approved for release 2014/09/29.

http://nsarchive.gwu.edu/NSAEBB/NSAEBB493/docs/intell_ebb_026.PDF. Both to quell fear and uncover further answers, Johnson formed the President's Commission on the Assassination of President Kennedy, which became known as the Warren Commission: he cajoled Supreme Court Chief Justice Earl Warren into heading it up, to add a strong sense of legitimacy to the Commission's findings. Even after the Commission ruled that a conspiracy had not transpired, a Harris survey showed that 66% of Americans still believed one had occurred. Louis Harris, "The Harris Survey: 66% See Conspiracy in Kennedy slaying" *The Washington Post* (Monday morning, May 29, 1967), LBJL, Box 179 "Office Files of Frederick Panzer," Folder "Office Files of Fred Panzer ASSASSINATION/OSWALD."

¹¹⁴ Johnson first displayed his anxiety over conspiracy rumors while watching NBC's news broadcast; he started talking back to anchormen Chet Huntley and David Brinkley: "Keep talking like that and you'll bring on a revolution just as sure as I'm sitting here." See David Robarge, "DCI John McCone and the Assassination of President John F. Kennedy," *Central Intelligence Agency* (9/29/2014). <https://archive.org/details/DCIJohnMcConeAndTheAssassinationOfPresidentJohnF.Kennedy>. Accessed July 16, 2017.

1966 phone conversation that was captured by the White House taping system. "And what was going on in Washington? And when would the missiles be comin'?" the president fretted.¹¹⁵ He knew this uncertainty was not only disconcerting, it was dangerous. In an article entitled "The Problem of the Succession to the Presidency" *New York Times* columnist James Reston noted, "In this day of instantaneous attack, nobody could be quite sure whether the assassination was the end or merely the beginning of the agony."¹¹⁶ The idea that a third world war might erupt momentarily was a real concern, perhaps even greater than during the Berlin and Cuban crises.

In preparation for the possibility of a nuclear attack, the Joint Chiefs of Staff ordered that the DEFCON levels be raised from DEFCON V (normal readiness posture) to DEFCON IV (increased intelligence watch) at 2:15 p.m. EST.¹¹⁷ Going one step further, a secret naval message stated that "this [was] the time to be especially on the alert" and ordered precautions consistent with DEFCON III (increased readiness posture) be taken, minus the recall of personnel on leave because it would visibly indicate "heightened tensions."¹¹⁸ Yet, officials denied raising DEFCON levels so as not to incite

¹¹⁵ "[Johnson] repeated that point in a 1970 interview with Walter Cronkite. 'I think the first thought that I had was that this is a terrifying thing that may have international consequences, and the problems that we'd had with Castro and what I had seen in intelligence reports and other things that concerned me, that this might be an international conspiracy of some kind.'" As quoted in Gillon, *The Kennedy Assassination*, p. 60-61.

¹¹⁶ James Reston, "The Problem of Succession to the Presidency," *The New York Times* (December 6, 1963).

¹¹⁷ "Memorandum for Bromley Smith 4 December 1963," LBJL, NSF Subject File Box 20, Folder "Kennedy Death DEFCON PROCEDURES."

¹¹⁸ Remarkably, after hearing of the assassination at 2:15 p.m. from the Joint Chiefs of Staff, it took the Department of Defense's US Southern Command a full thirty-five minutes to order the change and another ninety-eight minutes for it to be accomplished at 4:28 p.m. "Memorandum for Bromley Smith 4 December 1963," LBJL, NSF Subject File Box 20, Folder "Kennedy Death DEFCON PROCEDURES."

panic. They told newspapers such as the *New York Herald Tribune* that “no unusual alert of troops at any point in the world” had occurred.¹¹⁹

The goal of calming public and private anxiety over a possible conspiracy, one that might escalate to a nuclear attack, governed Johnson’s actions and demeanor during the transition. This was central to Johnson’s thought process when he took the oath of office aboard Air Force One. He was not sure whether or not the oath had to be taken before his position as president was official, but he was sure that every vice president who suddenly transitioned to the presidency had done so.¹²⁰ Aware of the public mood and that many of Kennedy’s aides thought poorly of him,¹²¹ the new president focused on eliminating any ambiguity as to whether or not he was now in charge, desiring to convey a sense of command. In the hours and days after the assassination, all who encountered the new president were treated to a cool, calculating, disciplined Johnson, rather than the tempestuous vice president they had been expecting.¹²²

Although official records of whether security for the Speaker of the House John McCormack and the Senate president pro tempore Carl Hayden (those next in line for the

¹¹⁹ Night Duty Report Major Leo J. Parent 25 November 1963,” LBJL, NSF Subject File Box 20, Folder “Kennedy Death DEFCON PROCEDURES.” See also “Letter to Mr. Bundy December 4, 1963,” LBJL, NSF Subject File Box 20, Folder “Kennedy Death DEFCON PROCEDURES.” This explains why Reston began the statement on instantaneous attack in the paragraph above with the incorrect claim that “no additional atomic bombers were flushed, as during the Cuban crisis.” James Reston, “The Problem of Succession to the Presidency,” *The New York Times* (December 6, 1963).

¹²⁰ Gillon, *The Kennedy Assassination*, p. 107.

¹²¹ See Ted Sorensen’s *Counselor* for an account of a Kennedy aide who stayed on with Johnson through the transition (and also for a cogent account of the Kennedy administration crises). Sorensen submitted his resignation letter on the day after the assassination, but Johnson did not accept it. He was the first to resign on February 29, 1964. Sorensen, *Counselor*.

¹²² Studying Johnson’s doodles, historian David Greenberg later observed these dual sides of the president’s character: while many of the doodles reflected the president’s “explosive personality,” Johnson’s drawings depicting regimented boxes and lines demonstrated a “different side of his character” which was “coolly measured and systematic.” David Greenberg, *Presidential Doodles* (New York: Basic Books, Perseus Books Group, 2006), p. 161. On Johnson’s success in checking his temper and appearing calm and in control, see historian Robert Caro’s conclusion, suggesting Johnson pulled off this feat “long enough.” Caro, *The Years of Lyndon Johnson*, pp. 598-605.

presidency) was increased after Kennedy's murder seem to be lost to history,¹²³ *The New York Times* reported that within minutes after the announcement of Kennedy's death, Secret Service arrived at the Capitol to begin an "around-the-clock guard" of the speaker.¹²⁴ At the same time that McCormack heard the Secret Service was on its way to the Hill to protect him, reporters told him that Johnson had been shot, allowing him to come to the conclusion that he might suddenly now be president. According to historian William Manchester, the speaker stood up, swooned, and was still recovering in his chair at the House restaurant when another congressman dispelled the rumor.¹²⁵ A few days later, the White House announced the speaker would be kept informed on all matters related to national security and be invited to "those National Security Council and other key decision-making meetings."¹²⁶ White House Press Secretary Pierre Salinger stated that the speaker's attendance at meetings "would be in no way inconsistent with his legislative responsibilities,"¹²⁷ highlighting the separation of powers concern that would become a key point of debate as Bayh's amendment moved through Congress.

Johnson also contacted Truman and Eisenhower, inviting them to the White House on the day after the assassination to further a sense of continuity. The new

¹²³ The author has contacted the Capitol Police, Metropolitan Police, Senate Historian Don Ritchie, NARA archivist Tom Eisinger, LBJ Library archivist Allen Fisher, a Secret Service Historian, and others, but has found records elusive. Additionally, she corresponded with Steven M. Gillon; he is of the opinion that security around the speaker and Senate president pro tem was increased, but cannot find official supporting documentation either.

¹²⁴ John D. Morris, "McCormack, Next in Line to the Presidency," *The New York Times* (November 23, 1963), p. 11.

¹²⁵ William Manchester, *The Death of a President: November 20 – November 25, 1963* (New York: Arbor House, 1967), p. 247.

¹²⁶ *Congressional Quarterly Almanac 88th Congress 1st Session 1963*, Volume XIX (Washington, D.C.: Congressional Quarterly Inc., 1963), p. 65.

¹²⁷ Salinger also confirmed that Hayden would be attending weekly congressional meetings of White House officials now that he had succeeded Johnson as the presiding officer in the Senate. Nan Robertson, "McCormack Asked to Join on Key Meetings of Policy," *The New York Times* (December 4, 1963).

president ensured that he was photographed with them to bolster his legitimacy.¹²⁸ More importantly, he consulted with them prior to his speech before a joint session of Congress on November 27, 1963. This speech, his first public address as president, is the best example of Johnson's measured manner in the aftermath of Kennedy's murder, demonstrating for the world that he was now in control. The presentation drew attention to the succession issue: the television cameras panned from McCormack to Carl Hayden, ages seventy-one and eighty-six respectively, behind him at the podium. Lee Harvey Oswald's shots put a man with little experience in foreign affairs into the most powerful office in the world, and Truman's Presidential Succession Act of 1947 decreed that the aging men sitting behind Johnson were next in line.

Notably, an early draft of Johnson's speech by Adlai Stevenson emphasized the anxieties facing the nation: specifically the possibility of nuclear war. This draft stated that Kennedy's greatest contribution was that as president, he "match[ed] national power with national restraint at a time in history when our national safety can no longer be secured by competitive pursuit of ever-greater nuclear power."¹²⁹ The language in Stevenson's draft was softened in the final version and references to nuclear arms were elided. In its place appeared the more ambiguous line "in an age when there can be... no victors in war... we must be prepared at one and the same time for the confrontation of

¹²⁸ Johnson ordered a Secret Service detail to protect former President Eisenhower at about seven thirty in the evening of November 22. U.S. Senate Historian Don Ritchie points out that 1965 was the first time the federal government provided Secret Service to former presidents, even to ones that had death threats against them. Don Ritchie, Interview with Author, December 5, 2014.

¹²⁹ "For Mr. McGeorge Bundy, White House, From Benjamin H. Read, Executive Director, Department of State," LBJL, NSF Speech File, Box 1, Folder "Speech, President's Joint Session of Congress (11/27/63)," p. 7.

power and the limitation of power.”¹³⁰ Johnson’s final draft soothed the nation – in part because of the content Johnson chose to leave out.

Although not overtly discussed in the final draft of Johnson’s speech, the issue of nuclear weapons surfaced in some of the commentary, married with the idea of continuity. The United Information Agency Research and Reference Service’s Daily Report Supplement for the president noted that Moscow observed, “When we speak of the Kennedy line, which the new president is preparing to continue, we refer to what was dominant in that line – that is concern for averting thermonuclear war.”¹³¹ On that topic, the Soviet satellite Czechoslovakia broadcast that it would have preferred to have heard language much closer to Stevenson’s earlier draft: something of a reiteration of Kennedy’s speech before the U.N. General Assembly. In that speech, Kennedy urged the securing of peaceful cooperation. Prague radio believed it was not a good omen that Johnson did not do the same.¹³²

Shortly after Johnson’s transition, the Italians weathered one of their own.¹³³ In August 1964, Italian President Antonio Segni suffered a cerebral hemorrhage like Franklin Roosevelt in 1945. Unlike the American president who died of the hemorrhage, Segni slipped into coma, and the Italian Senate President, Cesare Merzagora, took on

¹³⁰ “Office of the White House Press Secretary, Remarks of the President to a Joint Session of Congress (As Actually Delivered),” LBJL, NSF Speech File, Box 1, Folder “Speech, President’s Joint Session of Congress (11/27/63).”

¹³¹ “Daily Report Supplement, World Reaction Series: Foreign Radio and Press reaction to President Johnson’s Speech of 27 November 1963,” No. 9 – 1963. LBJL, NSF Speech File, Box 1, Folder “Speech, President’s Joint Session of Congress (11/27/63),” p. 2.

¹³² “Worldwide Reaction to President Johnson’s Speech to Congress – November 27, 1963,” (United States Information Agency Research and Reference Service, November 29, 1963), LBJL, NSF Speech File, Box 1, Folder “Speech, President’s Joint Session of Congress (11/27/63),” p. 5.

¹³³ Robert Caro argues that the Johnson transition period lasted seven weeks, ending with his State of the Union Address on January 8, 1964. See Caro, *The Years of Lyndon Johnson*.

presidential responsibilities until he recovered. The Vice President of the Senate stepped into Merzagora's office, and had Segni not recovered, a presidential election would have taken place within fifteen days. Birch Bayh's supporters in the fight for succession and inability legislation in the U.S. Congress noted that the Italian president, "as in most European systems," served more of a ceremonial role as head of state, but among other responsibilities, the Italian president was head of the Defense Council. In their memo to Senator Bayh, they compared the orderly succession in Italy with the uncertainty that accompanied presidential incapacities in the U.S., remarking that "given the corrupt, volatile, and unstable nature of Italian society and politics ... the Italians have handled their crisis much better than Americans did during the Garfield and Wilson episodes."¹³⁴ They judged that "the method of deciding inability, although not stipulated by the Constitution or statute, was handled well."¹³⁵ The sudden presidential transition in Italy was a stark reminder that in the precarious nuclear age, a president could become incapacitated at any time. The Italian crisis occurred in the middle of the 1964 U.S. presidential election season, accentuating the need for an able Commander in Chief, a succession plan, and a method of filling a vice presidential vacancy.

Nuclear anxiety played a central role in the '64 campaign, one in which Johnson was determined to secure a landslide victory to prove his legitimacy. Even after Cecil Stoughton's famous photograph of him taking the oath of office recorded the event for posterity, he complained: "I took an oath. I became president. But for millions of Americans I was still illegitimate, a naked man with no presidential covering, a pretender

¹³⁴ "To Senator and Larry Conrad from Jerry Udall and George Condon," NA, CJ, SCA, Box 9, Folder "88th Congress, PI - Memo (Staff) 1964."

¹³⁵ Ibid.

to the throne, an illegal usurper.”¹³⁶ One of the most notable passages in Johnson’s acceptance speech at the 1964 Democratic National Convention in Atlantic City, N.J., was the assertion, “We cannot act rashly with the nuclear weapons that could destroy us all. The only course is to press with all our mind and all our will to make sure, doubly sure, that these weapons are never really used at all.”¹³⁷ In fact, the first bullet point of the 1964 Democratic platform pamphlet noted that “at the start of the third decade of the nuclear age,” maintaining a nuclear arsenal was of the utmost importance. The goal, the document stated, was to “continue the overwhelming supremacy of [America’s] Strategic Nuclear Forces.”¹³⁸

Republican presidential nominee Barry Goldwater’s loose talk of nuclear weapons during the campaign rattled Americans’ nerves.¹³⁹ In *The Conscience of a Conservative*, Goldwater argued that the U.S. was in danger of losing its freedom to the Soviet Union; because of nuclear parity, the war would be won by the Soviet’s superior manpower.¹⁴⁰ Further, Goldwater believed, the strategy of the United States “must be

¹³⁶ “LBJ Ascends to the Presidency,” White House Historical Association. <https://www.whitehousehistory.org/teacher-resources/lbj-ascends-to-the-presidency>. Accessed February 2, 2017.

¹³⁷ “Acceptance Speech at the Democratic National Convention (August 27, 1964), Lyndon B. Johnson,” Miller Center (University of Virginia), <http://millercenter.org/president/speeches/speech-5660>. Accessed February 3, 2016.

¹³⁸ In bold letters under “Building The Peace,” the pamphlet argued that these nuclear weapons must remain with the president. The statement was a direct counter to many made by the Republican nominee, Arizona Senator Barry Goldwater, who argued in a 1960 book written on his behalf, *The Conscience of a Conservative*, that because of the split-second timing needed to make decisions regarding the use of nuclear bombs, smaller ones should be under the control of NATO commanders in the field. “One Nation, One People: Democratic Platform, 1964,” LBJL Office Files of Frederick Panzer Box 145, Folder “1964 Democratic Platform,” p. 8-9.

¹³⁹ Mann, *Daisy Petals and Mushroom Clouds*, p. 21. Goldwater’s language regarding relations with the Soviet Union recalled Eisenhower’s brinkmanship – a Goldwater presidency would not feel like a natural progression from Kennedy’s flexible response. Quite the opposite, Goldwater had made a name for himself in the Senate as one of the main opponents of Kennedy’s Limited Nuclear Test Ban Treaty.

¹⁴⁰ Thus, according to the Senator, the U.S. “should make every effort to achieve decisive superiority in small, clean nuclear weapons.” Barry M. Goldwater, *The Conscience of a Conservative* (Mansfield, CT: Martino Publishing, 1960), p. 119.

primarily offensive in nature”: the U.S. should not be afraid to launch a preemptive nuclear attack on the Soviet Union.¹⁴¹ In May 1964, Goldwater was quoted saying “I don’t want to hit the moon. I want to lob one [presumably a nuclear missile] into the men’s room of the Kremlin and make sure I hit it.”¹⁴² In July, when accepting the Republican nomination in San Francisco’s Cow Palace, Goldwater continued to paint himself as an extremist, famously saying: “I would remind you that extremism in the defense of liberty is no vice. And let me remind you also that moderation in the pursuit of justice is no virtue.”¹⁴³ Johnson capitalized on these quotes, repeating them on the campaign trail through Election Day.¹⁴⁴

The Soviets, not surprisingly, replied to this saber rattling with vehemence, elevating fears that nuclear war was on the horizon. During a speech televised to the Soviet people, Khrushchev compared the 1964 Republican National Convention to “the Fascist gatherings” in Nuremburg and suggested that the GOP nominee was a “wild” or “semi-wild” man, though he did not mention Goldwater by name.¹⁴⁵ Khrushchev then told attendees at a conference marking the twentieth anniversary of Poland’s communist government that the Soviets should “as the saying goes, clean our weapons and stay on full alert.... If the [Americans] want to unleash war, we must not be caught unprepared.”¹⁴⁶ The Soviet leader drew attention to the possibility that if voters chose the

¹⁴¹ Ibid, p. 118.

¹⁴² Fendall W. Yerxa, “President Finds G.O.P. ‘Smearlash,’” *The New York Times* (October 22, 1964).

¹⁴³ Mann, *Daisy Petals and Mushroom Clouds*, p. 27.

¹⁴⁴ Ibid.

¹⁴⁵ “*K Trigger-Wary About Goldwater*,” New York Herald Tribune, July 22, 1964. LBJL Goldwater Files Series 1 Goldwater: Press Relations, Politics Polls, & Foreign Policy Box 318, Folder “Goldwater, Sen. Barry: Foreign Policy Khrushchev And Russian Criticism Of 1964.”

¹⁴⁶ Ibid.

wrong candidate, they may have been inadvertently ticking the box on their own death sentences.

Because many Americans regarded the possibility of a nuclear war with the Soviets as the most-critical issue of the election, many political ads played on this fear.¹⁴⁷ Advertising firm Doyle, Dane, and Bernbach created “the Daisy Ad,” which stands out as the most famous political ad in American history. Though the sixty-second ad aired only once on NBC on September 7, 1964, it was memorable because it connected the next generation with the horror of a nuclear explosion. The ad featured a little girl picking the petals off a daisy while a countdown proceeded in the background; then, reflected in the pupil of her eye, was the explosion of a nuclear bomb. Goldwater’s name was not mentioned. Johnson’s voice could be heard in a poignant voiceover espousing a Manichean view of America’s future, or lack thereof, under the next president. These ads, and others like them, did not create the electorate’s nuclear anxiety, but they did creatively put that fear to work toward obtaining a Johnson victory.¹⁴⁸

In January 1965, with Johnson elected in his own right and Humphrey installed as vice president, Senator Bayh began to press forward with succession and inability legislation. Johnson arguably had a more productive first one hundred days in office than Franklin Roosevelt. The Twenty-Fifth Amendment can be considered a piece of this

¹⁴⁷ John G. Geer, *In Defense of Negativity: Attack Ads in Presidential Campaigns* (Chicago: University of Chicago Press, 2006), 3. As quoted in Mann, *Daisy Petals and Mushroom Clouds*, p. 115.

¹⁴⁸ Additional Johnson ads reflected this fear. For example, the “Telephone Hotline Spot,” pictured an unanswered phone ringing (meant to mimic the hotline installed between Washington and Moscow after the Cuban missile crisis) with the announcer concluding that it only rang in a crisis and should be answered by a president well-equipped to handle it. “The decisions they make here [in the office of the president] can change the course of history or end history altogether,” the voiceover in the “Our President” spot stated. “Type of Commercial Commander in Chief: ‘Our President,’” *Museum of the Moving Image: The Living Room Candidate* (2012), <http://www.livingroomcandidate.org/commercials/type/commander-in-chief>. February 3, 2016.

effort. But just after the inauguration, Johnson was taken to Bethesda Medical Center and diagnosed with tracheitis, an irritation of the upper breathing tube that causes a cough and is a symptom of the common cold. Though the president's hospitalization was merely a precaution, it again drew attention to the possibility that a president could become incapacitated, or die suddenly, in the middle of a nuclear-age crisis.¹⁴⁹

Only halfway through the turbulent 1960s, the nation had already experienced overwhelming anxiety that peaked with the Cuban crisis and Kennedy's assassination. Nuclear anxiety infused the political and cultural atmosphere, affecting both legislators' decisions and their constituents' day-to-day actions. The chronology of nuclear advances and related events directly correlates to the rise in anxiety, as seen in cultural institutions and popular media. This nuclear anxiety permeated political culture, taking concrete form in the construction of bomb shelters and the enactment of civil defense measures. America's leaders were no different from their constituents in that they, too, were afraid of their own end, so they devised shelters in secret locations and developed COG plans. But beyond their own mortality, these leaders were concerned about the continuity of the institution of the presidency itself, and the ultimate continuity of the laws. The Twenty-Fifth Amendment would be their response.

¹⁴⁹ See Laurence Stern, "Johnson to Remain in Hospital for Rest," *The Washington Post* (January 24, 1965).

Chapter 3: Ingraining Anxiety: The Passage of the Twenty-Fifth Amendment in the Nuclear Age

Even prior to the assassination of President John F. Kennedy, momentum had begun to build for a new constitutional amendment to solve the presidential succession and inability issues that had existed since the nation's founding. From December 1963 through February 1967, references to the shock of Kennedy's assassination lessened, but direct and indirect allusions to the nuclear anxiety that permeated American culture and politics continued unabated. Focused on the shock of the Kennedy assassination, traditional histories of the Twenty-Fifth Amendment, however, have missed the fact that before the president's sudden death, congressmen and expert witnesses already were framing the urgent need for a solution to the succession and inability problem in language that displayed society's deep undercurrent of nuclear anxiety.

Dwight Eisenhower and Richard Nixon – leaders formerly in the presidential line of succession – provided statements in hearings that the Nixon/Eisenhower and Kennedy/Johnson letter agreements were an insufficient solution. The major architect of the amendment, Birch Bayh, believed that S.J. Res. 35 – introduced before Kennedy's assassination by Senators Estes Kefauver and Kenneth Keating – did not solve the problem either. But what appeared to be a typical legislative dead end changed when Bayh harnessed nuclear anxiety to the passage of the bill. Bayh reflected in a 2014 interview that nuclear anxiety was an important, continuous factor that provided a sense of urgency and also helped to speed the process of ratification.¹ It was this nuclear

¹ Birch Bayh, Interview with author, November 11, 2014.

anxiety that contributed to each stage of the process from Bayh's original drafting, passage through committees and the Senate in 1964, debate over time limits, the passage through both Houses of Congress in 1965, and finally ratification in the states in February 1967.

Oral interviews of key actors and examination of the Subcommittee on Constitutional Amendments files and other previously unexamined archives reveal that senators shared concerns about presidential succession and inability in a nuclear age, but the archives also uncover contradictions that complicated the amendment's progress: different ways of thinking about nuclear anxiety manifested in strong, and sometimes opposing, suggestions for the language and structure of the succession and inability plan. Congressmen disagreed about the amount of detail the amendment should contain. In some cases, greater detail appealed to congressmen as a solution to the problem of ensuring presidential continuity, while to others, the detail seemed like a liability. Different institutional values held by each House also contributed to a stalemate in Conference Committee. The urgency of concern about presidential stability amid the real possibility of instant nuclear destruction directly contributed to ratification, but also complicated the process of ratification. In Colorado, for example, those who were worried about a nuclear attack tended to be pro-amendment. However, a significant subset of those who were *really* worried about a nuclear attack took positions against the amendment on the grounds that it did not go far enough in protecting the continuity of the presidency. Despite these different reactions to the prospect of nuclear destruction, after more than two decades at the forefront of America's psyche, nuclear anxiety became ingrained in the constitutional framework of American government.

* * *

A year after the Sputnik launch, and after Eisenhower and Nixon signed their letter agreement on March 3, 1958, Senator Estes Kefauver of Tennessee, chairman of the Judiciary Committee's Subcommittee on Constitutional Amendments, had made it clear that he believed the time had come to pass inability and succession legislation.² In April 1958, Kefauver had introduced S.J. Res. 28, which embodied the spirit of the letter agreements with few modifications. He reintroduced the bill in the 86th Congress (1959-1960). Both times, the chairman was able to move the bill out of his subcommittee to the wider Judiciary Committee, but no further. Congress adjourned in 1960 with the legislation still on the Committee's agenda.

Then, in early 1963, Kefauver announced that he would join Republican Senator Kenneth Keating of New York to co-sponsor a bill, S.J. Res. 35, endorsed by the American Bar Association, that "simply authorizes Congress to pass laws on how to decide when a president is disabled," or, in other words, enabled Congress to establish procedure.³ The thrust of the release was that "this is the time to do it – when we have a young, healthy president, when extensive hearings on this subject would not be embarrassing to anyone."⁴ In a private correspondence, Kefauver stated that he had "managed to obtain a tentative commitment from the administration that it will go along with [S.J. Res. 35]" and repeated that the president was "obviously healthy" and therefore "no inferences can be drawn from our interest in this matter that the president might be in

² Kefauver earned a national reputation by presiding over a special Senate committee that investigated organized crime. Hearings were held in more than a dozen cities and became a sensation thanks to television coverage as the new medium rapidly gained popularity, finding a place in most American households.

³ "Memo from Washington by Senator Estes Kefauver," NA, CJ, SCA, Box 4, Folder "88th-Kefauver PI Aug 1961-1963." Senator Thomas Dodd of Connecticut also added his name to S.J. Res. 35 at this time.

⁴ Ibid.

poor health.”⁵ A healthy president would not taking succession planning as a slight. Legislating a solution now was imperative.⁶

On June 10 and 18, 1963, the Senate Subcommittee on Constitutional Amendments held hearings on presidential succession and inability bill S.J. Res. 35, sponsored by Kefauver and Keating. The bill was less detailed than many pieces of legislation pending in the Subcommittee, drawn up that way in the hope that Congress would be more inclined to pass a less-complicated piece of legislation. It did not deal with vice-presidential vacancy, nor did it guard against the contingency that Congress may not act in the case of a succession crisis. But it had the tacit support of former Vice President Richard Nixon, who experienced first-hand the issues involving an incapacitated president when Eisenhower was ill. Nixon wrote to Kefauver before the hearings began, saying: “With the advent of the terrible and instant destructive power of atomic weapons, the nation cannot afford to have any period of time when there is doubt or legal quibbling as to where the ultimate power to use those weapons resides.”⁷ Pointing to the “constitutional defect” in his opening statement, Keating agreed with the

⁵ Though the Kennedys had carefully constructed an image of tanned and vigorous president, the truth was much grimmer. Historian Robert Dallek, with the assistance of physician Jeffrey Kelman, analyzed JFK’s medical records and showed, in *An Unfinished Life*, that JFK was far from healthy, relying on a cocktail of drugs and cortisol shots for health issues, including Addison’s disease, to get him through his daily responsibilities. “A *New York Times* article made the claim that a New York physician warned he would make his knowledge of Kennedy’s treatments public, because “no president with his finger on the red button has any business taking stuff like that.” See Robert Dallek, *An Unfinished Life*. No president: As quoted in Edward B. MacMahon and Leonard Curry, *Medical Cover-ups in the White House* (Washington, DC: Farragut 1987), 119-37.

⁶ In a moment of eerie prescience, a publisher wrote to Kefauver, agreeing that legislation was of the utmost importance: “With so many trigger-happy fanatics here and abroad together with the increasing strain of the presidency, your efforts to provide a sound basis for inability is very timely.” “Letter from A.I. Boreman, Publisher, to Kefauver February 18, 1963,” NA, CJ, SCA, Box 4, Folder “88th- Kefauver, PI Correspondence Aug 1961- June 1963.”

⁷ Nixon did not appear to testify in June 1963, though he was a key witness in later hearings (as described later in this chapter). “Letter from Richard Nixon to Estes Kefauver June 10, 1963,” NA, CJ, SCA, Box 5, Folder “88th-Kefauver PI- Corr- June Hearings Witnesses 1963.”

former vice president: failing to take action in this era could result in paralysis at the very time that quick and cogent decision-making was imperative.⁸ With these fears in mind, the subcommittee as a whole came to that conclusion as well; the bill was voted out of the subcommittee to the full Judiciary Committee.

On August 10, 1963, two weeks after his sixtieth birthday, Kefauver died of a heart attack; the hope of a more solid succession and inability plan almost died with him. Senator James O. Eastland, chairman of the Senate Judiciary Committee, decided to dissolve the panel. Staff and resources would be distributed elsewhere.⁹ Yet a memorandum written in round cursive handwriting on United States Senate letterhead in the last of Kefauver's files noted, confidentially, that presidential disability had "prospects at this time."¹⁰

At the same time, Birch Bayh, the freshman senator from Indiana, and his staff were searching for their own opportunities to resolve the succession and inability issue, hoping to fill the void Kefauver's death created. In an interview in 2014, Bob Keefe, Bayh's office manager, confessed that "being so junior, [Bayh's staff members] weren't yet aware of the opportunities that lay before them; they weren't yet attuned to moving when the corpse was still warm."¹¹ Upon learning of Eastland's decision, Keefe urged

⁸ Hearing Before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary, US S, 88th Cong., 1st Sess., p. 11.
http://heinonline.org.proxy.libraries.rutgers.edu/HOL/Page?men_tab=srchresults&handle=hein.cbhear/cbhearings0639&id=26&size=2&collection=congreg&terms=crisis&termtype=phrase&set_as_cursor=
 Accessed May 19, 2017.

⁹ Kefauver had been a favorite of Eastland's according to Bob Keefe. Bob Keefe, Interview with Author, November 5, 2014.

¹⁰ "United States Senate Memorandum," NA, CJ, SCA, Box 4, Folder "88th- Kefauver, Memos- Briefs on Amendments."

¹¹ Bob Keefe, Bayh's office manager, learned of the potential dissolution of the Subcommittee on Constitutional Amendments while talking with Fred Graham, who had served as Kefauver's subcommittee counsel. Bob Keefe, Interview with Author, November 5, 2014.

Bayh to go see the chairman immediately, that very afternoon. When Bayh returned about two hours later,¹² he was the newly named Chairman of the Subcommittee on Constitutional Amendments.¹³ On September 30, 1963, the Judiciary Committee ratified his appointment.

Kennedy's sudden death elicited calls for legislation to remedy the confusion surrounding presidential succession and inability; these were coupled with direct and indirect references to the tense cultural and political mood of the era surrounding the potential for nuclear war. "Has the Congress prepared the presidency adequately for the possibilities of a violent age?" James Reston asked in a column on December 5, 1963. "Is the rule of presidential succession satisfactory for these days of human madness and scientific destruction?"¹⁴ Similarly, a *Washington Post* editorial insisted that "the whole problem of succession to the White House needs a fresh analysis ... in these days of hair trigger defense few things would be more perilous than uncertainty as to where the powers of the presidency would lie in case of disaster or a succession of disasters."¹⁵ These articles served as a motivating factor for Bayh.¹⁶

At first, Bayh questioned his ability as a junior senator to achieve any steps toward a succession and inability solution. He was well aware that even if an amendment

¹² It was clear he had been drinking, which was highly unusual. In fact, Keefe said, the senator was "half-drunk." Bob Keefe, Interview with Author, November 5, 2014.

¹³ Asked about that turn of events in an interview in 2012, Bayh smiled and said that he and Eastland bonded over drinks, but in his recollection, he returned to the office, the phone rang, and Eastland informed him of his new title. In *One Heartbeat Away*, Bayh states it took Chairman Eastland two days to make that phone call. Bayh was not known to imbibe alcohol in great quantities; during his videotaped interviews, he enjoys his preferred drink, Diet Dr. Pepper, of which his wife Kitty tries to curtail his consumption. Regardless of the precise chronology, Bayh's elevation was the result of what he called a "series of unusual circumstances." Call: Bayh, *One Heartbeat Away*, 28. Bayh's drinking habits: Birch Bayh, Interviews with Bob Blaemire, 2012.

¹⁴ James Reston, "The Problem of the Succession to the Presidency," *The New York Times*, December 5, 1963.

¹⁵ "Presidential Succession," *The Washington Post*, December 2, 1963, p. A20.

¹⁶ Bayh, *One Heartbeat Away*, p. 32.

passed through Congress, it needed to be ratified by three-fourths of the states. The amendment would take a minimum of two to three years because some legislatures met only biannually.¹⁷ Another constraint: the amendment would have to be ratified by the necessary thirty-eight states within seven years.¹⁸ Yet, in addition to the articles, Bayh was also spurred on by President Johnson's November 27 address after Kennedy's assassination. Although the speech was intended to soothe the nation, the television cameras panned from Johnson to House Speaker John McCormack and Senate President pro tempore Carl Hayden, ages seventy-one and eighty-six, respectively, behind him as he delivered the speech. Bayh saw the absolute necessity of finding a solution to the succession and inability issue, which would be the focus of his work for the better part of two years and beyond.

Bayh had been thrust into a centuries-old constitutional conundrum.¹⁹ On December 4, after listening to debate in a Judiciary Committee meeting that focused mainly on other matters but included references to the succession bill that Kefauver and Keating had introduced earlier in the year, Bayh decided to draft his own measure. He believed that the succession bill, with Keating as its key sponsor now, simply gave Congress a power it already had – to establish procedures to determine inability – and did not solve the inability problem, nor the one of succession. On a yellow-lined eight-by-

¹⁷ Texas is one example; please see the end of the chapter for further discussion on this topic.

¹⁸ Bayh's later Equal Rights Amendment would fall short of the necessary number, three-fourths or thirty-eight states, by just three states.

¹⁹ On the day of the assassination, Bayh was working closely with Attorney General Robert Kennedy and others in the administration on the Studebaker car plant, trying to keep the jobs in South Bend, Indiana, though the factory was closing. He spoke with the attorney general by phone, boarded a Chicago-bound plane to meet with the company's CEO, and heard the morbid news from the pilot upon landing. Bayh believes he was one of the last people, if not the last person, Robert Kennedy spoke with before receiving the news at Rose Hill that his brother had been shot. Their efforts were successful in retaining the jobs: the Studebaker plant became an Asanti dealership. Birch Bayh, Interviews with Bob Blaemire, 2012.

five tablet he scrawled in pen the first points of what would become the Twenty-Fifth Amendment: *Presidential succession should be kept within the executive branch. Vice presidential vacancies must be filled. Disability dealt with.*²⁰

The second week in December, the senator gathered his team together and began the herculean undertaking.²¹ Bob Keefe explained that it was clear to Bayh that the Subcommittee he now led, composed of Democrats James O. Eastland of Mississippi and Thomas J. Dodd of Connecticut, and Republicans Everett McKinley Dirksen of Illinois, Hiram L. Fong of Hawaii and New York's Keating, would be given neither a budget for staff nor space until they found "something to do."²² John D. Feerick – author of a paper entitled "The Problem of Presidential Inability: Will Congress Ever Solve It?" published in the *Fordham Law Review Journal* in 1963²³ – became the chair of the American Bar Association's Junior Bar Conference in the spring of 1964, and made it the Junior Bar Association's mission to garner further support for a presidential succession and inability amendment.²⁴ Donald E. Channell, Lowell Beck, Jim Kirby, Lewis Powell, Dale Tooley,

²⁰ Bayh, *One Heartbeat Away*, p. 301.

²¹ Bernard "Bud" Fensterwald, a former Kefauver staffer, former counsel to the Subcommittee on Constitutional Amendments, and chief counsel of the Judiciary Subcommittee on Administrative Practice and Procedure, urged the senator to push forward on the succession and inability legislation before any of his colleagues did, and volunteered to work with him. Larry Conrad, a member of Bayh's legislative staff, operating from a closet in the corner of Bayh's office, was delegated with the task of forming an agenda for the Subcommittee and became the Subcommittee's chief counsel. Steven Lescher, a temporary member of Bayh's staff because he was a recipient of a fellowship from the American Political Science Association, weighed in on Bayh's draft.

²² Bob Keefe, Interview with Author, November 5, 2014.

²³ John D. Feerick, "The Problem of Presidential Inability: Will Congress Ever Solve It?" Vol 32, Issue 1, *Fordham Law Review* (1963). <http://ir.lawnet.fordham.edu/flr/vol32/iss1/3/>.

²⁴ Feerick wrote to all fifty governors to inquire about their own succession laws. Their responses lead to his paper that became the lead in the program for an ABA convention in early 1964. The meeting took place January 20-21, 1964 at the Mayflower Hotel in Washington, DC. Feerick's paper was widely circulated, including to Attorney General Kennedy, who thanked him for his diligent research. In a letter to *The New York Times* that was published just five days before Kennedy's assassination, Feerick wrote: "Congress has consistently failed the American people by not acting to eliminate the possibility of a gap in the executive." Letters to Feerick: Feerick's personal files in Larchmont, NY are rich with correspondence expressing appreciation for his article. See also John D. Feerick, *Memoir – February 22, 2016*.

Martin Taylor, and other members of the ABA would become instrumental in conducting the campaign – in Congress, among the state legislatures, and with the public – to get presidential succession and inability measures written into the Constitution.

In his book *One Heartbeat Away*, Bayh wrote that his reason for proposing succession and inability legislation was inspired by Kennedy's murder. But in his press release of December 12, 1963, no mention was made of the assassination. Significantly, the statement referred to the increased pace of communications and technology (and therefore warfare) in the modern era of globalization, and concluded that that the tense international atmosphere called for immediate action: "The accelerated pace of international affairs, plus the overwhelming problems of modern military security, make it almost imperative that we change our system to provide for not only a president but a vice president at all times."²⁵ Bayh's statement highlighted the increased importance and responsibilities of the vice president during the Cold War, pointing out that the vice president was a statutory member of the National Security Council and the National Aeronautics and Space Administration, requiring him to decide key issues of the day.²⁶ In testimony later, members of the public and Congress alike would amplify Bayh's point:

Unpublished. p. 203. Congress has failed: John D. Feerick, "Letters to the Times: Fixing Presidential Succession," *The New York Times*, November 17, 1963.

²⁵ For a cogent explanation of the accelerated pace of the modern era of globalization, see Yale H. Ferguson and Richard W. Mansbach, *Globalization: the Return of Borders to a Borderless World?* (New York: Routledge, 2012). "Speech by Senator Birch Bayh proposing an Amendment to the Constitution of the United States regarding the Offices of President and Vice President," NA, CJ, SCA, Box 9, Folder "88th Congress PI- Press Releases (Bayh) 1963," and (identical to) "Speech by Senator Birch Bayh proposing an Amendment to the Constitution of the United States regarding the Offices of President and Vice President," NA, CJ, SCA, Box 6, Folder "88th Congress, PI, Bills-S.J. Res 139- Introductory Speech (Bayh) 1963 Dec 12."

²⁶ "Statement by Senator Birch Bayh," NA, CJ, SCA, Box 8, Folder "88th Congress, PI- Hearings- Statements- Bayh, Birch, 1964 Jan 22."

even if it had not been the case in the past, now, during the atomic age, having a successor in place was vital to the nation's security.²⁷

Nuclear anxiety was a key motivating factor driving the amendment forward from the outset. As Bayh got to work with his team to perfect his first draft, he, too, reflected that, for the sixteenth time in U.S. history, the nation was without a vice president, but that, as Bayh wrote, "this was a different and dangerous age. The possible consequences of inaction were... terrifying."²⁸ They began by using the letter agreements as a template for the amendment. The first point would permit a vice-presidential vacancy to be filled when it occurred, rather than the position standing empty until the next presidential inauguration, as had happened in 1963. The second goal was to make an attempt to address the issue of presidential disability. The third was to revise the 1947 succession law to eliminate the possibility for congressional succession and a potential violation of the separation of powers found in the Constitution. In this draft, the secretary of State, followed by Cabinet secretaries in order of creation of the department, would replace the speaker of the House and the Senate president pro tempore.

The question of whether these succession and inability concerns could be remedied by a simple statute did not arise within Bayh's tight-knit group. In June of that year, in addition to emphasizing potential paralysis of the executive branch during a crisis

²⁷ Cornell University historian and political scientist Clinton Rossiter affirmed that the amendment was "imperative especially under conditions of modern existence.... Perhaps the single most pressing requirement of good government in the United States today is an uninterrupted exercise of the full authority of the presidency." Democratic Senator Frank Moss of Utah said that to continue with the status quo would be "foolhardy in these days of instant crisis ... I do not believe that world order in the age of the atom, supersonic flight, and instant communications can tolerate that sort of leadership strain in the most powerful country in the world." Rossiter statement: "The Problem of Succession to the Presidency," NA, CJ, SCA, Box 7, Folder "88th Congress, PI, Correspondence Rossiter, Clinton R. 1964." Moss statement: "Statement of Senator Frank E. Moss," NA, CJ, SCA, Box 9, Folder "88th Congress, PI, Hearings-Statements: Moss, Frank C 1964 Jan 23," p. 4.

²⁸ Bayh, *One Heartbeat Away*, p. 34.

if action was not taken immediately, Keating had made an eloquent argument favoring an amendment. He believed the American people would question any assumption of power under a statute and the “uncertainties of the present situation would persist.” A statute would only suffice as an interim measure until an amendment could be ratified. Worse still, he argued, was the “hazard” of having only the letter agreements in place. It was a “minimum safeguard” that would be useless in the event of a disagreement between the president and vice president as to whether or not the president’s inability had ended.²⁹ Bayh’s first attempt at constructing an amendment amounted to six pages consisting of seven detailed sections – longer than all previous amendments taken together.³⁰

Bayh introduced Senate Joint Resolution 139 on December 12, 1963.³¹ Concerns at this time revolved around a perceived weakness in the 1947 succession law: the potential for the presidency to switch parties suddenly during the nuclear age. On the day it was introduced, Walter Lippmann poked holes in the current succession legislation. “Under the badly considered 1947 law,” he wrote, “the whole administration of the government can be transferred from one party to another by the act of one sniper.”³² The

²⁹ Hearing Before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary, US S, 88th Cong., 1st Sess., p. 11.
http://heinonline.org.proxy.libraries.rutgers.edu/HOL/Page?men_tab=srchresults&handle=hein.cbhear/cbhearings0639&id=26&size=2&collection=congrecc&terms=crisis&termtype=phrase&set_as_cursor=.
 Accessed May 19, 2017.

³⁰ Birch Bayh, *One Heartbeat Away*, p. 37.

³¹ Senator Edward V. Long of Missouri, who also sat on the Judiciary Committee, though not on the Subcommittee, was the original cosponsor of S.J. Res. 139 when it was introduced on December 12, 1963. Bayh introduced S.J. Res. 139 after conferring with more seasoned colleagues, such as Speaker McCormack, Senate President Pro Tempore Hayden, and Senate Judiciary Chairman Eastland. Bayh’s also received advice from his father. A director of physical education in the Washington, D.C. public school system, Birch Evan Bayh, Sr. told his son in a handwritten letter, “I know you consult closely with your chairman, Sen[ator] Eastland, and will have his approval for all moves. Older men like younger men to seek their advice.” “Dear Son,” NA, CJ, SCA, Box 6, Folder “88th Congress, PI, Bills- Correspondence 1965-64”.

³² Walter Lippman, “Today and Tomorrow... The Presidential Succession,” *The Washington Post*, December 12, 1963, p. A21.

Committee for Economic Development, a public policy think tank, suggested avoiding a potential sudden switch in parties by altering the line of succession so that Congress was cut out. In the think-tank's proposal, the secretary of Defense would be third in line behind the vice president and secretary of State, removing the speaker of the House and Senate president pro tempore put in place by the 1947 law.³³ Notably, the proposal pointed out: "[As] Commander in Chief of the armed forces, the president must keep his finger on the nation's nuclear trigger. If that grip should loosen even for a brief period the resulting slowness of our response to nuclear aggression might well prove disastrous."³⁴ The proposal underscored the urgency of finding a solution to presidential succession and inability because of the power the president had at his fingertips.

Despite these concerns, Bayh complained that his early press conferences on S.J. Res. 139 were not well attended. One way to publicize the effort and build support, Bayh thought, was to alert the public to star witnesses invited to testify at the Subcommittee hearings. Hearings on the measure began on January 22, 1964, and stretched over six sessions, lasting until March 5; Bayh hoped that one of the stars of the hearings would be former President Dwight Eisenhower, who, he believed, was "the only person alive that could adequately describe the need for an inability amendment."³⁵ Although Eisenhower declined the invitation to appear in person,³⁶ explaining that he was spending the winter

³³ "Confidential—Not For Release, First Draft Policy Statement," NA, CJ, SCA, Box 6, Folder "88th Congress, PI- Committee for Economic Development, 1964," 45. At least one piece of CED correspondence was written on Eastman Kodak Company letterhead, an indication that business executives were also concerned about the sudden transition of executive power during a crisis. See "To The Honorable Birch Bayh from Marion B. Folsom, Chairman," NA, CJ, SCA, Box 17, Folder "89th Congress, PI- Hearings- Correspondence- Witnesses 1965."

³⁴ "Top US Priority in a Nuclear Age—Presidential Succession and Inability," NA, CJ, SCA, Box 6, Folder "88th Congress, PI- Committee for Economic Development, 1964."

³⁵ Birch Bayh, Interview with author, November 11, 2014.

³⁶ John Tower, a member of the Committee on Labor and Public Welfare, was a former constitutional law professor, making him a natural for Bayh's list of potential witnesses. But in a letter to Bayh dated January

in Southern California, he agreed to submit a letter for the record. In that letter, Eisenhower pointedly did not suggest that the letter agreements signed by himself and Nixon in 1958 would suffice to solve the succession and inability problem. Instead, he stated that the “bothersome” possibility of a disaster removing the president and vice president simultaneously meant that changes should be made by constitutional amendment.³⁷ He admitted the issue was complex: “There is no completely foolproof method covering every contingency and every possibility that could arise in the circumstances now under discussion.”³⁸ But the former president believed that, in a time of disaster, the “individuals concerned” would be men whose chief concern would be the public good.³⁹

Among those who testified at the Subcommittee hearings was Laurens Hamilton, a former legislator from New York and the great-great-grandson of Alexander Hamilton; he emphasized the nuclear question in arguing for immediate action on succession as the president was the key to the nation’s survival in the case of an attack. Pointing out to the Subcommittee that: “we live in a day when lightning sneak attack might be made on us by an aggressor,” he said the president served as the nation’s greatest defense because: “he and he alone has the authority to push the vital button or to deliver the agreed code

24, 1964, he, like Eisenhower declined to participate in the hearings. Though he did express his desire that a workable solution be found, he supported a more general or “enabling” piece of legislation. A year later, when asked by Conrad to co-sponsor Bayh’s legislation, his staff would decline on his behalf and say “we think he supports the 1886 law.” He was, a year-and-a-half later, one of the five “nay” votes on the amendment’s final language. Bayh, *One Heartbeat Away*, p. 170.

37 “Letter from Former President Dwight D. Eisenhower... Included in the Record of March 5 Hearings,” NA, CJ, SCA, Box 9, Folder “88th Cong., PI- Hearings- Statements For the Record: Eisenhower, Dwight D.”

³⁸ Ibid.

³⁹ Ibid.

word over hot line telephones.”⁴⁰ Hamilton was so anxious for action, he followed up with similar language in a letter dated five days later, April 13, 1964.⁴¹

Testimony from members of Congress on both sides of the aisle was rife with similar remarks that nuclear war was a grim possibility, and, as such, the U.S. required an immediate solution to the succession and inability problem. Republican Louis C. Wyman of New Hampshire went on at length, stating that a “crippling inability is a daily possibility with any president” and concluded that Congress must act because “in this atomic era seconds can be crucial.”⁴² Republican Senator Jacob K. Javits of New York stated “the split-second exigencies of this nuclear age do not permit the luxury of further incomplete solutions.”⁴³ LeRoy Collins, a former governor of Florida who served as permanent chairman of the Democratic National Convention in 1960, reminded those present, “that the responsibilities of the presidency are far more awesome [sic] in this atomic age.” Of the age itself, he said, “we live on a thin line between the possibility [sic] of cataclysm on the one hand, and the greatest era of human progress of all time on the other. Any missing gap in our leadership thus contributes to the peril....”⁴⁴ And Senator James B. Pearson, Republican of Kansas, argued that “in an era when defense of the entire free world through the use of our nuclear deterrents, rests on the spoken word of

⁴⁰ “Mr. Hamilton’s testimony,” NA, CJ, SCA, Box 8, Folder “88th Cong., PI- Hearings- Report- Mock-Up pp. 398-498, 1964.”

⁴¹ “Letter to Hon. Birch Bayh from Laurens M. Hamilton,” NA, CJ, SCA, Box 7, Folder “PI Correspondence Hamilton, Laurens M. 1964.”

⁴² “Statement of Congressman Louis C. Wyman 31-160 472,” NA, CJ, SCA, Box 8, Folder “88th Congress, PI- Hearings- Report- Mock-Up, pp. 398-498, 1964.” It is no surprise that Congressman Wyman supported the Twenty-Fifth so strongly: in February 1962, he drafted H.R. 1164, a similar solution, though statutory, which the ABA’s House of Delegates supported. Wyman requested to testify in a letter to Bayh. “To the Honorable Birch Bayh from Louis C. Wyman,” NA, CJ, SCA, Box 7, Folder “88th Congress, PI- Correspondence Congressional, 1963-1964.”

⁴³ “From the Office of Jacob K. Javits,” NA, CJ, SCA, Box 8, Folder “88th PI Hearings Statements: Javits, Jacob K.”

⁴⁴ “But no president in history,” NA, CJ, SCA, Box 6, Folder “88th PI Bills SJ Res 139- Working File,” 2.

one man, the President of the United States, we cannot leave any doubt about the fact of succession or the capabilities of the president's successor."⁴⁵ The Kennedy/Johnson letter agreement of August 10, 1961 was included in the testimony. The agreement had concluded by underscoring that “obviously,” not having a plan in place “is a risk which cannot be taken in these times.”⁴⁶ The voices calling for action were building.

One expert witness, Professor Ruth Miner of Wisconsin State College, was adamant that a solution to the issue was needed because of the tense public mood of the era, and suggested – due to her worry that an atomic attack would occur when all officials in the line of succession were in D.C. – that the line of succession after the vice president include state governors.⁴⁷ Miner, however, expressed a concern that those who argued in favor of an executive branch line of succession did not mention: Cabinet members, she noted, are specialists in their field, but not in all fields. The secretary of State, for example, was qualified only as an expert in international affairs.⁴⁸ Further, she argued that because of the danger that a nuclear attack could occur when all those in the line of succession were in range of the attack, after the vice president, the line of succession should include the governors in the order of their states’ population.⁴⁹

⁴⁵ “Statement of Senator James B. Pearson, 31-160 018,” NA, CJ, SCA, Box 8, Folder “88th Congress, PI-Hearings- Report- Mock-Up, pp. 1-22, 1964.”

⁴⁶ Hearing Before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary, US S, 88th Cong., 1st Sess., p. 86.

http://heinonline.org.proxy.libraries.rutgers.edu/HOL/Page?men_tab=srchresults&handle=hein.cbhear/cbhearings0639&id=26&size=2&collection=congreg&terms=crisis&termtype=phrase&set_as_cursor=.

Accessed May 19, 2017.

⁴⁷ “Statement of Ruth Miner, Associate Professor of political science and business law, Wisconsin State College, Whitewater, Wisconsin,” NA, CJ, SCA, Box 8, Folder “88th Congress, PI Hearings- Report- Mock-Ups pp. 499-567, 1964,” 31 160 585.

⁴⁸ Ibid.

⁴⁹ The United States does, after Johnson (and with the exception of Ford) begin to see the era of former Congressional leaders as president end, and former State governors begin to be elected as president. (Also please note: Miner’s proposal, although not widely-advocated, would most likely have garnered the support of Colorado State Senator John R. Bermingham, who expressed similar concerns but was silenced by the ABA’s effective campaign, as discussed later in this chapter.) “Statement of Ruth Miner, Associate

The governors who testified did not discuss Miner's succession idea, but they also argued that the 1947 act was inadequate in light of nuclear anxiety. Governor Edmund Brown of California testified that it "would be tragic, in this day of nuclear weapons when foreign policy decision literally can mean life or death, not to provide the machinery in all contingencies for a sure and smooth transition of executive power."⁵⁰ And Governor Nelson A. Rockefeller of New York echoed Brown's sentiments: "In my view, the present succession statute, enacted in 1947, does not adequately cope with the nation's needs at a time of international crisis and tension when the 'hot line' to Moscow might have to be used on short notice by the nation's Chief Executive."⁵¹ Rockefeller's support was important because of speculation that he would be the Republican nominee for president that year.

The only witness to eclipse Rockefeller's star power was scheduled for the last day of the hearings, March 5: Bayh had enlisted former vice president Richard Nixon to talk about the dire need for the succession and inability amendment. "He was going to be our clean-up hitter," Bayh said, "Here was living proof of a president and a vice president who had been in that situation."⁵² Nixon's views on succession had not changed since his

Professor of political science and business law, Wisconsin State College, Whitewater, Wisconsin," NA, CJ, SCA, Box 8, Folder "88th Congress, PI, Hearings- Report- Mock-Ups pp. 499-567, 1964," 31 160 587.

⁵⁰ Please see my treatment of civil defense and Governor Brown in the previous chapter, Chapter 2. "State of California, Governor's Office, Sacramento," NA, CJ, SCA, Box 8, Folder "88th Congress, PI- Hearings- Report- Mock-Up, pp. 494-597, 1964," 31-160 576.

⁵¹ "Dear Senator Bayh from Nelson A. Rockefeller, Governor, Feb 25, 1964, 31-160 414," NA, CJ, SCA, Box 8, Folder "88th Congress, PI- Hearings- Report Mock-Up pp. 398-498, 1964."

⁵² Baseball analogies, such as referring to Nixon as "the clean-up hitter," are a norm for Bayh. Bayh, though raised in Terra Haute, Indiana, was a Washington Senators fan until they left DC in 1971; after that he followed the Baltimore Orioles. Bayh played for the Senate Democrats; many of the stories in his soon-to-be-published official biography by Bob Blaemire are of memories of the Democrat-Republican baseball games at RFK stadium. These "friendlies" and other examples of bipartisan picnics and dinners, point to the cordial respect senators had for one another at the time. Bayh has said they would often "go along [with legislation] to get along." Birch Bayh, Interview with author, November 11, 2014.

letter to Senator Kefauver over the summer, before JFK's assassination.⁵³ In fact, he was even more adamant that the existence of atomic weapons made it imperative to ratify an amendment. After stating that the president was a the defender of the free world, he continued: "The United States and the free world can't afford 17 months or 17 weeks or 17 minutes in which there is any doubt about whether there is a finger on the [nuclear] trigger."⁵⁴ Nixon also made the case in an essay for the *Saturday Evening Post* "Fifty years ago the country could afford to 'muddle along' until the disabled president either got well or died," he wrote. "But today when only the president can make the decision to use atomic weapons in the defense of the nation, there could be a critical period when no finger is on the trigger because of the illness of the Chief Executive,"⁵⁵ he added. Those that had the experience of being in the presidential line of succession shared the belief that lack of planning for such a crisis was unacceptable.

Keating's resistance was the final barrier to successfully getting S.J. Res. 139 out of the Subcommittee and in front of the full Judiciary Committee for consideration; therefore, to get Keating to abandon S.J. Res. 35 that simply enabled Congress to establish procedure, and support S.J. Res. 139, Bayh made a strategic concession. Keating had written to Bayh that he was inclined to support Bayh's S.J. Res. 139 on one condition: Bayh's preliminary version called for succession to pass to the secretary of State and other Cabinet members if the presidency and vice presidency were both vacant,

⁵³ The former vice president, who just about a year earlier had lost a bid to become governor of California and vowed to retire from politics, talked for forty minutes without notes.

⁵⁴ Nixon testified on the final day of the hearings, Thursday, March 5, 1964. He stressed the import of filling vacant presidential seats and dealing with disability immediately during the early press conference, though he preferred the Electoral College rather than Congress, take up the task. "31-160 541," NA, CJ, SCA, Box 8, Folder "88th Congress, PI- Hearings- Report- Mock-Up, pp. 494-597, 1964," 31-160 p. 541.

⁵⁵ "Speaking Out: We Need A Vice President, by Richard M. Nixon, From Saturday Evening Post, Jan. 1, 1964," NA, CJ, SCA, Box 8, Folder "88th Congress, PI- Hearings- Report- Mock-Up, pp. 494-597, 1964," 31-160 531.

a change from Truman's 1947 Presidential Succession Act that allowed for the vacancy to be passed to Congress. Bayh must relent on his conviction that the line of succession remain in the executive branch. Bayh was ready to compromise. In order to reach an agreement with Keating, Bayh abandoned this point, one he had thought necessary as he scrawled notes on the plane in December 1963. Bayh conceded this point even though some witnesses had called for an executive line of succession during the Subcommittee hearings.⁵⁶

Bayh's concession was not just political, it was also a reaction to the apprehension in the media surrounding McCormack's abilities. The Massachusetts media was lambasting the speaker as a leader who was past his prime and usefulness.⁵⁷ McCormack was reportedly "shaken" when asked by reporters if rumors were true that he would quit his post in order for someone younger to take his place.⁵⁸ A national newspaper added to the fray by suggesting that McCormack must "feel a sense of dread that the presidency in a time of fearful responsibility and extraordinary peril might by some tragic mischance devolve on [him]."⁵⁹ McCormack, mistakenly thinking for a moment after the Kennedy assassination that he had succeeded to the presidency, did, indeed, experience dread.⁶⁰ By mid-March, however, newspapers such as *The New York Times* were predicting that

⁵⁶ For example, in a letter submitted for testimony, Senator Leverett Saltonstall of Massachusetts forwarded the argument that the secretary of State be placed next in the line of succession to ensure an orderly transfer of power because a potential sudden switch to a different political party "would hardly be conducive to the smooth and uninterrupted conduct of the nation's affairs." "Honorable Birch Bayh, Chairman from Leverett Saltonstall, Senator" NA, CJ, SCA, Box 8, Folder "88th Congress, PI- Hearings- Report- Mock-Up pp. 398-498, 1964."

⁵⁷ "McCormack Prefers Current Succession," *The Washington Post*, December 8, 1963, p. A13.

⁵⁸ McCormack, Hayden Won't Quit: Deny Plans to Give Up Congress," *The Washington Post* December 12, 1963, p. A1.

⁵⁹ Marquis Childs, "The Shaky Line of Succession," *The Washington Post* November 29, 1963, p. A20. In March 1964, Conrad and Leshner met with Marquis Childs as well as with *New York Times* editor Arthur Krock (separately) in an effort to "maintain the public interest." Bayh, *One Heartbeat Away*, p. 98.

⁶⁰ William Manchester, *The Death of a President: November 20 – November 25, 1963* (New York: Arbor House, 1967), p. 247.

Bayh's amendment would not advance further in the House because the chances that the speaker (and those that did not want to offend him) would block the bill were higher than the possibility of dual presidential and vice presidential vacancies.⁶¹

Johnson, who was seeking a term in his own right in 1964, reminded Bayh to be mindful of McCormack's position when strategizing about passage. Nobody knew the flaws in the succession process better than Johnson. But Johnson had not provided any support during the Subcommittee hearings forcing Bayh to incorporate an earlier letter of Deputy Attorney General Nicholas deB. Katzenbach's dated June 18, 1963, into the record in the hopes that critics of his succession and inability bill would not make note of the administration's silence. Katzenbach had expressed support for the Kefauver-Keating succession legislation prior to Bayh's introduction of S.J. Res. 139. Katzenbach's main reason for supporting the earlier bill, Bayh knew, could also be applied to S.J. Res. 139. "The primary purpose," the Attorney General had said, "is to confer broad discretion on the Congress" when "the president and vice president have reached an impasse, or an atomic attack or like holocaust prevents communication and agreement between the president and vice president."⁶² Yet the president recognized that some members of the House would not vote favorably for S.J. Res. 139 out of respect for McCormack, despite fears of a chaotic transfer of presidential power in the nuclear age. Johnson relayed this advice to Bayh in late March 1964, after the hearings were finished, when they met in Atlantic City at a convention of the United Auto Workers. In an interview many years later, Bayh recalled their conversation on Marine One during the return trip to D.C.:

⁶¹ Change Doubtful in Succession Law," *The New York Times*, March 15, 1964, p. 40.

⁶² "Mr. Katzenbach's testimony," NA, CJ, SCA, Box 8, Folder "88th Congress, PI- Hearings- Report-Mock-Up pp. 398-498, 1964," 31-160 442.

I thought I would lobby him to come out in support of the Twenty-Fifth Amendment. [The president] said, “You know, Birch, you’re not going to get that passed, not now.” He said you’re not going to get that passed as long as there’s no vice president because the House of Representatives is not going to vote for a measure that will take the speaker out of the chain of command because he’s their leader. So basically, we didn’t push it that way because that would’ve happened.... He said to wait until Hubert [Humphrey] and I are elected and Hubert is vice president and you can get it passed, the House will go along with it. And so that’s exactly what we did.⁶³

Two months later, May 27, 1964, S.J. Res. 139 was reported out of the Subcommittee to the full Senate Judiciary Committee. The *Congressional Quarterly* noted that a Senate Subcommittee had approved a measure that “would provide a means of filling vice presidential vacancies, unsolved problems of paramount importance in a push-button-war age, in the opinion of some.”⁶⁴ With Johnson’s advice in mind, however, Bayh was content to see S.J. Res. 139 unanimously pass the Judiciary Committee on August 4, 1964, and then pass the Senate with a roll call vote of 65-0 on September 30, 1964, about five weeks before the presidential election and only days before Congress adjourned for the campaign season on October 3. Bayh now intended to “introduce the amendment at the beginning of the following session, pass it rapidly through the upper chamber, and bring [the] entire effort to bear upon the House of Representatives.”⁶⁵ Heightened nuclear anxiety would allow him to do just that.

* * *

Bayh felt the administration’s support was crucial to passage in the House. He managed to secure another brief meeting with the president to discuss succession and inability

⁶³ Bayh, Interview with author, November 11, 2014.

⁶⁴ Bayh joined with three other Subcommittee members – Senators Dodd, Fong, and Keating – on a press release sharing with the public the news that the bill had progressed out of the Subcommittee. “Presidential Inability and Veep Vacancies,” NA, CJ, SCA, Box 6, Folder “88th Congress, PI- Correspondence 1965-64 CQ Congressional.”

⁶⁵ Bayh, *One Heartbeat Away*, p. 98.

legislation on December 10, 1964. Johnson, seated in his rocking chair, was preoccupied with his hand, which was healing from the removal of a small growth. He made no promises to Bayh, instead directing the senator to talk to his aides, presidential press secretary Bill Moyers and Deputy Attorney General Ramsey Clark. Bayh eventually got Clark on the phone and confessed that during the last session, congressmen were “jittery of the speaker’s feelings,” and although he didn’t think that would be the case this time, “we couldn’t afford to take any chances.” Bayh emphasized that if the administration acted, “we’ll be home free.”⁶⁶ Bayh’s pleas were successful. The president – who does not have a constitutional role in the amending process – mentioned the succession and inability legislation in his State of the Union address on January 4, 1965, saying: “I will propose laws to insure the necessary continuity of leadership should the president be disabled or die.”⁶⁷ With those eighteen words, Johnson sounded as though he were promising a statute, not an amendment, but Bayh thought that was unlikely.

When the president’s State of the Union Address concluded, the House stayed in session and House Judiciary Committee Chairman Emanuel Celler introduced House Joint Resolution 1. Bayh introduced the companion bill, S.J. Res. 1, two days later, on January 6. They were identical to one another and to S.J. Res. 1 as passed by the Senate in September 1964. The bill read as follows:

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 of both houses of Congress.

⁶⁶ Bayh, *One Heartbeat Away*, pp. 163-67.

⁶⁷ Lyndon B. Johnson, “Annual Message to Congress on the State of the Union,” January 4, 1965. <http://www.presidency.ucsb.edu/ws/?pid=26907>. Accessed July 25, 2016.

Section 3. If the president declares in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the vice president as acting president.

Section 4. If the president does not so declare, and the vice president with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits to the Congress his 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.

Section 5. Whenever the president transmits to the Congress his written declaration that no inability exists, he shall resume the powers and duties of his office unless the vice president, with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits within two days to the Congress his written declaration that the president is unable to discharge the powers and duties of the 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.⁶⁸

Bayh had been gathering outside support, informing colleagues in a December 21, 1964 letter, that a range of groups were already on board such as the American Bar Association, cities, and counties.⁶⁹ Responses from colleagues adding their support trickled in.

Along with Bayh's letter, the president's resounding win (which brought Democratic supermajorities in both houses⁷⁰) and his subsequent support for Bayh's bill, helped Bayh collect co-sponsors for S.J. Res. 1. S.J. Res. 1 became a "hot item," according to Keefe.⁷¹ Bayh received just a handful of rejection letters.⁷² A short,

⁶⁸ In its final form, the amendment would consist of just four sections. John Feerick, *The Twenty-Fifth Amendment* (1976), p. 246.

⁶⁹ The list includes: the American Association of Law Schools; the State Bar Associations of Arizona, Arkansas, California, Colorado, Connecticut, Hawaii, Indiana, Iowa, Kansas, Louisiana, Michigan, Ohio, Rhode Island, Texas, Virginia, and Vermont; the Bar Associations of Denver, Colorado; the District of Columbia; Dade County, Florida; the City of New York; Passaic County, New Jersey; Greensboro, North Carolina; York County, Pennsylvania; and Milwaukee, Wisconsin. "To Senator-elect George Murphy from Birch Bayh, Chairman," NA, CJ, SCA, Box 7, Folder "88th Congress, PI- Correspondence Congressional 1963-1964."

⁷⁰ Democrats began the 89th Congress, 1st sess., with supermajorities in both Houses of Congress: a filibuster-proof 68-32 in the Senate, and a lead of 295-140 in the House.

⁷¹ Bob Keefe, Interview with author, November 5, 2014.

⁷² Archival files contain these letters from Senators Richard Russell, Jr. (D-Georgia), Spessard Holland (D-Florida), Stuart Symington (D-Missouri), Joseph S. Clark (D- Pennsylvania), Wallace R. Bennett (D-Utah),

perfunctory “no thank you” letter typed by a secretary was customary in the early 1960s, leaving Bayh and his staff to guess as to the reasoning behind the rejections. Overall, however, it was such a popular piece of legislation, according to one preparatory document, that 53 of 68 Democrats in the Senate allowed their names to be added to the bill by mid-January 1965.⁷³

Three weeks after delivering the State of Union Address, and after additional lobbying by Bayh and his staff, Johnson officially endorsed Bayh’s amendment, sending a support message to Congress on January 28, 1965 that emphasized that a nuclear holocaust or other such catastrophe required planning in the form of an amendment. Thanks to Providence alone, America had avoided a chaotic transfer of presidential power. But, Johnson said, “It is not necessary to endure the nightmare of nuclear holocaust or other national catastrophe to identify these omissions as chasms of chaos into which normal human frailties might plunge us at any time.”⁷⁴ He continued, “The potential of paralysis implicit in these conditions constitutes indefensible folly for our responsible society in these times. Common sense impels, duty requires us to act – and to act now, without further delay.”⁷⁵ Highlighting the tense cultural and political mood, he urged: “Action on these measures now will allay future anxiety among our own people,

Thomas J. McIntyre (D-New Hampshire), Edmund Muskie (D-Maine), Edmond Edmonton (D-Oklahoma), Albert Gore, Sr. (D-Tennessee), and John Tower (R-Texas) declining to cosponsor the amendment. NA, CJ, SCA, Box 7, Folder “88th Congress, PI- Correspondence Congressional 1963-1964.”

⁷³ This figure, combined with 22 of 32, or 69 percent of Republicans, meant that, although it saw lively debate, 75 percent of the Senate cosponsored the amendment six months before it passed. “Background on S.J. 1,” NA, CJ, SCA, Box 16, Folder “89th Congress, PI-Bills- S.J. Res. 1-Cosponsors, 1965 Jan 14.”

⁷⁴ “For Release on Delivery to the Senate,” Box 3. Office Files of Bill Moyers: Special Message on Office of the President. LBJL.

⁷⁵ Ibid.

and among peoples of the world.”⁷⁶ Until that formal announcement, Bayh was unsure of the president’s exact position on the amendment, but the president was clearly urging Congress to act before nuclear disaster struck.

By the end of January, Bayh’s appeals combined with the president’s endorsement had been somewhat effective;⁷⁷ yet, influential dissenters existed on both sides of the aisle.⁷⁸ Dirksen emerged as a key opponent, despite believing an amendment was urgent.⁷⁹ In a statement of his position on February 1, 1965, he wrote “we must have an amendment to deal with the problem of presidential succession and inability,” but he took issue with the language in S.J. Res. 1.⁸⁰ He had been preoccupied with the Civil Rights Amendment in 1964, allowing S.J. Res. 139 to progress out of the Judiciary Committee and to a successful floor vote, but now took up the argument Keating had dropped.⁸¹ Dirksen was in favor of the broadest language possible that would enable Congress to decide on presidential inability. He felt vagaries would remain but had an

⁷⁶ *Cong. Rec.*, 89th Cong., 1st sess., vol. 111, pt. 2., p. 1460.

<http://heinonline.org.proxy.libraries.rutgers.edu/HOL/Page?handle=hein.congrec/cr1110002&id=1&size=2&collection=congrec&index=congrec/creu>. Accessed May 22, 2017.

⁷⁷ Eventually, Bayh would get more than seventy of his Senate colleagues to co-sponsor. “The Great Society Congress: 25th Amendment Legislation,” The Association of Centers for the Study of Congress. <http://acsc.lib.udel.edu/exhibits/show/legislation/25th>. Accessed May 24, 2017.

⁷⁸ Subcommittee files indicate that four of the senators he wrote—Symington, Clark, McIntyre, and Muskie—agreed to co-sponsor. “Background on S.J. 1,” NA, CJ, SCA, Box 16, Folder “89th Congress, PI-Bills-S.J. Res. 1-Cosponsors, 1965 Jan 14.”

⁷⁹ Ironically, the two men were very friendly, but they were an unlikely pairing. Dirksen was a Republican and a veteran of Capitol Hill. Bayh was a Democrat and a newcomer to a chamber that emphasized seniority. However, the two men bonded almost immediately, during the Kennedy administration. Bayh recalled a memorable experience with the minority leader aboard the presidential yacht in 1963: I remember we were going down the [Potomac] River on the Sequoia. Bobby Kennedy, the Attorney General at the time, had gotten all members of the Judiciary Committee and taken them on the river for a sunset cruise so he could get to know them. I remember being on the fantail of this boat and [Dirksen] said “Birch, do you know what we need to do?” And I said “What’s that, Minority Leader?” And he said “We need to start right now getting you reelected.” I think I said “What’s that again! And he began to rattle off a list.... It was a sincere observation on his part.” Birch Bayh, Interview with author, November 11, 2014.

⁸⁰ “S.J. Res. 1 Summary of My Position – Senator Everett McKinley Dirksen,” NA, CJ, SCA, Box 17, Folder “89th Congress, PI- SJRes 1 Dirksen Opinion 1965 Feb 1.”

⁸¹ Keating was no longer in the Senate, having been defeated in 1964 by Democrat Robert F. Kennedy.

opinion on how to remedy them. “The proper way to cure these ambiguities is to omit the details that give rise to them,” he counseled.⁸² Bayh scribbled “advocates blank check” on the bottom of his copy of Dirksen’s statement, concluding that Dirksen supported a simple enabling amendment, very similar to Senator Keating’s S.J. Res. 35.⁸³ Dirksen then introduced his own amendment along those lines, which was debated in the Subcommittee on January 29, 1965, the day after the president sent his message to Congress.⁸⁴ Three days later, although not every senator was in agreement about the language of S.J. Res. 1, the bill was voted unanimously out of the Subcommittee.⁸⁵

During the first four days of February when the full Judiciary Committee considered S.J. Res. 1, Robert Kennedy raised similar concerns to that of Dirksen regarding the language in section five, but his solution was to add detail, not remove it as Dirksen preferred. Kennedy’s first issue was that “inability” was left undefined in the amendment. He wanted the “gravity” and “duration” explained. Short of that, he wished for examples of what did *not* count as an inability.⁸⁶ Further, he added, “Just yesterday, Secretary [of State Robert] McNamara pointed out that a nuclear attack on this country would take 149 million lives. This terrible realization that those are the stakes we’re playing for,” meant that the president should not be “second-guessed” when decisive

⁸² “S.J. Res. 1 Summary of My Position – Senator Everett McKinley Dirksen,” NA, CJ, SCA, Box 17, Folder “89th Congress, PI- SJRes 1 Dirksen Opinion 1965 Feb 1.”

⁸³ Ibid.

⁸⁴ The Subcommittee had held hearings for four-and-a-half hours. As Bayh noted, “nothing had come out in the second set of hearings that had not been disclosed in the first.” Birch Bayh, *One Heartbeat Away*, p. 203.

⁸⁵ Full committee debate seemed to be dragging on thanks to Dirksen’s insistence on an amendment like S.J. Res. 35, so Bayh requested that the Committee vote on the amendment section by section. No changes were made to the first two sections. The third and fourth sections were changed to specify that the letter declaring disability would be transmitted to the president of the Senate and the speaker of the House of Representatives rather than the more general term, “Congress.” Bayh, *One Heartbeat Away*, p. 209.

⁸⁶ “To the Honorable Emanuel Celler from Robert F. Kennedy,” NA, CJ, SCA, Box 17, Folder “89th Congress, PI- Congressional Correspondence 1965.”

action was needed.⁸⁷ The Senators were in agreement that an amendment was needed because of the existence of nuclear bombs, but disagreed about the language.

The same week the Senate Judiciary Committee approved the resolution containing the amended language, the House Judiciary Committee held its own hearings (on February 9, 10, 16, and 17, 1965); the testimony was replete with references to nuclear anxiety as the reason for moving forward with H.J. Res. 1. Convening the hearings, in his opening statement, Chairman Celler did not mention the tragic death of the late president. Rather, he listed the duties of the president and argued that the nation could not leave the office unfilled, even briefly, because of these responsibilities in the nuclear age. He stated: “In this nuclear age [the president’s] finger rests upon the trigger.... One would have to be blind not to see and acknowledge the dangers” the nation was gambling with by not having a solution to the important problem.⁸⁸ Celler then pointed out that thirty-eight proposals were before the House on the topic of succession and inability. He concluded that a lack of a perfect solution should not, in this pressing case, be a deterrent to immediate action. Bayh agreed. “What we wanted,” Bayh said, was “to have a system that would – right and wrong, without politics, without a crisis of the moment – say, ‘Here it is.’”⁸⁹ Conveying this sentiment, Bayh was speaking for many of his colleagues who felt finding a solution was of the utmost urgency.

Bayh was also one of the experts who testified before the House Judiciary Committee and mentioned a nuclear nightmare. He began by discussing time limits,

⁸⁷ “Friday, February 19, 1965, Robert F. Kennedy,” Folder “2/65-3/65,” Presidential Inability and Succession, Box 94, Robert F. Kennedy Papers, John F. Kennedy Library and Museum.

⁸⁸ Hearing Before the Committee on the Judiciary on Miscellaneous Proposals Relating to Presidential Inability, 89th Cong., 1st sess., February 9, 10, 16, and 17, 1965, p. 2.
[https://babel.hathitrust.org/cgi/pt?id=uc1.\\$b654933;view=1up;seq=5](https://babel.hathitrust.org/cgi/pt?id=uc1.$b654933;view=1up;seq=5). Accessed May 26, 2017.

⁸⁹ “A Modern Father of Our Constitution: An Interview with Former Senator Birch Bayh,” 79 *Fordham Law Review* 781, 2011, p. 790.

focusing on the number of days that might elapse between the nomination of a vice president and the vice president's confirmation. Bayh shared what the Senate Judiciary Committee was thinking, posing a nuclear holocaust scenario as follows: "What if we were engaged in nuclear war and the seat of government is destroyed? There would be a time element involved finding a place where the Congress could meet and convene despite rapid travel we take for granted."⁹⁰ Nuclear war could cause numerous problems for presidential continuity – not the least of which was convening Congress to determine a president's inability if the president and vice president disagreed – but predicting the hardships that would come in the aftermath of a nuclear attack was difficult.

The issue of time limits would become the greatest point of contention when ironing out the differences between the Senate and House versions of the bill in the Conference Committee. Colorado Congressman Byron G. Rogers, a member of the Judiciary Committee, raised the issue of the need to include provisions for dual presidential and vice-presidential incapacities in a nuclear age. "Since your committee finds a need to change the present posture we are in because of the nuclear age, and since it is conceivable, though remote, that some situation like [dual inability] might occur,"⁹¹ Rogers noted. Focused on the specter of nuclear war, Democratic Congressman Abraham J. Multer of New York reminded the Committee of policymakers' unease around Eisenhower's illnesses saying, "I need not document the circumstances of these

⁹⁰ Here Bayh acknowledged not just the development of the bomb, but that the speed of travel, due to technological "advancements," had also changed since the last major presidential inability. Hearing Before the Committee on the Judiciary on Miscellaneous Proposals Relating to Presidential Inability, 89th Cong., 1st sess., February 9, 10, 16, and 17, 1965, p. 67.

[https://babel.hathitrust.org/cgi/pt?id=uc1.\\$b654933;view=1up;seq=5](https://babel.hathitrust.org/cgi/pt?id=uc1.$b654933;view=1up;seq=5). Accessed May 26, 2017.

⁹¹ Hearing Before the Committee on the Judiciary on Miscellaneous Proposals Relating to Presidential Inability, 89th Cong., 1st sess., February 9, 10, 16, and 17, 1965, p. 158.

[https://babel.hathitrust.org/cgi/pt?id=uc1.\\$b654933;view=1up;seq=5](https://babel.hathitrust.org/cgi/pt?id=uc1.$b654933;view=1up;seq=5). Accessed May 26, 2017.

occasions, for we can all recall the danger than can be sensed when a president is incapacitated, particularly in the nuclear age.”⁹² Howard W. Robison, another Representative from New York, suggested not only ratifying an amendment, but including a statute to specify additional procedures in the event of disability. One of the provisions Robison stipulated was a commission with the responsibility to declare the president inabled. He said, “I feel the latter contingency is important in view of the perilous nuclear-threatened world in which we live.”⁹³ In another statement, California Congressman Edward R. Roybal, expressing his support for H.J. Res. 1, also tied the need for the amendment to the nuclear age. “I am sure the members of this Committee fully realize that we can no longer afford, in this nuclear-space age, to leave the fate of or [sic] government to the whims of chance.”⁹⁴ Talk of time limits continue to pivot on the fact that Congress would be making the decision on inability in the nuclear age when minutes mattered.⁹⁵

⁹² Hearing Before the Committee on the Judiciary on Miscellaneous Proposals Relating to Presidential Inability, 89th Cong., 1st sess., February 9, 10, 16, and 17, 1965, p. 182.

[https://babel.hathitrust.org/cgi/pt?id=uc1.\\$b654933;view=1up;seq=5](https://babel.hathitrust.org/cgi/pt?id=uc1.$b654933;view=1up;seq=5). Accessed May 26, 2017.

⁹³ Hearing Before the Committee on the Judiciary on Miscellaneous Proposals Relating to Presidential Inability, 89th Cong., 1st sess., February 9, 10, 16, and 17, 1965, p. 260.

[https://babel.hathitrust.org/cgi/pt?id=uc1.\\$b654933;view=1up;seq=5](https://babel.hathitrust.org/cgi/pt?id=uc1.$b654933;view=1up;seq=5). Accessed May 26, 2017.

⁹⁴ Hearing Before the Committee on the Judiciary on Miscellaneous Proposals Relating to Presidential Inability, 89th Cong., 1st sess., February 9, 10, 16, and 17, 1965, p. 289.

[https://babel.hathitrust.org/cgi/pt?id=uc1.\\$b654933;view=1up;seq=5](https://babel.hathitrust.org/cgi/pt?id=uc1.$b654933;view=1up;seq=5). Accessed May 26, 2017.

⁹⁵ On the night the House Judiciary Committee Hearings concluded, Bayh and his staff nervously worked late; S.J. Res. 1 was about to be introduced on the Senate floor. Causing Bayh consternation was the fact that *The New York Times* had reported that Dirksen believed Katzenbach, based on his testimony a year earlier, was opposed to Bayh’s amendment, and, like Dirksen, supported an enabling amendment – even though President Johnson had given Bayh’s amendment his blessing. In response, Bayh asked both Deputy Attorney General Ramsey Clark and White House aide Jack Valenti for a letter confirming Katzenbach’s support. Valenti promptly sent a memorandum to the president notifying him of Bayh’s call. The memo read: “Hearings are beginning tomorrow on presidential disability, etc. Senator Everett Dirksen is trying to torpedo the whole thing and use as ammunition remarks made by Attorney General Katzenbach a year ago. Katzenbach’s testimony this time is perfect and aids the bill a great deal. What Bayh needs: a strong letter to Bayh from Katzenbach saying “This I believe” and setting forth his views. Do you agree to such a letter going from Katzenbach?” Below the question appears only two words: the word “Yes,” with a blank next to it, and the word “No,” also followed by a blank. The blanks remain unchecked in the archived memorandum; it is unclear exactly how Johnson reacted. Katzenbach, following two of his predecessors in

On February 19, 1965, Bayh introduced his reworked legislation, S.J. Res. 1, on the floor of the Senate. In his speech on the Senate floor, Bayh listed the crises America was dealing with when Eisenhower had his heart attack in 1955, and then read a pertinent section of Nixon's *Six Crises* aloud, underscoring the fact that it was the president's job to react to these situations and it was he who had his finger on the nuclear button. In the section Bayh read, Nixon had written: "The ever-present possibility of an [atomic] attack was hanging over us. Would the president be well enough to make the decision? If not, who had the authority to push the button?"⁹⁶ The author of the amendment had not only pointed numerous times to nuclear attack as the reason for urgent passage, but was now highlighting the nuclear anxiety of the former vice president, who was once first in the line of succession.

Bayh was deeply concerned that Dirksen or other senators might hold up his amendment – that would ascertain, without doubt, who succeeded to the presidency in a crisis and had the authority to detonate nuclear bombs.⁹⁷ This led him to ask his ally, Senator Sam Ervin who was at home in Morgantown, North Carolina, to return from vacation early, to support S.J. Res. 1.⁹⁸ Ervin agreed to return to Washington and paid tribute to Bayh's work in a speech on the Senate floor.⁹⁹ John Little McClellan (D-

the Justice Department, Herbert Brownell, and William P. Rogers, ultimately agreed with Bayh that his amendment was necessary. Bayh planned to pull the letter out of his pocket on the floor of the Senate should he be challenged. Dirksen: "Dirksen Opposes Disability Plan," *The New York Times* (February 12, 1965), p. 8. Memo: "To Mr. President from Jack Valenti, February 17, 1965," LBJL. Legislative Background, Presidential Disability Box 1, Folder "Presidential Disability – 4. Legislative Struggle." Bayh would use letter: Bayh, *One Heartbeat Away*, pp. 246-47.

⁹⁶ *Cong. Rec.*, 89th Cong., 1st sess., 1865, vol. 111, p. 3251.

http://heinonline.org.proxy.libraries.rutgers.edu/HOL/Page?men_tab=srchresults&handle=hein.congrec/cr1110003&id=485&size=2&collection=congreg&terms=BAYH&termtype=phrase&set_as_cursor=.

Accessed May 28, 2017.

⁹⁷ Bayh, *One Heartbeat Away*, p. 245.

⁹⁸ *Ibid.*

⁹⁹ Bayh, *One Heartbeat Away*, p. 252.

Arkansas) and others also raised their voices in support of S.J. Res. 1. When McClellan rose to speak, he focused on the import of a smooth transition of executive power in a democracy and the requirement that the government be prepared for the worst possible crisis: nuclear war. The Democrat from Arkansas warned that Congress must prepare for the worst: “This was never more true [sic] than in today’s nuclear age, when this morning’s crisis is often relegated to the back pages of the afternoon newspapers, headlining still another crisis.”¹⁰⁰ The senator was emphasizing the swift pace of nerve-racking events; a succession and inability plan was an essential element in preparing for unknown crises.

Just before the vote in the Senate, however, senators proposed amendments that could have acted as temporary impediments to passage by sending S.J. Res. 1 back to committee.¹⁰¹ The most seriously considered, Senator Strom Thurmond’s amendment, called for the Electoral College to be convened to fill a vice presidential vacancy.¹⁰² Thurmond may have been seeking to delay the amendment’s progress out of personal animosity toward Bayh. Bayh generally recalled positive relations with his colleagues,

¹⁰⁰ *Cong. Rec.*, 89th Cong., 1st sess., 1965, vol. 111, p. 3274.

http://heinonline.org.proxy.libraries.rutgers.edu/HOL/Page?men_tab=srchresults&handle=hein.congrec/cr1110003&id=485&size=2&collection=congreg&terms=BAYH&termtype=phrase&set_as_cursor=

Accessed May 28, 2017.

¹⁰¹ Democratic Senator Ross Bass of Tennessee, who was concerned that congressional control by one party would hold up the selection of a vice president, offered one such amendment. Congressman Clarence Brown of Ohio expressed a related concern to that of Bass, one of the biggest issues when it came to House passage of the joint resolution: it would take away from Congress the constitutional right it had to select a president. John O. Pastore of Rhode Island wanted the words “and no other business shall be transacted until such issue is decided upon” inserted into Bayh’s amendment. Fellow Democrat Joe Tydings passed Bayh a note which told him to “stick to [his] guns, Pastore [is] wrong.” “Note from Senator,” NA, CJ, SCA, Box 16, Folder “89th Congress, PI- Note from Senator During Floor Debate 1965 Feb 14.”

¹⁰² In a similar vein, many before, during, and after the Twenty-Fifth’s journey through the ratification process called for, if not an Electoral College vote, than a vote of the general electorate to decide who would succeed to the presidency. Often this suggestion was contingent upon the number of months between the death, removal, resignation, or inability of the president and the next quadrennial election.

but¹⁰³ Thurmond was an exception.¹⁰⁴ Ervin proved instrumental in saving the day, however. Ervin reminded senators about a moment in 1868, when a group led by president pro tempore of the Senate Ben Wade – who was in line for the presidency after Andrew Johnson had assumed the office when Lincoln was assassinated – led the impeachment process against Johnson. The clause requiring a two-thirds majority, which Wade had failed to acquire by just one vote, was all that stood between Johnson and the rival party gaining power.¹⁰⁵ Ervin’s point eased remaining concerns: at least some detail was necessary as opposed to a simple enabling amendment, the matter was urgent, and every vote counted. The following day, with Ervin’s assistance, the measure passed, 72-0. Another hurdle had been cleared.

* * *

S.J. Res. 1 was delivered to the House on February 22, 1965. The House passed a modified version of S.J. Res. 1 by a vote of 368 to 29 on April 13, and returned the bill to the Senate on April 22. In the House, Celler’s statement echoed that of Johnson’s January 28 endorsement. He said that while fate had been kind to America, Congress could not expect America’s luck to hold out. He noted that the resolution had the support of the American Bar Association and reread earlier testimony into the record. The chairman

¹⁰³ This is true not just of my interactions with Bayh, but of other interviews I have been privy to. Please see Bayh, Interview with author, November 11, 2014 and Bayh, Interviews with Bob Blaemire, 2012.

¹⁰⁴ Bayh confessed to the author: “Strom and I were not close. I remember one experience I had with him. He was giving Mac [Republican Senator Charles Mathias of Maryland, 1969-1987] a hard time on the Judiciary Committee. Mac was a Republican, but he was a liberal Republican, and he was on our Subcommittee and he was one Republican vote we could count on. With that vote plus the Democratic majority we could get something out [of the Subcommittee to the full Judiciary Committee and to the Senate floor for a vote]. Strom was very tough on him; it was a personal thing with him. And I remember... ask[ing] Strom if there was something we could do for our friend Mac. And he turned on me and said “Birch Bayh, you do any criminal thing.” And I said “What’s that?” And he repeated it. My muscles hardened, but luckily we just parted company. I think our staffs intervened and I think our staffs kept it from going any farther.” Bayh, Interview with author, November 11, 2014.

¹⁰⁵ Bayh, *One Heartbeat Away*, p. 258.

again iterated the sentiment that, because the president's finger was on the nuclear trigger, Congress could not ignore the danger inherent in failing to enact Bayh's resolution. He said, "One would have to be blind not to see and acknowledge the danger and the risk we are faced with at this very moment."¹⁰⁶ He then urged the approval of the constitutional provision to ensure a smooth presidential transition.

When the House returned the bill to the Senate on April 22, moderate changes were made limiting the time in which Congress had to decide the president's disability; Bayh used the nuclear issue to sway the decision-making. The House had added the provision that if Congress did not declare within ten days that the president was inabled, he would resume office.¹⁰⁷ Bayh commented that, although he was not a doctor, time for diagnoses and discussion would be needed. He would "bet that there are some illnesses which can't even be diagnosed in ten days, let alone enough time for congressional discussion."¹⁰⁸ After a ten day period, Congress could still be weighing the evidence and "we might have a president who could be completely off his rocker reassuming his powers and duties, even if it meant he could blow us all to kingdom come in an hour's time," he said.¹⁰⁹ Bayh had again invoked the nuclear specter as a main argument, this time for the Senate not to cave to the House.

¹⁰⁶ *Cong. Rec.*, 89th Cong., 1st sess., 1965, vol. 111, pt. 6, p. 7937.

http://heinonline.org.proxy.libraries.rutgers.edu/HOL/Page?men_tab=srchresults&handle=hein.congrec/cr1110006&id=739&size=2&collection=congreg&terms=nuclear&termtype=phrase&set_as_cursor=. Accessed May 28, 2017.

¹⁰⁷ One House delegate later reasoned the lengthy debate around the Civil Rights Act, which had taken place the year before, indicated the need for some time limit on whether or not the president was inabled." As quoted in Bayh, *One Heartbeat Away*, p. 289.

¹⁰⁸ Bayh, *One Heartbeat Away*, p. 285.

¹⁰⁹ Bayh, *One Heartbeat Away*, p. 285. (Twenty-one days was eventually agreed upon.)

One other time-related difference remained between the Senate and House versions:¹¹⁰ in the House version, Congress was required to convene within forty-eight hours to discuss the president's inability, and Bayh, yet again, brought up the possibility of nuclear attack. Congress convening in that last instance would only occur if the president and vice president had disagreed about the president being disabled. On this point, Bayh stated, "If we're hit by an atomic attack and the Capitol building is destroyed, it might take more than forty-eight hours for Congress to convene."¹¹¹ Bayh's colleagues in the Senate felt that limitations on the time in which Congress had to decide the president's disability were unacceptable. Interested in protecting the Senate's tradition of free debate, Bayh requested a conference.¹¹² Though the resolution moved forward in both Houses for the same reason, a strong belief that something needed to be done to provide for smooth transitions during the nuclear age, different versions of the bill now existed and needed to be hammered out in Conference Committee.

The Joint House/Senate Committee met between May 11 and June 10, 1965, and debate ranged over issues of both physical and mental incapacity.¹¹³ House members seemed determined that their version of the amendment should be approved by the Senate without compromise. Senators who had previously been opposed, like Dirksen, now sided

¹¹⁰ Additionally, the House wanted the vice president and Cabinet's transmission to the president pro tem of the Senate and the speaker of the House regarding the president's continued disability to occur within two days. Two days originally appeared in the Senate's version of the bill, before Senator Hruska had suggested ten and the Senate compromised on seven. At this point, Bayh privately told his staff that the Senate ought to compromise with the House on four days. Four appears in the amendment's final form. Bayh, *One Heartbeat Away*, p. 283.

¹¹¹ Bayh, *One Heartbeat Away*, p. 283.

¹¹² Bayh, *One Heartbeat Away*, p. 279.

¹¹³ The Conference Committee consisted of Senators Bayh, Eastland, Ervin, Dirksen, and Hruska and Congressmen Celler, Rogers, and McCulloch, as well as John Corman of California and Richard Poff of Virginia.

with their fellow senators.¹¹⁴ When Bayh had made his initial presentation to the Senate in February, he said that incidents less cataclysmic than an outbreak of nuclear war could lead to uncertainties about chain of command. He cited two recent examples: the removal of the growth on Johnson's hand on December 1, 1964, and his hospitalization due to a cold on January 23, 1965 (and then launched into discussion of Eisenhower's 1955 heart attack and the nuclear attack scenario). These and other examples of uncertainty at the top urgently required the bill's passage without further complications.¹¹⁵

Congressional debate sometimes involved somewhat farfetched scenarios; some of which stemmed from the plots of popular TV shows, movies, and books of the time. During a Conference Committee meeting, McCullough referred to "not that which is probable, but that which may be possible."¹¹⁶ In particular, multiple scenarios of possible usurpation of presidential power were offered – such as if someone suggested he had

¹¹⁴ On the surface, the sticking point appeared to be the ten versus seven versus four days of mediation. This was particularly true of Dirksen who had favored a simple enabling amendment, without any specifics, from the outset. Yet further investigation has unveiled another version of the story. Bayh, when interviewed in 2012, explained that he went to Dirksen's office to lobby him directly and discovered Dirksen's cooperation on the matter was linked to an amendment that would allow prayer and Bible reading in public schools, overriding recent Supreme Court rulings deeming such activities unconstitutional. The furor following those rulings led congressmen to introduce 149 bills by 1964, including calls for a "Prayer Amendment." But the Prayer Amendment had died in the fall of 1964 when Congress adjourned sine die. Bayh said of his meeting in Dirksen's office: "He kept me cooling my heels seated in the inner office on the couch next to a table. Prayer Amendment postcards were piled on that table six-to-eight inches high." Looking back, Bayh knew this was probably strategic on Dirksen's part: when Dirksen finally saw him, he said "Yes, I'm with you on this, but people are concerned about the Prayer Amendment." On September 19, 1966, Bayh offered a substitute for Dirksen's amendment that declared: "Nothing in the Constitution or the Supreme Court decisions relating to religious practices in our public schools prohibits local school officials from permitting individual students to engage in silent, voluntary prayer or meditation." Senator Sam Ervin was against the adoption of Bayh's substitute because he believed it had no legal effect. Bayh's substitute was rejected. Birch Bayh, Interviews with Bob Blaemire, 2012. Substitute amendment: Sam Ervin, *Preserving the Constitution: The Autobiography of Senator Sam Ervin* (Charlottesville, VA: The Michie Company, 1984), p. 241.

¹¹⁵ Bayh, *One Heartbeat Away*, p. 248.

¹¹⁶ McCullough had turned down an offer to testify in January 1964, but this quote appears with a few others in a handwritten note on United States Senate letterhead. It seems one of Bayh's staff members, most likely Larry Conrad, Counsel to the Subcommittee, was charged with the task of collecting key statements during the debate in 1965. "Note that the House," NA, CJ, SCA, Box 16, Folder "89th Congress, PI- S.J. Res. 1- Conference- Meetings 1965, May-June."

received a letter from the president himself declaring insanity, only to have the president announce on national television shortly thereafter that the letter was a forgery, or if the president was tricked into signing a declaration of insanity – with nuclear bombs as the backdrop.¹¹⁷

During an impasse in the debate in a Senate and House Committee Conference, in an attempt to keep the process moving forward, Bayh lost control, or appeared to, of his temper. This scene revolved around this most controversial piece of the bill – the time limits on inability-related decisions.¹¹⁸ The root of the problem at this meeting was that Bayh had been assured by Celler that McCullough, who had argued for a ten day-period of mediation by Congress, would go along with his decision on time limits. At this meeting, however, Bayh found he was mistaken: McCullough was unbendable, and Celler could not overrule the ranking Republican member of the House Judiciary Committee because bipartisan support was needed for passage.¹¹⁹ Bayh stormed out – “for effect,” he later claimed.¹²⁰ Part of his anger was real as he, his staff, and the ABA, had been working very diligently for two years and he did not want all their efforts to be for naught this late in the process. Of course, he believed it was imperative to come to a rapid conclusion to the succession and inability issue – in the form of his amendment.

¹¹⁷ Bayh, *One Heartbeat Away*, p. 233.

¹¹⁸ During the Conference Committee, Bayh pounded the pavement, at times literally walking from office to office, to persuade Eastland, Dirksen, Ervin, and Hruska to agree to a four-day limitation on the vice president and Cabinet so that the Senate conferees could present a united front. At the time of this conference committee meeting, the House wanted a two-day meditation period; Senator Bayh considered agreeing to Senator Hruska’s suggestion of seven, but met with him privately late on the night of June 9, 1965, explaining he felt the full Senate body would not accept a period longer than four days as the Senate was hesitant to accept any limitations. Hruska reluctantly agreed to the four days which appears in the final Amendment. Bayh, *One Heartbeat Away*, pp. 288-297.

¹¹⁹ Bayh, *One Heartbeat Away*, pp. 288-297.

¹²⁰ Bayh, *One Heartbeat Away*, p. 298.

Shortly thereafter, ABA president Lewis Powell was summoned away from a conference in Puerto Rico to make amends between Celler and Bayh, and a chance meeting among the three in the Washington, DC, airport brought about reconciliation and an agreement on limitations so that the amendment could move forward.¹²¹ Bayh conceded to a thirty-day limitation, then Ervin suggested twenty-one days in response to McCullough's push for ten days. After a two-month deadlock, twenty-one days was agreed upon.¹²² In the end, "they gave a few days and we gave a few days," Bayh recollected.¹²³ Then the conference report was passed by voice vote in the House on June 30, 1965. Much of the earlier testimony was repeated for the record, such as Congressman Roybal's comment that "we can no longer afford" delay "in the nuclear space age."¹²⁴ What remained was for the bill, S.J. Res. 1, to go back through the Senate with the changes. The debate in the Senate began on the same day.

Despite the need for action during the nuclear age, the amendment's passage was not a given. Gore and Senator Frank J. Lausche of Ohio¹²⁵ both wanted tighter language and more specifics written into the amendment when the trend had always been to write

¹²¹ Bayh, *One Heartbeat Away*, p. 303.

¹²² John Feerick, *The Twenty-Fifth Amendment* (1976), p. 104. This appears in the Amendment's final form.

¹²³ Bayh, Interviews with Bob Blaemire, 2012.

¹²⁴ Congressman Poff listed the changes that had been made, including that at this point Sections 4 and 5 were combined into a single section, Section 4. Fordham Law School Dean Emeritus John Feerick has what appears to be the only copies of his correspondence with Poff on this issue at his private office in Larchmont, NY. *Congressional Record*, Vol. 111, Part II. 89th Congress, 1st Session (June 30, 1965), p. 15213. For Poff's statement see:

<http://heinonline.org.proxy.libraries.rutgers.edu/HOL/Page?handle=hein.congrec/cr1110002&id=1&size=2&collection=congre&index=congre/cru>. Accessed May 29, 2017. See also: John Feerick, Interviews with author, February 24, and May 27, 2015.

¹²⁵ Lausche suggested "having both a majority of the members of the Cabinet *and* a majority of the members of the body created by Congress" determine whether the inability had ended. Of Lausche, Bayh said, "It was pretty hard to nail him down. He was a Democrat, but pretty conservative. It was his way or the highway often." Birch Bayh, Interview with author, November 11, 2014.

less into the Constitution to allow future generations more flexibility.¹²⁶ In addition to Senators Gore¹²⁷ and Lausche, Senators Walter Mondale and Eugene McCarthy of Minnesota¹²⁸ voted against S.J. Res. 1, even though they were listed as cosponsors. Mondale supported an enabling amendment of the type that Dirksen favored, as did Senator John Tower, the fifth “Nay” vote.¹²⁹ Mondale and Tower, therefore, swung in the opposite direction of Gore and Lausche, suggesting as the longest amendment to date, S.J. Res. 1 went against the basic principles of constitutional law, a desire not to write specifics into the Constitution. McCarthy went to an extreme, suggesting that a statute rather than an amendment offered the most flexibility.¹³⁰ Although McCarthy’s argument may have had contained a kernel of truth, a statute would not offer a solution to the

¹²⁶ Gore was able to obtain postponement of further debate on the floor in order to have time to study the legal connotation of the language in the disability clause until July 6, 1965. On that day, he noted that it was impossible to provide for every contingency, but that changes could not be made after ratification. This fact, he claimed, would have added uncertainty, rather than certainty, to a sudden presidential transition. Urging others to join with him in opposing S.J. Res. 1, he concluded “should the Conference Report, with its present language, be approved, doubt and uncertainty will, upon ratification, become embedded in the Constitution.” “Remarks of Senator Albert Gore Prepared for Delivery on the Floor of the United States Senate,” NA, CJ, SCA, Box 16, Folder “89th Congress, PI, S.J. Res. 1 Floor Statement: Gore, Albert 6 July 1965”.

¹²⁷ In retrospect, his opposition was inexplicable to Bayh. “You know I don’t know why that was the case either because ... he was a very liberal senator for a senator from Tennessee. He was for civil rights at a time when it wasn’t popular down there and he was a fighter.... I’m sure I knew at the time; I don’t remember why he took that position.” Birch Bayh, Interview with author, November 11, 2014.

¹²⁸ Additionally, Mondale likely would have had difficulty voting against his senior Senator, McCarthy. Bayh, Interview with author, November 11, 2014.

¹²⁹ Others, such as Democratic Senator Allen J. Ellender of Louisiana, were of the same mindset as McCarthy, but did not ultimately vote against the resolution. Reacting to his opponents, Bayh did not want to leave open the possibility of easily removing the president for partisan reasons: this is one of the two main reasons a constitutional amendment, rather than an act, was the chosen remedy. In *Explicit and Authentic Acts*, David Kyvig comes to a different conclusion about whether or not Bayh and the ABA knew that it was more difficult to challenge an amendment once it was ratified. They were “convinced that a constitutional amendment offered the best prospect for a clear and unchallengeable remedy to most potential crises.” Both additional protection for the president and the fact that it provided a more secure plan, taken together, are the reasons that an amendment was the chosen plan. See Kyvig, *Explicit and Authentic Acts*, p. 362.

¹³⁰ In March 1964, when Bayh had asked McCarthy if he wanted to testify before the Subcommittee, McCarthy declined, reminding Bayh that he believed that an act of Congress, rather than an amendment to the Constitution, was the correct course of action. “Letter to Birch Bayh from Eugene McCarthy, March 18, 1964,” NA, CJ, SCA, Box 7, Folder “88th Congress, PI- Correspondence- Congressional 1963-64.”

succession and inability issue that would provide a sense of security. The author of the amendment believed that “One reason the Constitution adapted itself so well to changes of the time has been the breadth of language and its open-endedness.”¹³¹ The Constitution was not easily amended, but a statute could easily be changed by a second statute overriding the first.

Going into the vote, Bayh was nervous that the amendment would not pass, however.¹³² This was in large part because Gore spoke at length about his opposition to the amendment.¹³³ Ervin, one of Bayh’s most steadfast allies, alleviated some of Bayh’s fear by speaking next on the floor, urging the Senate to pass the amendment.¹³⁴ Returning to the nuclear context, he reminded his colleagues, “This is a dangerous period in which we live” when a president “can start an atomic holocaust.”¹³⁵ Another one of the senators causing Bayh’s jittery nerves was the slain president’s brother, Robert Kennedy.¹³⁶ But, as his comments earlier in the year revealed, he was concerned about the possibility of

¹³¹ Bayh, *One Heartbeat Away*, p. 66.

¹³² *Ibid.*, p. 319.

¹³³ While Bayh’s staff kept track of the votes, they did not know the mindset of every last senator.

¹³⁴ Reminiscent of his February 19 testimony, Ervin told his fellow senators to pass the amendment without making further changes, stating, “We were convinced of the old adage that too many cooks spoil the broth. We had more cooks with more zeal concerned with preparing this ‘broth’ than any piece of proposed legislation I have ever seen in the time I have been in the Senate.” *Cong. Rec.*, 89th Cong., 1st sess., 1965, vol. 111, pt. 2., p. 15590.

<http://heinonline.org.proxy.libraries.rutgers.edu/HOL/Page?handle=hein.congrec/cr1110002&id=1&size=2&collection=congreg&index=congreg/creu>. Accessed May 29, 2017.

¹³⁵ *Cong. Rec.*, 89th Cong., 1st sess., 1965, vol. 111, pt. 2., p. 15590.

<http://heinonline.org.proxy.libraries.rutgers.edu/HOL/Page?handle=hein.congrec/cr1110002&id=1&size=2&collection=congreg&index=congreg/creu>. Accessed May 29, 2017.

¹³⁶ Bayh told the author, “Well, I don’t know if we ever got his vote. I was down in the leader’s seat, the seat that leaders were issued, the front corner aisle seat, and somebody came down and said “you better see what those folks are doing back there.” And Bobby and Phil Hart [D-Michigan] and some others were saying this would make it possible for a coup to take place and that these were people [the Cabinet] that the president never really knew. That’s not true: the president knew all of them. Some of them he knew very well. Bobby was just way off base on that. Birch Bayh, Interview with author, November 11, 2014.

nuclear attack and this may have helped sway his vote. Robert and Edward Kennedy were both “Aye” votes in the end.¹³⁷

In his final floor speech, Bayh concluded that during other times in history, it may not have mattered if a competent president was at the helm in times of crisis, but because of the possibility of nuclear war, the succession and inability amendment must be passed now. Juxtaposing the period before the bomb with the current era, Bayh stated, “Today, with the awesome power at our disposal... when it is possible actually to destroy civilization in a matter of minutes [with nuclear weapons], it is high time that we listened to history.” The amendment would ensure “a President of the United States at all times, a president who has complete control and will be able to perform all the powers and duties of his office.”¹³⁸ After his speech that once again emphasized the dangers of the nuclear era, the amendment passed by a roll call vote of 68-5 in the Senate on July 6.

Although the Twenty-Fifth Amendment was (and still is) the longest amendment to date, the final form of the amendment, whittled down from five sections to four, did not contain specific details on a number of important issues. The definition of inability and how Congress would arrive at the decision on inability were left open-ended. Further, the amendment did not revert back to the executive line of succession put in place in 1886, but instead kept the controversial congressional line of succession as dictated by the 1947 Presidential Succession Act. The amendment states:

Section 1. In case of the removal of the president from office or of his death or resignation, the vice president shall become president.

¹³⁷ ““Mr. Kennedy of Massachusetts.” – “Aye.” Mr. Kennedy of New York.” – “Aye.”” Birch Bayh, *One Heartbeat Away*, p. 332. The *Congressional Record* confirms his assertion. *Cong. Rec.*, 89th Cong., 1st sess., 1965, vol. 111, pt. 2, p. 15590.

<http://heinonline.org.proxy.libraries.rutgers.edu/HOL/Page?handle=hein.congrec/cr1110002&id=1&size=2&collection=congrec&index=congrec/creu>. Accessed May 29, 2017.

¹³⁸ Bayh, *One Heartbeat Away*, p. 331.

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 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.¹³⁹

More broadly, nuclear attack provisions were not written into the amendment, but concerns about such an attack clearly affected the language and structure of the amendment that passed. The words of the framer of the amendment, congressmen, and expert witnesses, illustrate that this nuclear anxiety was an underlying cause precipitating passage. Congressmen had recognized the need for an immediate solution in the nuclear age, and, by the summer, the Twenty-Fifth Amendment had gone to the states for ratification.

¹³⁹ The Constitution of the United States, Amendment XXV.

* * *

Ratification by three-fourths of the states was now all that remained for the Twenty-Fifth Amendment to become part of the Constitution, but the amendment's success was not guaranteed. Following passage in the senate, Bayh and his American Bar Association supporters immediately launched a campaign to get the necessary thirty-eight states on board. Eventually, thirteen states would ratify the amendment in 1965, eighteen in 1966, and the final seven states in January and February of 1967. Over the course of these nineteen months, ratification of the amendment got caught up in confusion about the meaning of certain sections. Though the amendment could fail in twelve states and still become part of the Constitution, Bayh and the ABA worried that a rejection in any state, would cause a domino effect, affecting the amendment's overall progress.¹⁴⁰ While some states ratified quickly and without issue, political and cultural tensions determined the amendment's success in others: in particular, the nuclear issue.

Nuclear anxiety was most evident in the state-level ratification process when state legislators in Colorado, Arkansas, and Pennsylvania considered ratification. In Colorado and Arkansas, legislators would have been more comfortable ratifying the amendment if succession and inability procedures in the event of nuclear attack were written into the amendment. In particular, Colorado has been singled out by other scholars because the amendment did not pass the first time it was brought to a vote, leading to procedural questions. However, previously unexamined correspondence between Colorado State Senator John R. Bermingham and members of the ABA reveal that Bermingham's letters

¹⁴⁰ "As you know, the rejection of the amendment in any state... might have a snowball effect." "Letter to R. Dale Tooley from John D. Feerick," July 20, 1965. Personal Files of John D. Feerick, Folder "JBC-ABA II through Sept. 1965."

contain pleas that specific provisions be written into the amendment to deal with a nuclear crisis.¹⁴¹ In Arkansas, the amendment's lack of detail pertaining to a nuclear attack also was criticized, holding up the amendment's progress briefly. Conversely, on the floor of the Pennsylvania House, the possibility of nuclear conflict was cited as the reason why the amendment needed immediate ratification and partisan politics had to be overcome.

Bayh and the ABA went to work immediately after the legislation passed Congress, drafting letters to every member of each of the fifty state legislatures asking for their endorsement of the amendment.¹⁴² The ABA's intense campaign was highly organized and its work during the ratification process built on earlier methods.¹⁴³ For example, during the ratification phase in Colorado, lobbying efforts — like sending letters to each legislator that had voted against the amendment the first time it was considered in the state legislature — were combined with media efforts such as securing

¹⁴¹ The author interviewed Colorado State Senator John R. Bermingham on February 2, 2015. At the time, he was 91 years old and did not remember the specifics of Colorado's vote on the Twenty-Fifth Amendment. However, he was eager to speak about how nuclear anxiety affected a great portion of his career, including his naval service in the Pacific at the end of WWII.

¹⁴² This was a tremendous undertaking. And it was not the first time Bayh and the ABA had been in touch with state legislators: in 1964, long before passage, they had taken the clever step of polling every speaker and senator pro tem in each of the fifty state legislatures, to ask whether Bayh's S.J. Res. 139 or Keating's S.J. Res. 35 would more easily pass at the state level and this study had proved helpful in obtaining Johnson's support prior to his 1965 State of the Union Address. As Bayh and his allies assumed, S. J. Res. 139 was overwhelmingly preferred, in large part because the official endorsement of the Bar Association came down to the support of eminent attorneys in each state and, collectively, their opinions carried weight. "To Members of the Committee on Presidential Disability and Advisory Committee, Report # 1 – 1964-65, from Donald E. Channell, September 3, 1964" NA, CJ, SCA, Box 7, Folder "88th Congress, PI Correspondence Channell, Donald E. ABA 1964." See also Feerick, *Memoir – February 22, 2016*. Unpublished. p. 210.

¹⁴³ The ABA's effort was based out of the association's Washington, D.C. office and run by ABA lawyers Donald Channell and Lowell Beck, together with their assistant Michael Spence. They "set up a clearinghouse," as Feerick recalled, that became "a hub for the entire effort." They worked closely with the executive director, Bert Early, who was based in Chicago. Feerick, *Memoir – February 22, 2016*. Unpublished. p. 207.

television spots.¹⁴⁴ The potential need for practical application of what had originally been an academic interest of Feerick's became obvious when Kennedy's sudden death drew nation-wide media attention, but that reason was not emphasized as the amendment made its way through the states.¹⁴⁵

In Pennsylvania, the amendment passed through both houses of the legislature and through two additional readings before it met with delays related to concerns about the nuclear era. The cause of the amendment's pause was a lone representative, Philadelphia Democrat Eugene Gelfand, whose party controlled the statehouse.¹⁴⁶ Gelfand, perhaps unaware of the scrutiny and debate the amendment had undergone at the federal level, argued against ratifying Bayh's amendment too quickly without careful consideration. But Gelfand's colleague, Republican Representative G. Sieber Pancoast of Montgomery County, urged the Pennsylvania state legislature to back the amendment. In the floor

¹⁴⁴ During the passage of Bayh's bill through Congress, ABA members lobbied and fielded calls from both the executive and legislative branches of the federal government; asked state and local bar associations and fellow constituents to write letters to members of Congress; spoke in front of civic organizations; and published articles and editorials in newspapers across the country. In Nebraska alone, ABA member Richard Hansen appeared more than 50 times to deliver speeches across the state in support of ratification. Hansen was a longstanding advocate of succession reform, having published in 1962 a book called *The Year We Had No President* that documented periods in which the president was not able to carry out his responsibilities. He had testified as an expert before Congress in 1963, and advocated for the amendment throughout the process. Nebraska became the first state to ratify at 12:15 p.m. on July 13, 1965. Wisconsin ratified just four minutes later, at 12:19 p.m. Oklahoma followed three days later. Massachusetts ratified next, on August 9, 1965. All four ratified without major incident, though the specifics of the nature of debate have been lost to history. Instead, newspapers such as *The New York Times* in the case of Nebraska and Washington, focused only on the race to ratify. See, for example: "Wisconsin First State on Twenty-Fifth", July 14, 1965, *The New York Times* (1923-Current File). "Nebraska Says it was First to Ratify 25th Amendment" July 15, 1965, *New York Times* (1923-Current File). "5th State Ratifies Amendment", August 19, 1965, *New York Times* (1923-Current File). See also: Feerick, *Memoir – February 22, 2016*. Unpublished. p. 209.

¹⁴⁵ No provisions existed in the current law for the possibility of Kennedy remaining alive in a comatose state, for example. Arthur Krock, in his *New York Times* article of November 24, 1963, was one of the media icons that drew attention specifically to Feerick's work. Arthur Krock, "The Continuum: Kennedy's Death Points Up Orderly Progression in U.S. Government", November 24, 1963, *The New York Times* (1923-Current File).

¹⁴⁶ "Notes of Meeting held in Miami Florida, August 9, 1965," Personal Files of John D. Feerick, Folder "JBC- ABA II Through Sept. 1965."

debate, Pancoast argued that Section 4 of the amendment might lead to a power struggle between political parties, a struggle that was unacceptable for any “length of time in our atomic age.”¹⁴⁷ Gelfand, who spoke next argued that though anxious times called for action, the House still should not vote in haste: “I know the tenor of the times is to do something,” he said, “but let us not rush pell-mell down the road to madness just for the sake of doing something, because it could mean disaster.”¹⁴⁸ The amendment was not brought to a vote.

The ABA pushed back. It mobilized federal, state, and local bar associations, as well as other members of the Pennsylvania legislature, to put pressure on Gelfand to allow the process to move forward.¹⁴⁹ The ABA was able to convince Pennsylvania legislators that not ratifying would lead to more serious disaster in the dangerous age. Gelfand did not mention the Bar Association’s pressure, but in a matter of weeks, Pennsylvania became the fifth state to ratify on August 18, 1965.

Kentucky was also ready to take up the issue at this time. Lieutenant Governor Harvey Lee Waterfield wrote to Bayh explaining that Governor Edward Breathitt had called a special session in part to consider the amendment, and he asked for assistance in winning over the state’s legislators. “In light of what happened in Colorado,” he wrote, “I would request that you send to me any material that can be presented to our legislators in

¹⁴⁷ Commonwealth of Pennsylvania Legislative Journal, Session of 149th of the General Assembly, vol. 1, no. 64 (re Senate bill 1001, printer's No. 1203), August 18, 1965, p. 1560.

¹⁴⁸ Ibid, p. 1563.

¹⁴⁹ “Notes of Meeting held in Miami, Florida, August 9, 1965,” Personal Files of John D. Feerick, Folder “JBC- ABA II Through Sept. 1965.”

support of the proposed amendment."¹⁵⁰ This background information may have proved persuasive. Kentucky ratified on September 16.¹⁵¹

But in Arkansas, Bayh and the ABA encountered a holdup. Bayh's personal appearance at the National Governors' Conference in July had helped bring Governor Orval Faubus on board.¹⁵² After the conference, Bayh and Faubus exchanged letters. In a letter dated August 5, Faubus stated that he had hoped that Congress would pass the amendment while Arkansas had been in special session, but now it did not look likely that Arkansas would ratify before the Arkansas legislature convened next.¹⁵³ Speaker J.H. Cottrell disseminated a copy of an article by Professor George D. Haimbaugh that had appeared in the *South Carolina Law Review*, "Vice Presidential Succession: A Criticism of the Bayh-Cellar [sic] Plan," criticizing the amendment's lack of specific provisions to deal with a nuclear attack. In the article, Haimbaugh brought up the possibility of a nuclear crisis and the effect it would have on succession, criticizing the amendment for not addressing it. Significantly, he wrote, "Arguments for the Bayh-Celler plan for vice presidential succession must also include a ritual reference to the thermonuclear age." He

¹⁵⁰ In Colorado, early ratification of Bayh's amendment seemed likely, but a protracted battle ensued at the same time Kentucky was considering ratification. "Letter to Senator Birch Bayh from Harvey Lee Waterfield, July 23, 1965," NA, CJ, SCA, Box 18, Folder "PI Rat Corres Govs and State Officials Jul 1965."

¹⁵¹ Arizona and Michigan followed Kentucky in quick secession. They were the seventh and eight states to ratify, on September 22 and October 5, respectively. Bayh's home state of Indiana was the ninth to ratify on October 20, 1965. Bayh had begun his career in the state legislature, while putting himself through law school at night; he was thrilled to fly home to address a joint session of the legislature. Governor Roger Branigin had called a special session for the purpose of ratifying the amendment, which voted in favor the same day. Then the California legislature followed suit the next day, becoming the tenth state to ratify. State governmental officials whose states contained the more major metropolises may have felt added pressure to support the amendment because evacuation was more difficult. (Please see California Governor Edmund G. Brown, Jr.'s comments in Chapter 2.) Indiana: Bayh, *One Heartbeat Away*, p. 338.

¹⁵² The National Governor's Conference took place in Minneapolis that year; Senator Bayh's attendance enabled him to directly lobby a great number of governors at the same time. "Letter to Senator Birch Bayh from Orval E. Faubus, August 5, 1965," NA, CJ, SCI, Box 18, Folder "P In Rat Corres Govs and State Officials 1965."

¹⁵³ "Letter to Senator Birch Bayh from Orval E. Faubus, August 5, 1965," NA, CJ, SCI, Box 18, Folder "P In Rat Corres Govs and State Officials 1965."

continued, “The possibility of the simultaneous death of all in the line of succession is a nuclear age reality, but the Bayh-Celler plan does not meet this danger.”¹⁵⁴ Haimbaugh suggested that the amendment was not useful because it was granting Congress powers it already had to designate successors to the presidency that would not be affected by a nuclear attack on Washington, D.C. He argued that under Article II, Congress has “the power to extend the line of officials to include high-ranking officials who work outside the Washington area.” Haimbaugh presumably was referring to the “necessary and proper” clause. In a rebuttal entitled “Vice Presidential Succession: In Support of the Bayh – Celler Plan,” also published in the *S.C. Law Review*, Feerick agreed that Congress had the power to extend the line of succession, but the concern that a line of succession consisting of officials not in Washington did not need to be dealt with in the amendment.¹⁵⁵ Instead, the amendment was urgent and, Feerick charged, Haimbaugh’s arguments were “invalid, inapplicable, and unrealistic.” Though readership numbers are not available, Feerick’s response may have helped move it to a vote in Arkansas. Arkansas ratified the amendment on November 4, 1965.

The amendment began to pick up steam in the states;¹⁵⁶ however, the ratification process in Colorado threatened the amendment’s overall success. Initially, the ABA assumed that Colorado would be one of the first states to ratify because the Colorado

¹⁵⁴ George D. Haimbaugh, “Vice Presidential Succession: A Criticism of the Bayh-Cellar [sic] Plan,” Vol. 17, Rev. 315, *South Carolina Law Review Journal*, 1965.

¹⁵⁵ John D. Feerick, Vice Presidential Succession: In Support of the Bayh – Celler Plan,” (New York: Fordham University Press, 1966), The Fordham Law Archive of Scholarship and History, http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1381&context=faculty_scholarship. Accessed March 10, 2016.

¹⁵⁶ New Jersey, Delaware, Utah, West Virginia, Maine, and Rhode Island all ratified in the span of two months between November 1965 and January 1966. Delaware ratified on December 7, the 178th anniversary of its ratification of the Constitution. Bayh smoothed over questions about the disability provisions (Sections 3 and 4) in the West Virginia Senate, by phone. Bayh, *One Heartbeat Away*, p. 339. No transcripts are available.

legislature passed a memorial resolution, S.J.M. 5, asking Congress to move forward on the amendment on presidential succession and inability in February.¹⁵⁷ Colorado Governor John Arthur Love called another special session of the legislature in the summer of 1965 to deal with issues that had resulted from flooding, but added the amendment to the agenda. At that time, with less than the usual number of members present, the legislation supporting ratification of the amendment was given surface consideration and voted down narrowly after the third reading in the Senate.¹⁵⁸ However, both Tooley and Dines expressed great optimism that the legislature would most likely consider the amendment more favorably when it reconvened in January 1966 for its regular session, and pointed to the earlier memorial.¹⁵⁹

Instead, the heightened anxiety surrounding a nuclear attack caused concern. In a letter to Feerick on July 21, 1965, Tooley added an article he wrote in *The Denver Post*, a response to its article the day before, entitled “Twenty-Fifth Amendment has Serious Defects.” He complained that the *Post* had reversed its earlier position in support of the

¹⁵⁷ A memorial, according to Colorado Office of Legal Legislative Services aide Robert Garcia, is introduced by the Colorado House of Representatives solely for one of the following three purposes: to propose amendments to the constitution of the state of Colorado; to recommend the holdings of state constitutional conventions; or to ratify proposed amendments to the Constitution. This memorial was designed for the latter purpose, R. Dale Tooley, head of the Colorado Bar Association, wrote in a letter to Feerick on February 3, 1965.¹⁵⁷ Purposes of memorial: Email to Author from Robert Garcia (December 23, 2016). Purpose for this memorial: See “Page 72 Senate Journal— 14th Day— January 19, 1965,” and “Letter to Mr. John Feerick from R. Dale Tooley, February 16, 1965,” Personal Files of John D. Feerick, Folder “JBC- ABA II Through Sept. 1965.”

¹⁵⁸ The third reading is the third and final reading of the bill when the final vote is taken. Not all members need be present, only a quorum is required. Opponents argued that the timing was inappropriate as the special session had been called explicitly to deal with flood-related matters. Colorado Representative Allen Dines’ letter to Birch Bayh provided additional detail: only twelve senators had voted against the resolution, they were all Republicans, and consequently, the House did not get to consider it during the special session. Third reading defined: Email to Author from Robert Garcia (December 23, 2016). Opponents’ reason: “Letter to Senator Birch Bayh from Allen Dines, July 29, 1965,” NA, CJ, SCA, Box 18, Folder “Ratification - Correspondence State Legislatures 1965.”

¹⁵⁹ “Letter to John Feerick from R. Dale Tooley, July 22, 1965,” Personal Files of John D. Feerick, Folder “JBC- ABA II Through Sept. 1965.”

amendment.¹⁶⁰ One notable point of the *Post*'s was that the amendment did not deal directly with vice presidential inability. What if both the president and vice president were simultaneously unable to serve? It was a dangerous omission because a coherent Commander in Chief was needed when seconds mattered in the nuclear era, the *Post* argued: "In a nuclear age, the presidency must be occupied at all times by a man in full possession of his faculties."¹⁶¹ In Colorado, it looked like a lack of specifics around vice presidential inability during the nuclear age might prevent ratification.

Colorado State Senator John R. Bermingham also worried about the proposal's failure to contend with a nuclear catastrophe. In a July 22 letter to Feerick, Tooley enclosed a *Rocky Mountain News* article entitled "GOP Senator Explains Vote on Amendment" published that day featuring Bermingham, one of the original sponsors of the memorial. He was now one of twelve representatives opposed to the amendment. In the article, his opposition was framed in terms of process as much as substance. Bermingham called for an open hearing, voicing his opinion that the public should have a say in any vote to amend the Constitution. Stating his opposition was misunderstood, he mentioned that he and several other senators had "serious objections" to the

¹⁶⁰ In his letter of July 21, 1965, Tooley quoted The *Denver Post*'s editorial position as of April 15, 1965. The *Post* stated that "ratification will be forthcoming" and "it will come none too soon." "Letter to John Feerick from R. Dale Tooley, July 21, 1965," Personal Files of John D. Feerick, Folder "JBC – ABA II Through Sept. 1965."

¹⁶¹ The *Rocky Mountain News* stated that the current speed of communications should allay the concern that Congress might decide inability on the basis of partisan politics. Congress, in this case, would not get away with such a course of action because the nation would know the details instantaneously. It read: "With today's instant communication, when the whole country would know every detail of congressional behavior (and a president's illness), the risk is enormously reduced." Full Possession of his Faculties: "Twenty-Fifth Amendment has Serious Defects," *The Denver Post*, July 22, 1965. Personal Files of John D. Feerick, Folder "JBC- ABA II Through Sept. 1965." Speed of communications: "The Bayh Amendment Passes," *The Rocky Mountain News*, February 23, 1965. Personal Files of John D. Feerick, Folder "JBC- ABA II Through Sept. 1965."

amendment.¹⁶² Then, in his first letter to the ABA dated August 10, 1965, Bermingham made clear that he wanted provisions explicitly written into the Twenty-Fifth Amendment in case of a nuclear crisis. He questioned “why no provision was included in the proposed amendment to cover the situation that would occur if an atomic bomb wiped out the entire city of Washington while all our high officials were present. How would the government get started again?”¹⁶³ The senator would continue this laser-like focus on the lack of detail in the event of a nuclear attack for months.

Tooley’s assistant, Michael Spence, responded to Bermingham ten days later noting that Bermingham was not the only one to have raised questions about whether the succession and inability amendment addressed nuclear attack. Spence stated that although the drafting committee did consider that possibility, the amendment “could not cover every possible situation which might be imagined.” The amendment was designed to deal only with problems “which history has indicated might be likely to occur,” he said.¹⁶⁴ He went further, stating that the amendment “does not deal with the subject of atomic holocaust specifically” but admitted that “The occurrence of atomic destruction under any circumstance would be chaotic.”¹⁶⁵ He concluded by saying that the amendment would not cause problems during such events.

This was not the assurance that Bermingham wanted. He wrote again to Spence stating that the huge sums spent annually on defense against atomic attack were proof

¹⁶² “GOP Senator Explains Vote on Amendment,” *Rocky Mountain News* (Denver, Colorado: July 22, 1965), Personal Files of John D. Feerick, Folder “JBC- ABA II Through Sept. 1965.”

¹⁶³ “Letter to American Bar Association from John R. Bermingham, August 10, 1965,” NA, CJ, SCA, Box 6, Folder, “PI ABA Junior Bar Conference 3 of 4, Dale Tooley File 1965 Jun-Dec.”

¹⁶⁴ *Ibid.*

¹⁶⁵ “Letter to the Honorable John R. Bermingham from H. Michael Spence, August 20, 1965” NA, CJ, SCA, Box 6, Folder, “PI ABA Junior Bar Conference 3 of 4, Dale Tooley File 1965 Jun-Dec.”

that the nuclear issue was an important one.¹⁶⁶ He then concluded his letter by asking more pointedly why the amendment could not cover an atomic attack: “Do I interpret your remarks correctly in concluding that our laws make no provision whatsoever for continuity or succession in our government [in the event of an attack]... Is there any reason why the succession law could not be amended to cover an atomic holocaust?”¹⁶⁷

Spence focused on the questions related to process, rather than those related to nuclear attack. He pointed out that the Twenty-Fifth Amendment did not change the line of succession dictated in the 1947 Presidential Succession Act (after the vice president, the speaker of the House, followed by the Senate president pro tempore, followed by Cabinet secretaries in order of the Department’s creation). Further, Section I of Article 2 of the Constitution allows Congress to legislate on succession and that to provide for “contingencies such as the atomic holocaust you suggest,” succession law could be amended in the future. Spence – attempting to drive a wedge between the two issues that legislators at both the federal and state levels saw as intricately linked – added that the problem of an atomic holocaust was separate from the problems the amendment addressed.

Birmingham, though not completely satisfied, did not continue the battle to add language to the amendment to cover a nuclear attack. He told Spence he agreed they were separate issues; however, he emphasized the salience of the nuclear issue to the public, and that it was Congress’ duty to legislate on both. Birmingham wrote, “Nevertheless, they are not unrelated in the thoughts of the public and it seems to me that Congress has

¹⁶⁶ “Letter to Mr. H. Michael Spence from John R. Birmingham, August 26, 1965,” NA, CJ, SCA, Box 6, Folder, “PI ABA Junior Bar Conference 3 of 4, Dale Tooley File 1965 Jun-Dec.”

¹⁶⁷ Ibid.

as much duty to take action with respect to the one problem as the other.”¹⁶⁸ In Colorado’s case, it seems that the dispute was between those who were worried about a nuclear attack and those who were *really* worried about a nuclear attack. The former supported an amendment, and the latter were against an amendment that did not include specific instructions to deal with a nuclear holocaust.

Spence did not fully answer Bermingham’s question on a nuclear provision. As assistant to the director, Spence was following his marching orders to get the amendment ratified by any means possible. Moreover, if the amendment were redrafted to include any provisions for a nuclear attack, it would have to start again at the beginning, in a congressional subcommittee. Bermingham could have held up the amendment in Colorado, similar to what happened in Pennsylvania and Arkansas. On January 27, 1966, the ABA sent cards to every member of the Colorado legislature asking not only that they support ratification, but that they go beyond this by contacting a list of representatives who previously had opposed the amendment.¹⁶⁹ Senator Bayh’s office also dictated a defense of the amendment that was distributed by the ABA to each member the following week.¹⁷⁰ The ABA had feared a domino effect: that if the amendment was not ratified in Colorado because the language was deemed deficient in some way, other states would

¹⁶⁸ “Letter to Mr. H. Michael Spence from John R. Bermingham, September 9, 1965,” NA, CJ, SCA, Box 6, Folder, “PI ABA Junior Bar Conference 3 of 4, Dale Tooley File 1965 Jun-Dec.”

¹⁶⁹ Letter to Mr. Charles Gallagher from R. Dale Tooley, January 27, 1966” Personal Files of John D. Feerick, Folder “John D. Feerick JBC-ABA III, From October 1, 1965 to January 26, 1967.”

¹⁷⁰ Bayh, *One Heartbeat Away*, p. 340.

block ratification as well. Yet, after intense focus on the nuclear issue, Colorado ratified the amendment on February 3, 1966.¹⁷¹ Additional states began to fall into line rapidly.¹⁷²

The final effort toward ratification came in February 1967: three states, Nevada, North Dakota and Minnesota, vied for the honor of being the thirty-eighth state to ratify. Nevada and North Dakota on February 8, and February 9, 1967, respectively, upon learning that they were only the thirty-seventh state to ratify, withdrew their ratifications. At first, the validity of North Dakota's nullification was unclear. Minnesota ratified next, followed by a second attempt an hour and thirteen minutes later (due to a difference in time zones) by Nevada. When North Dakota's nullification was finalized, Nevada

¹⁷¹ The ABA was so consumed by the problems in Colorado even early on, that in a memorandum containing notes from their annual meeting, the update on Utah was simply that it did not have a "Colorado-type problem." Bayh and the ABA were able to breathe easier when the halfway mark was reached with New Mexico's ratification on February 3, the same day as Colorado. Kansas, Vermont, and Alaska all ratified in February as well. Idaho, Hawaii, Virginia, Mississippi, New York, Maryland, and Missouri all ratified the next month, March 1966. But in Alabama, Bayh and Feerick feared Governor George Wallace might opportunistically seize on the amendment as a way to gain national attention and shore up states' power. In this case, Wallace, who had sought the presidency in 1964, was planning to run again. In southern states, civil rights had become a battle between federal and state power. In 1963, on the topic of civil rights, Bayh had written in a press release stating: "Too often in the past, states' rights has been falsely invoked to block and delay progress." Here they were afraid Wallace might make a call for states to avoid ratification or purposefully withhold ratification. Alternatively, Wallace might demand that the amendment be rewritten to empower states – perhaps by the inclusion of a special election that would involve state delegates; or by the substitution of state governors in the line of succession; or by the invention of a committee of governors that would help determine presidential inability. But Alabama did not consider ratification in its 1965 session, or in its special session that had been called specifically to deal with legislative reapportionment. Attorney Bert Nettles, the ABA's contact in Mobile, told Feerick in a letter of September of that year that it would be considered in the next regular session in 1967. "Colorado-type problem": "Notes of Meeting held in Miami Florida, August 9, 1965," Personal Files of John D. Feerick, Folder "JBC- ABA II Through Sept. 1965." Kansas, Vermont, and Alaska: Birch Bayh, *One Heartbeat Away*, p. 340. Bayh press release: "From the Office of Senator Birch Bayh for Release upon Delivery, October 12, 1963," U.S. Senate Historian's Office. Folder, "Bayh Newspaper Clippings." They were afraid: John D. Feerick, Interview with author, February 28, 2016. "Letter to John Feerick from Bert S. Nettles," September 20, 1967. Personal Files of John D. Feerick.

¹⁷² The remaining states ratified the amendment without issue, with the exception of a hiatus from July 6, 1966, the first anniversary of the Senate vote, until January 1967 because many state legislatures only convened biannually. New Hampshire became the 30th state to ratify on June 13, 1966. Louisiana, the 31st state to ratify, ratified at the end of their session on July 5, 1966. After success in Louisiana, Bayh and the ABA began to prepare for regular legislative sessions to reconvene in 1967. "Preparation continued on the necessary groundwork to do battle then," This preparation included more successful letter-writing to the governors and legislators in the states that had yet to ratify. Bayh, *One Heartbeat Away*, p. 341.

became the thirty-eighth state to ratify.¹⁷³ Ultimately, the amendment was ratified by 47 states: only Georgia, North Dakota, and South Carolina¹⁷⁴ did not ratify officially.

Once three-fourths of the states have ratified, the amendment automatically becomes part of the Constitution; presidents do not need to affix their signature to an amendment. However, Johnson chose to sign the amendment anyway, in a ceremony on February 23, 1967, recognizing and signifying the achievement.¹⁷⁵ Technically, he served simply as witness to the signature of General Services Administrator Lawson Knott – a contrivance devised to afford Johnson the opportunity to show the public he supported this popular idea. At the signing ceremony, Vice President Hubert Humphrey was at the president's side. Those next in the line of succession, Senate president pro tempore Carl Hayden and speaker of the House John McCormack, were also present. Johnson's presence at the ceremony closed the circle he had begun when in his 1965 State of the Union Address he made a brief inclusion of the topic. Newspapers such as *The New York Times* heralded it as a successful piece of the president's Great Society Program. Tom

¹⁷³ Feerick stated that formal efforts by the ABA to ratchet up additional states ended at this point, but he speculated that some ABA members kept up efforts in their own states. In some states this may have happened for symbolic reasons, but, more than likely, in other states, the Bar Associations would have wanted to see the process through to ratification simply because they had been in favor of Bayh's amendment since early 1964. For example, Alabama ratified the amendment on March 14, 1967, after the amendment had already become part of the Constitution. Texas did not hold a regular legislative session from May 31, 1965 (before the Twenty-Fifth Amendment passed Congress) through January 10, 1967, but Governor John Connally listed ratification of the amendment as "one of the key items" of his 1967 agenda. Texas ratified the amendment on April 25, 1967. John D. Feerick, Interview with author, February 28, 2016.

¹⁷⁴ A procedural error caused Georgia not to be added to the ratification list, though it appears that both houses of the legislature approved the measure just prior to their session's adjournment. In South Carolina, ABA member William "Bill" Able followed the campaign procedures used by the ABA in other states as evidenced from a letter in Feerick's personal files. Georgia: See Birch Bayh, *One Heartbeat Away*, p. 340 fn. South Carolina: See "Letter to Hon Robert T. Ashmore from William F. Able, March 8, 1965."

¹⁷⁵ Until 1950, the secretary of State handled the duty of administering the ratification process. From 1950-1985, the General Services administrator took on this responsibility, which is currently in the hands of the Archivist of the United States, the head of the National Archives and Records Administration. Please see National Archives, "The Constitutional Amendment Process," *The Federal Register*. <http://www.archives.gov/federal-register/constitution/>.

Wicker of *The Times*, when assessing Johnson's Great Society ideas, both new and old, wrote, "There is still a category of Great Society proposals – old ideas that at last seem to have a great chance of fulfillment.... Mr. Johnson has even tackled the oldest established permanent loophole in the Constitution by lending his support to an amendment on presidential succession and inability."¹⁷⁶ It is conceivable, however, that Johnson might not have been able to add the succession and inability solution to his list of Great Society accomplishments if it were not for the tense political and cultural mood.

The Twenty-Fifth Amendment became part of the U.S. Constitution on February 10, 1967, three years, two months, and nineteen days after Bayh drafted the legislation on his flight to Chicago. Nuclear anxiety was ingrained in the Constitution itself, even as the Constitution continued to take shape based on the needs of the era. As references to the sudden transition from Kennedy to Johnson faded into the background, nuclear anxiety remained at the forefront of political discourse at the federal and state levels. The lens of nuclear anxiety reveals new facets of the amendment's path to ratification unavailable through more traditional accounts focused on a staid legal process or that omit the cultural and political mood or attribute the anxiety that helped propel the amendment forward solely to the presidential assassination. Although the amendment in its final form did not contain specific procedures to follow in the event of nuclear attack, congressmen attempted to strike a balance between including enough detail to provide a solid and reassuring answer to the succession and inability problem and, at the same time, allowing flexibility should unforeseen events happen, especially as a result of a nuclear attack. This desire to allow future Congress' maneuverability led to gaps and vagaries in the

¹⁷⁶ Tom Wickers, "Johnson's Great Society: Lines are Drawn," *The New York Times*, March 14, 1965, p. E3.

amendment that successive Congresses would debate within a climate of heightened nuclear anxiety.

Chapter 4: “A *Dr. Strangelove* Situation”: The Twenty-Fifth Amendment in Practice

“This is a true *Dr. Strangelove* kind of situation,”¹ Birch Bayh, the Twenty-Fifth Amendment’s architect, said to his fellow congressmen when the debate over passage of the amendment had turned to inability issues. The 1964 film, *Dr. Strangelove or How I Stopped Worrying and Learned to Love the Bomb*, dramatized an inconceivable event, nuclear catastrophe, with black humor.² Dr. Strangelove represented a scientist – an individual in a field Americans love to trust – that had become “strange,” or gone insane. In invoking the popular film, Bayh pointed to Cold War anxieties about the collision of military and scientific power, as it focused on the ability of the president who wielded that power. The Twenty-Fifth Amendment was designed to secure the line of presidential succession in case of a sudden strike, and at the same time, prevent a president who had become crazy or inabled from having control of the bomb. Yet the amendment in practice did not completely succeed in stopping lawmakers from “worrying,” nor did it work exactly as the framers of the amendment intended.

The first applications of the amendment in the 1970s revealed procedural gaps and vagaries in Sections 1 and 2 of the amendment, but resulted in smooth executive transitions. Section 3 of the amendment was invoked in 1985, 2002, and 2007,

¹ *Hearing Before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary*, SJ Res 26, Proposing Modification of the Twenty-Fifth Amendment of the Constitution of the United States, 89th Cong., 1st sess., February 25, 26, and March 11, 1975. Printed for the use of the Committee on the Judiciary. (Washington: U.S. Government Printing Office, 1976). See also: Chapter 2.

² Another 1964 film, *Fail-Safe*, also dealt with the loss of control over the bomb, leading to catastrophic results. These films are just two of the myriad representations of fear around the bomb prevalent in politics and pop culture since the bomb’s use in 1945. For a discussion of representations of nuclear anxiety in politics and culture, see Chapter 2.

respectively, and these applications, too, raised questions. The amendment was invoked six times between 1967 and 2017, three times to replace an elected official, and three times to deal with temporary presidential inability. The need for a stable chief executive at the nuclear trigger conflicted with political concerns, namely the president's desire to project an image of health and competency.³ Presidents and their advisors – whose power relied on that of the president – consistently failed to demonstrate willingness to put presidential continuity, and thus the safety of the nation, over their desire to hold on to power.

To understand the Twenty-Fifth Amendment as a product of an era of nuclear anxiety requires careful consideration not only of the times that the amendment was invoked, but also of the times it might have been invoked, but was not. Evidence suggests that the higher the nuclear anxiety, the less likely it was that the amendment would be invoked. Further, during periods of heightened nuclear anxiety, government officials intensified their search for solutions to perpetually challenging presidential succession and inability issues, sometimes stretching the flexible boundaries of the Constitution itself.

The year after the Twenty-Fifth Amendment became part of the Constitution, former vice president Richard Nixon was elected president. But his victory raised issues about a president's mental stability in a nuclear age. Nixon's volatile state of mind, and therefore his ability to provide stable leadership, was not a new concern, but rather a continued source of anxiety. Although Nixon had reinvented himself as a mature statesman, many

³ For a complete study on the history of an image, see: David Greenberg, *Nixon's Shadow: The History of an Image* (New York: W.W. Norton & Company, 2003).

Americans remembered his hot-tempered style from earlier in his career. Moreover, in an article published in July 1969, Arnold A. Hutschnecker, who functioned in effect as Nixon's psychotherapist, suggested the "the survival of the human race" depended on the "emotional stability" of the U.S. president. He warned of "hostile-aggressive" leaders in whom ambition "can reach a degree of madness."⁴ It was not hard to read the remark as thinly veiled reference to his famous patient.

An incident that raised a red flag about the president's mental health occurred in the pre-dawn hours of May 9, 1970, when students gathered in Washington to protest the Vietnam War and the murders of four students at Kent State University by National Guard troops. Much to his Secret Service detail's consternation, Nixon decided to take a walk to "rap" with student demonstrators near the Lincoln Memorial.⁵ While Nixon's version of his sojourn to the Memorial was printed in the major papers on May 10, his closest aides and the students he mixed with questioned his incoherence, choice of topics, and overall sanity.⁶ The incident fueled public debate about the president's ability to make clear decisions about war.

⁴ Arnold A. Hutschnecker, "The Mental Health of Our Leaders," *Look*, July 15, 1969, pp. 51-54. As quoted in Greenberg, *Nixon's Shadow: The History of an Image*, p. 244.

⁵ For a discussion of this episode, see: Greenberg, *Nixon's Shadow: The History of an Image*, pp. 232-234. See also: Joe Eszterhas and Michael Roberts, *Thirteen Seconds: Confrontation at Kent State* (Cleveland: Gray and Company, 1970). James A. Michener, *Kent State: What Happened and Why* (New York: Fawcett Crest, 1971). Howard Means, *67 Shots: Kent State and the End of American Innocence* (Boston: Da Capo Press, 2016). Rick Perlstein, *Nixonland: The Rise of a President and the Fracturing of America* (New York: Scribner, 2008). William Safire, *Before the Fall: An Inside View of the Pre-Watergate White House* (Garden City, NY: Doubleday, 1975), p. 202.

⁶ Nixon's erratic behavior during the Lincoln Memorial visit would have even his closest aides wondering if he was mentally stable. Nixon's Chief of Staff H. R. Haldeman would write in his diary hours after the Lincoln Memorial visit, "I am concerned about his condition," and note that Nixon's behavior that morning constituted "the weirdest day so far." Tom McNichol, "I Am Not a Kook: Richard Nixon's Bizarre Visit to the Lincoln Memorial" *The Atlantic* (November 14, 2011).

<http://www.theatlantic.com/politics/archive/2011/11/i-am-not-a-kook-richard-nixons-bizarre-visit-to-the-lincoln-memorial/248443/>. Accessed June 1, 2016.

During the nuclear age, mental inability – including issues like lack of comprehension, a need for anger management or the inability to cope with a particularly stressful day (as Nixon’s behavior suggested) – was proving to be more dangerous in a president than physical limitations.⁷ In Nixon’s case, however, illegal activity and not insanity or physical ailment put an early end to his term after five men were arrested and charged with second-degree burglary at the Democratic National headquarters in the Watergate hotel and office complex and the order for the break-in was traced to the top echelon of the executive branch. Between May and August 1973, the Select Committee on Presidential Campaign Activities chaired by Senator Sam Ervin investigated potential links between the president himself and the break-in at the Watergate hotel.⁸ During 1973 and 1974, all of Washington became engulfed in the drama as Americans tried to understand the complex events, the clash between Congress and the White House, and what the implications might be for the presidency. The removal of the president from

⁷ But it is important to note that medicine the president might take to mitigate the symptoms of a physical illness, such as some of Kennedy’s treatments for his back, can cause mental incapacitation or severe disorientation. According to presidential historian Robert Dallek who was given unique access to JFK’s prescription records: “In particular during times of stress, such as the Bay of Pigs fiasco, in April of 1961, and the Cuban Missile Crisis, in October of 1962—Kennedy was taking an extraordinary variety of medications: steroids for his Addison’s disease; painkillers for his back; anti-spasmodics for his colitis; antibiotics for urinary-tract infections; antihistamines for allergies; and, on at least one occasion, an anti-psychotic (though only for two days) for a severe mood change that Jackie Kennedy believed had been brought on by the antihistamines.” Robert Dallek, “The Medical Ordeals of JFK,” *The Atlantic*, December 2002. <http://www.theatlantic.com/magazine/archive/2002/12/the-medical-ordeals-of-jfk/305572/>. Accessed September 26, 2016.

⁸ On October 10, staff writers Carl Bernstein and Bob Woodward of *The Washington Post* revealed “spying and sabotage” conducted on behalf of President Nixon’s re-election, directed by officials of the White House and the Committee for the Re-Election of the President. Despite these disconcerting revelations, Nixon won reelection in November 1972. Carl Bernstein and Bob Woodward, “FBI Finds Nixon Aides Sabotaged Democrats,” *The Washington Post*, Times Herald (1959-1973), Washington, D.C., 1972.

office, which would trigger Section 1 of the Twenty-Fifth Amendment, appeared increasingly likely.⁹

Then, suddenly, on October 10, 1973, Vice President Spiro T. Agnew resigned amid charges of wrongdoing unrelated to the Watergate scandal,¹⁰ initiating Section 2 of the Twenty-Fifth Amendment instead. Richard Nixon became the first president to fill a vacancy in the office of the vice president, subject to confirmation by Congress. Agnew's resignation also seemed to increase the likelihood of Nixon's impeachment or resignation, since the general lack of regard for Agnew had acted as a kind of insurance policy for Nixon. Agnew resigned on what was the fifth day of the Yom Kippur war between Israel and its Arab enemies, which could have become a nuclear conflict.¹¹ The day after accepting Agnew's resignation, Nixon left for Camp David, the presidential retreat in Maryland. Feeling increasingly burdened by incessant bad news, the president began drinking heavily, a practice which apparently had become a habit. At 7:55 p.m., British Prime Minister Edward Heath requested a return call within thirty minutes to

⁹ See Journalist Elizabeth Drew's diary of this period, *Washington Journal: Events of 1973-1974*, which provides a window into the anxiety of the nation surrounding Nixon's potential inability. Elizabeth Drew, *Washington Journal: The Events of 1973-1974* (New York: Random House, 1975).

¹⁰ The vice president was accused of bribery, conspiracy, and tax evasion. Agnew pleaded no contest to a tax evasion count and resigned.

¹¹ Newly released evidence by a think tank, The Nuclear Proliferation International History Project of the Woodrow Wilson International Center for Scholars, argues that Israel considered using an atomic bomb in the 1967 war, which makes it plausible that Israel also considered using this weapon in the later war. Aron Heller, "U.S. Think Tank: Israel had Plans to Use Atomic Bomb in 1967," *Associated Press* (June 5, 2017). On the Yom Kippur War, see also: Simon Dunstan, *The Yom Kippur War: The Arab-Israeli War of 1973* (Oxford: Osprey Publishing, 2007). Mohamed Abdel Ghani El-Gamasy, *The October War: Memoirs of Field Marshal El Gamasy* (Cairo: The American University in Cairo Press, 1993). Chaim Herzog, *The Arab-Israeli Wars: War and Peace in the Middle East from the 1948 War of Independence to the Present* (London: Arms and Armour Press, Lionel Leventhal Limited, 1982). William B. Quandt, *Peace Process: American Diplomacy and the Arab-Israeli Conflict Since 1967* (Berkeley: University of California Press, 2005). Abraham Rabinovich, *The Yom Kippur War: The Epic Encounter That Transformed the Middle East* (New York: Schocken Books, 2005). Anwar el Sadat, *In Search of Identity: An Autobiography* (New York: Harper & Row, 1978). Asaf Siniver, *The Yom Kippur War: Politics, Legacy, Diplomacy* (Oxford: Oxford University Press, 2013). Kenneth Stein, *Heroic Diplomacy: Sadat, Kissinger, Carter, Begin, and the Quest for Arab-Israeli Peace* (New York: Routledge, 1999).

discuss the Middle East. Secretary of State Henry Kissinger asked privately if the prime minister's call could be declined because the president "was loaded," and, therefore, mentally incapacitated to the point where he could not perform his duties.¹² Nixon also was taking sedatives regularly in this period, compounding his inability to function at full capacity.¹³ Instead, Chief of Staff Alexander Haig seemed to be unofficially in charge, having for months regarded himself as a "surrogate [p]resident." Much like President Woodrow Wilson's wife and physician half a century before, he decided which issues he would handle and which ones he would bring to the president's attention.¹⁴ Lawrence Eagleburger, who served as secretary of State under President George H. W. Bush, later reflected that U.S. ability to deal with any potential nuclear crisis had been completely compromised.¹⁵

The image of a president not fully in command affected not just politics within the administration but also diplomatic relations. Key stakeholders outside the administration also knew that Nixon was not at the helm making the foreign policy decisions. Prime Minister Golda Meir of Israel sent her requests for weapons and supplies to Kissinger, not Nixon.¹⁶ On October 24, in the middle of one meeting, which took place at 2 a.m. while the president was sleeping, the president's men, without the president's input, instructed the U.S. military to raise the Defense Condition from DEFCON IV to

¹² Tim Weiner, *One Man Against the World: The Tragedy of Richard Nixon* (New York: Henry Holt and Company, 2015).

¹³ Robert Dallek, *Nixon and Kissinger: Partners in Power* (New York: HarperCollins Publishers, 2007), p. 530.

¹⁴ Bob Woodward and Carl Bernstein, *The Final Days* (New York: Simon and Schuster, 1976), p. 323-24.

¹⁵ Weiner, *One Man Against the World: The Tragedy of Richard Nixon*.

¹⁶ Often these requests went through the U.S. Ambassador to Israel, former Senator Kenneth Keating, who, in 1962, had cosponsored the "enabling" amendment, S.J. Res. 35. Keating and Meir: Henry Kissinger, *Crisis: The Anatomy of Two Major Foreign Policy Crises* (New York: Simon & Schuster, 2003), p. 14. Enabling amendment: see Chapter 3.

DEFCON III. DEFCON III was “the highest stage of readiness for essentially peacetime conditions,” according to Kissinger.¹⁷ Raising the alert sent a message in and of itself. But by the meeting’s conclusion, they disseminated the following explicit message to the Soviets: sending troops would be considered a “matter of the gravest concern involving incalculable consequences.”¹⁸ American intelligence had detected Soviet ships carrying nuclear arms in the Dardanelles and the Arab-Israeli War had ended, according to policy hand William Quandt, in “near-confrontation of the two nuclear superpowers.”¹⁹

Legally, Nixon’s advisors could not take this step. Kissinger, Haig, and other (unelected) officials were making foreign policy decisions as the U.S. and Soviets continued to arm their respective proxies.²⁰ Kissinger had decided the president was “too distraught to participate in the discussion.”²¹ During this critical time, final decisions were being made only by advisors. Unlike Wilson’s inability after World War I when foreign policy emanating from the White House stagnated, the Yom Kippur War occurred during the nuclear era when any improper decision or a president’s degraded mental capacity could have immediate and disastrous national security implications. Nixon was, without a doubt, not functioning at full capacity, and his incapacity could not have come at a more dangerous time. The president’s condition and the increased potential for a nuclear catastrophe should have initiated discussions about invoking Sections 3 or 4 of the Twenty-Fifth Amendment.

¹⁷ Kissinger, *Crisis: The Anatomy of Two Major Foreign Policy Crises*, p. 350.

¹⁸ The Soviets stood down and the cease-fire days later included an agreement for increased United Nations involvement. Dallek, *Nixon and Kissinger: Partners in Power*, p. 520-533.

¹⁹ Quandt, *Peace Process: American Diplomacy and the Arab-Israeli Conflict since 1967*, p. 104.

²⁰ The U.S.’ goal was to dissuade the Soviets from sending a ground force to Egypt. See “Memorandum of Conversation, Henry Kissinger, 7320337,” *National Security Archives*, October 22, 1973. <http://nsarchive.gwu.edu/NSAEBB/NSAEBB98/octwar-56.pdf>. Accessed July 27, 2017.

²¹ Dallek, *Nixon and Kissinger: Partners in Power*, p. 526.

Instead, nuclear anxiety made White House officials less inclined to invoke the amendment. Nixon did not declare himself inabled, nor was a vice president in place to do so. While Nixon was “unhappy at Kissinger’s assumption of presidential power,” he was entirely preoccupied, and completely beleaguered by the Watergate scandal, historian Robert Dallek argues in *Nixon and Kissinger: Partners in Power*.²² Kissinger and the Cabinet did not want to call attention to the matter of Nixon’s potentially compromised judgment for fear of losing their prime decision-making positions. Their power was linked to a crippled Nixon sitting in the Oval Office. No guarantees existed that the next president, even if he were hand-picked by Nixon, would allow them to exercise as much power. The vice presidential vacancy made the situation even more complex.²³ Sections 3 of the amendment requires that a vice president be in place, and Section 4 revolves around the vice president’s decisions.

Nixon arrived at a decision regarding his vice presidential nominee after his drunken episode, at dawn on October 12, 1973.²⁴ He selected Minority Leader Gerald R. Ford. Section 2 of the Twenty-Fifth Amendment does not provide direction to Congress as to how to consider the president’s nominee for vice president in order to arrive at a majority vote of both Houses. Congress found that the structure of the process needed to

²² The White House was focused on convincing the public of the benefits of keeping Nixon at the helm. As long as Kissinger would go along with the story that the president was making the foreign policy decisions, the chief of staff had free rein. For an account of the conversation in which Nixon tells Kissinger to make the situation appear as if the president was consulted in Kissinger’s decision-making on Yom Kippur, see: Kissinger, *Crisis: The Anatomy of Two Major Foreign Policy Crises*.

²³ If Nixon was determined to be inabled, House Speaker Carl Albert, a Democrat, would have assumed presidential responsibilities. The possibility that the presidency would switch parties was a concern of those critical of the amendment who preferred that Congress be elided from the line of succession as in the 1886 law.

²⁴ Elizabeth Drew points out that “dawn” came with disturbing connotations: Nixon had confronted the students at the Lincoln Memorial at dawn as well. Elizabeth Drew, *Washington Journal*, p. 40.

be created. That day, having cancelled recess, the question was raised in the Senate, specifically regarding whether to refer Ford's nomination to the Senate Rules Committee or to establish a special committee for that purpose.²⁵ A three-and-a-half-hour debate ensued: the Democratic caucus decided on a compromise. The compromise designated a special committee composed of the full membership of the Rules Committee plus three senators from each party. It passed by a vote of 40-24. Republicans held their own two-hour caucus and suggested the Rules and Administration Committee, not an augmented version of it, was enough. The Republican version prevailed.²⁶ Because of a lack of specifics in the amendment, however, another committee could have been chosen in either House and produced different results, perhaps leading to a rejection of the nominee, a repeat of the entire process, and a much longer vacancy in the vice presidency when time was of the essence.

The Senate Rules Committee held hearings on November 1, 5, 7, and 14, 1973. Both the senators and expert witnesses were aware that they were probably choosing Nixon's successor and were concerned about Ford's experience in foreign affairs, especially given the responsibilities of the president in the nuclear age.²⁷ For example, Vice Chairman of Americans for Democratic Action Joseph L. Rauh, Jr. stated that Ford's confirmation, because he was much less experienced than Nixon, was insurance that Nixon would not be impeached. He said, "I think as time goes on people will

²⁵ Recess had been scheduled from October 12-29, 1973.

²⁶ John D. Feerick, *The Twenty-Fifth Amendment: Its Complete History and Earliest Applications* (Fordham University Press, 1976), pp. 129-153. See also: Lester A. Sobel, *Presidential Succession: Ford, Rockefeller, and the Twenty-Fifth Amendment* (New York, NY: Facts on File, Inc., 1975), p. 41. Jules Witcover, *Crapshoot: Rolling the Dice on the Vice Presidency* (New York: Crown Publishers, 1992), pp. 266-268.

²⁷ Drew, *Washington Journal*, p. 134.

recognize that to put a foreign affairs neophyte in the president's seat... is unthinkable."²⁸

Rauh concluded Ford should not be confirmed because a mistake "could mean nuclear holocaust."²⁹ Representative George H. Mahon, testifying before the Senate Committee, eased senators' concerns on this issue by telling them that, having served closely with the nominee, Ford understood America's nuclear capabilities and how they affected America's role in international affairs.³⁰ Confirming Ford would not mean an inexperienced finger would be on the trigger if he should succeed Nixon, Mahon reassured his colleagues.

In addition to questions about process, the hearings raised questions as to the proper depth and breadth of information Congress should require from the president's nominee. Again, the Twenty-Fifth provided no guidelines. On the one hand, Ford's privacy had to be taken into account. On the other, the well-being of the nation was paramount. The Senate approved Ford by a vote of 92-3 on November 27, 1973; the Senate's approval took one month and eight days.³¹ The extent to which the nominee should be questioned was not described in Section 2 of the Twenty-Fifth Amendment; congressmen were melding the amendment to meet the situation's needs.

²⁸ *Hearing Before the Committee on Rules and Administration, United States Senate, The Nomination of Gerald R. Ford of Michigan to be Vice President of the United States, 93rd Cong., 1st sess., November 1, 5, 7, 14, 1973, (Washington: U.S. Government Printing Office, 1973), p. 333.*
<http://heinonline.org.proxy.libraries.rutgers.edu/HOL/Page?handle=hein.cbhear/cbhearings0908&id=1&col=lection=congreg&index=>. Accessed June 6, 2017.

²⁹ *Ibid*, p. 330.

³⁰ *Ibid*, p. 165.

³¹ Only Democratic Senators Thomas Eagleton of Missouri, William Hathaway of Maine, and Gaylord Nelson of Wisconsin voted against his nomination. Hathaway argued that because of the Watergate scandal, Nixon was not fit to choose a vice president, but most Senators focused on whether or not the nominee was fit for the position.

During the House debate, numerous speakers acknowledged that Ford would succeed to the presidency should Nixon not serve the entirety of his second term and, either way, he might be forced to make split-second decisions about nuclear warfare. One expert witness, Democratic Congressman Michael J. Harrington of Massachusetts, pointed out that tensions were not abating; rather, nuclear alert had been declared between the time of Ford's nomination and the hearings, and Ford might very well have to deal directly with that issue.³² After a five-hour debate on December 6, 1973, the House confirmed Ford by a vote of 387-5.³³ Ford's swearing in as the 40th vice president of the United States took place in the House Chamber before a joint session of Congress with Nixon, the entire Supreme Court, ambassadors, and foreign dignitaries in attendance.³⁴ Ironically, a nuclear attack on Washington during the swearing in ceremony would have caused government paralysis, exactly the type of scenario expert witness Ruth Miner and others envisioned when arguing in favor of incorporating greater detail into the amendment during committee hearings prior to the amendment's ratification.

Over the next eight months, evidence implicating Nixon in serious wrongdoing mounted, and after he lost a critical Supreme Court decision that forced him to give key White House recordings to the Watergate special prosecutor, Nixon realized that

³² *Hearings Before the Committee on the Judiciary*, House of Representatives, on Nomination of Gerald R. Ford to be the Vice President of the United States, 93rd Cong., 1st sess., November 15, 16, 19, 20, 21, 26, 1973, Serial No. 16 (Washington, D.C., U.S. Government Printing Office, 1973), p. 180.

http://heinonline.org.proxy.libraries.rutgers.edu/HOL/Page?men_tab=srchresults&handle=hein.cbhear/cbhearings0910&id=72&size=2&collection=congreg&terms=nuclear&termtype=phrase&set_as_cursor=. Accessed June 6, 2017.

³³ Senator Bayh, who was the leadoff witness in the House hearings, later recalled that “with Republicans it was a knock-down, drag out fight over [implementing] the Twenty-Fifth Amendment.” Birch Bayh, Interview with Author, November 11, 2014.

³⁴ House Speaker Carl Albert, next in line of succession to the presidency until Ford was officially sworn in, announced Ford's resignation as the U.S. representative of Michigan's Fifth Congressional District. Chief Justice Warren E. Burger performed the swearing in.

impeachment was inevitable. With Ford installed as vice president, on the evening of August 8, 1974, Nixon told a television audience of between 110-130 million people that he would resign the presidency the next day.³⁵ At 11:35 a.m. on August 9, Nixon became the first United States president to resign. The letter delivered by Alexander Haig to Kissinger contained just a single sentence: “Dear Mr. Secretary: I hereby resign the office of President of the United States. Sincerely, Richard Nixon.”³⁶ That one sentence triggered the second implementation of the Twenty-Fifth Amendment.

On August 20, the new president announced on television and radio that he was nominating the former governor of New York, Nelson Rockefeller, for vice president, and, once again, nuclear concerns loomed in the background. Rockefeller’s long career in government service could help Ford establish himself as a competent executive.³⁷ Yet despite his experience, Congress made the nominee provide testimony on seventeen different occasions.³⁸ On at least one occasion, *The Congressional Record* suggests that Rockefeller was questioned about his position on nuclear weapons. The extensive appendix to the hearing testimony includes questions such as: “In what circumstances, if

³⁵ Sobel, *Presidential Succession: Ford, Rockefeller, and the Twenty-Fifth Amendment*, p. 189.

³⁶ David Gergen drafted the letter and gives his account in *Eyewitness to Power: The Essence of Leadership, Nixon to Clinton*. When Ford was sworn in as President by Chief Justice Warren Burger a half hour later, he acknowledged that he had only been elected by the people of Michigan’s 5th congressional district. Ford said he was “acutely aware that you have not elected me as your president by your ballots, and so I ask you to confirm me as your president with your prayers.” Letter drafting: David Gergen, *Eyewitness to Power: The Essence of Leadership, Nixon to Clinton* (New York: Simon & Schuster, 2000), pp. 74-75. Ford speech: “Gerald R. Ford’s Remarks upon Taking the Oath of Office as President,” Gerald R. Ford Library and Museum. <https://www.fordlibrarymuseum.gov/library/speeches/740001.asp>. Accessed October 3, 2016.

³⁷ Though the nomination did not boost Ford’s overall popularity or help his presidency, he had a number of reasons for choosing Rockefeller. Many potential nominees within the Republican Party were associated with Nixon, but Rockefeller was not. In fact, Rockefeller was a better-known figure than Ford himself. However, Ford removed Rockefeller from the ticket in 1976.

³⁸ Questions were split into groups such as “Nelson Rockefeller as Family Member,” and “Nelson Rockefeller as Governor, Politician, and Executive.”

any, would [he] resort to the first use of nuclear weapons? What nuclear weapons would be treated as conventional?”³⁹ Some of his gubernatorial papers were inserted into the record, including one dating to February 1963 that dealt almost entirely with nuclear parity with the Soviets.⁴⁰ On August 20, 1974, Rockefeller was confirmed by majority vote of both houses of Congress. For the first (and, so far, only) time in American history, both the president and vice president were appointees not elected by the entire American electorate.⁴¹

The Twenty-Fifth Amendment had apparently functioned as planned in the appointments of Ford and Rockefeller. But some were unhappy that the nation lacked a popularly elected official in either top post. Early the following year, a concerned mood in Congress and among the public led to both a hearing on the first implementation of Section 2 of the Twenty-Fifth Amendment and the introduction of various bills in

³⁹ *Hearings Before the Committee on the Judiciary*, House of Representatives, on the Nomination of Nelson A. Rockefeller to be Vice President of the United States, 93rd Cong., 2nd sess., November 21, 22, 25, 26, 27; December 2, 3, 4, 5, 1974, Serial No. 45 (U.S. Government Printing Office, 1974), p. 1093. <http://heinonline.org.proxy.libraries.rutgers.edu/HOL/Page?handle=hein.cbhear/cbhearings0916&id=1&col=lection=congre&index=>. Accessed June 6, 2017.

⁴⁰ This February 1963 document was entitled “Statement from the Governor Concerning the Current Disarray within the Atlantic Alliance.” The confirmation hearings lasted more than two months. “*Hearings Before the Committee on the Judiciary*, House of Representatives, on the Nomination of Nelson A. Rockefeller to be Vice President of the United States, 93rd Cong., 2nd sess., November 21, 22, 25, 26, 27; December 2, 3, 4, 5, 1974, Serial No. 45 (U.S. Government Printing Office, 1974), p. 1387. <http://heinonline.org.proxy.libraries.rutgers.edu/HOL/Page?handle=hein.cbhear/cbhearings0916&id=1&col=lection=congre&index=>. Accessed June 6, 2017.

⁴¹ The framers had considered vacancies in both offices during one administration highly unlikely. In 1791, Congressman Aedanus Burke of South Carolina, stated that – having consulted with “a gentleman skilled in the doctrine of chances,” – the probability of such an event could occur once every 840 years. Democratic Senator Theodore Francis Green of Rhode Island repeated this assertion of Burke’s in 1945 and added it as an “Extension of Remarks” in the Hearing in February 1975. *Congressional Record of the United States of America. Proceedings and Debates of the 79th Congress*. First Session. Appendix. Volume 91 - Part 12. June 11, 1945, to October 11, 1945. Pages A2767 to A4294. United States Government Printing Office, Washington, 1945. Page A3640. *Hearing Before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary*, SJ Res. 26, Proposing Modification of the Twenty-Fifth Amendment of the Constitution of the United States. Printed for the use of the Committee on the Judiciary, 94th Cong., 1st sess., February 25, 26, and March 11, 1975. (Washington: U.S. Government Printing Office, 1976). For an in-depth study of how chance has shaped American culture, see T.J. Jackson Lears, *Something for Nothing: Luck in America* (New York: Viking Press, 2003).

Congress calling for changes to the amendment. For example, on November 9, 1973, Senator William Hathaway (D-ME) introduced S. 2678, which called for a special election of the president and vice president when both offices were vacant as well as for an “interim president” of the same party as the president.⁴² On February 25, 1975, during a hearing before the Judiciary Subcommittee on Constitutional Amendments, Bayh alluded to the fear of nuclear war: “The way I understand your proposal, Senator Hathaway, is that you feel we should continue to implement the provisions of the Twenty-Fifth Amendment, in the event there is... some crazy catastrophe of violence.”⁴³ When Hathaway responded, “That is correct,” Bayh endorsed the sentiment. Bayh then spoke about what he and the other framers of the Twenty-Fifth were thinking about the delicate balance the amendment tried to establish. Bayh said, “We had to draw the line as to what we felt had traditionally been constitutionally established and what we felt could be indeed enacted by statute.” Further, he suggested that Hathaway’s statute pointed to a weakness in the Twenty-Fifth Amendment – “that perhaps it did not go far enough.”⁴⁴ The architect of the amendment may have been recalling the moments during the

⁴² “In this way, whatever party mandate which attaches at the proceeding presidential election would be maintained until the people render their new judgment,” Hathaway argued. S. 2678 did not advance out of the Senate Committee on Rules and Administration. *Hearing Before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary*, SJ Res. 26, Proposing Modification of the Twenty-Fifth Amendment of the Constitution of the United States. Printed for the use of the Committee on the Judiciary, 94th Cong., 1st sess., February 25, 26, and March 11, 1975. Printed for the use of the Committee on the Judiciary. U.S. Government Printing Office. (Washington: U.S. Government Printing Office, 1976). p. 29-30.

⁴³ *Hearing Before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary*, SJ Res. 26, Proposing Modification of the Twenty-Fifth Amendment of the Constitution of the United States. Printed for the use of the Committee on the Judiciary, 94th Cong., 1st sess., February 25, 26, and March 11, 1975. Printed for the use of the Committee on the Judiciary. U.S. Government Printing Office. (Washington: U.S. Government Printing Office, 1976). p. 29-30.
<https://www.congress.gov/bill/94th-congress/senate-joint-resolution/26?q=%7B%22search%22%3A%5B%22S.J.+26%22%5D%7D&resultIndex=21>. Accessed September 6, 2016.

⁴⁴ Ibid.

ratification of the amendment when legislators called for additional language that would outline procedures in the event of a nuclear attack.⁴⁵

Along with his admission that the amendment did not cover all potentialities, Bayh supported Hathaway's suggestion that Congress enact a statute to deal with gaps in the line of succession in the event of a nuclear catastrophe. But Bayh did not support a statute that would allow for a special election. Bayh clarified his views when he testified in February on a different bill, S.J. 26, sponsored by Senator John Pastore (D-RI). It modified the Twenty-Fifth Amendment under the circumstances like those in which Ford became president: in such cases, the bill proposed, the vice president would serve as president only until a president elected in a special election took the oath of office.⁴⁶ Bayh argued that an election would be divisive "at a time when we really need something to pull us together."⁴⁷ The bills designed to change portions of the Twenty-Fifth Amendment did not become law, but the debate around them showed congressmen's continued anxiety surrounding both nuclear war and succession and inability issues. The consensus during the hearings on the first applications of the Twenty-Fifth Amendment was that the Twenty-Fifth Amendment had "worked" when applied – the unplanned executive transitions had gone smoothly – but constitutional questions still needed

⁴⁵ See Chapter 3.

⁴⁶ The bill stated that in such cases, "there shall be a special election for the offices of president and vice president, and the Twenty-Fifth Amendment shall not apply to the vacancy in the office of the vice president caused by such individual becoming president." *Hearing Before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary*, SJ Res. 26, Proposing Modification of the Twenty-Fifth Amendment of the Constitution of the United States. Printed for the use of the Committee on the Judiciary, 94th Cong., 1st sess., February 25, 26, and March 11, 1975. Printed for the use of the Committee on the Judiciary. U.S. Government Printing Office. (Washington: U.S. Government Printing Office, 1976). p. 29-30. <https://www.congress.gov/bill/94th-congress/senate-joint-resolution/26?q=%7B%22search%22%3A%5B%22S.J.+26%22%5D%7D&resultIndex=21>. Accessed September 6, 2016.

⁴⁷ Ibid.

ironing out and the threat of nuclear apocalypse was constantly weighing on lawmakers' minds.⁴⁸

Just two months after the next (planned) presidential transition -- Jimmy Carter was sworn in as president in January 1977 -- an accident occurred at Three Mile Island nuclear power plant in Pennsylvania. This accident increased popular resistance to the idea that nuclear power could ever be harnessed for good, resistance that had already been building at the local level for years. A popular thriller, *The China Syndrome*, released the same month, depicted a reporter who uncovered safety violations at a nuclear plant and became entangled in a plot to hide from the public the truth about the extent of the damage. In the minds of the public, issues of nuclear power and nuclear war also were entangled.⁴⁹ Later that year, on June 17, 1979, Carter and Soviet leader Leonid Brezhnev signed SALT II in Vienna. SALT II limited the number of nuclear delivery forces and placed other restrictions on strategic nuclear forces.⁵⁰ After the Soviets invaded Afghanistan on December 5, however, Carter asked the Senate not to consider the treaty.⁵¹ Nuclear tensions were building.

During the presidential campaign that year, Republican nominee Ronald Reagan had employed tough language directed at the Soviets, renewing fears of a nuclear confrontation. He appeared on televangelist Jim Bakker's PTL program and said, "We

⁴⁸ Congressmen determined the amendment worked so well in practice that some bills introduced in the wake of the sudden executive transitions called for an expansion of the amendment (such as similar provisions for times when the president was abroad).

⁴⁹ Paul Boyer, *By the Bomb's Early Light: American Thought and Culture at the Dawn of the Atomic Age* (Chapel Hill, NC: The University of North Carolina Press, 1985), p. 360.

⁵⁰ Strategic Arms Limitation Talks/Treaty (SALT) I and II. The Department of State. Office of the Historian. Department of State. <https://history.state.gov/milestones/1969-1976/salt>. Accessed July 24, 2017.

⁵¹ Carter asked Congress not to consider the treaty on January 3, 1980. It was not ratified.

may be the generation that sees Armageddon.”⁵² Reagan believed in a heroic figure that could change the outcome of Armageddon; the president’s mission was to protect Americans from nuclear catastrophe.⁵³ (It was for this reason that many congressmen had voted in favor of the Twenty-Fifth Amendment fifteen years earlier: the need to have a competent president manning the nuclear button.) These tensions combined with the overall unpopularity of Carter’s foreign policies, as well as the depressed mood of the electorate, and the declining economy, paved the way for Reagan’s victory. He was the oldest man who had ever been chosen for the presidency to that date.⁵⁴

Concerns about a smooth transition of presidential power were evident during the Carter-Reagan transition, which highlighted the fact that the Twenty-Fifth Amendment did not address a potential crisis on Inauguration Day.⁵⁵ In April 1980, the Director of the White House Military Office had ordered the Federal Emergency Management Agency (FEMA) to “monitor locations and recommend procedures to the president for presidential successor attendance” at “publicly announced scheduled events outside the White House complex... at which the president and other officials in [the] legal line of

⁵² Lou Cannon, Interview with Robert McFarlane, December 23, 1989. As quoted in Lou Cannon, *President Reagan: Role of a Lifetime* (New York: Public Affairs, 1991), p. 248.

⁵³ Cannon, Interview with Robert McFarlane, December 23, 1989. As quoted in Lou Cannon, *President Reagan: Role of a Lifetime*, p. 249.

⁵⁴ In 1984, when Reagan was asked during the second presidential debate – that focused on international affairs -- if he was too old, at age 73, to be president, Reagan responded, “I am not going to exploit, for political purposed, my opponent’s youth and inexperience.” Jacob Weisberg, *Ronald Reagan: The American Presidents Series: The 40th President, 1981-1989*, (New York: Times Books, Henry Holt and Company, 2016), p. 113.

⁵⁵ Although no mishaps occurred during Carter’s inauguration, Carter worried beforehand that one would occur. Just seven days after the inauguration, Carter ordered Andrews Air Force Base to run a COG drill to practice evacuating the president and first lady from the White House. (National Security Advisor Zbigniew Brzezinski and his secretary served as stand-ins for the president and Rosalynn Carter.) When Carter discovered that the Eisenhower/Kennedy era plans were rusty, the president tasked Brzezinski with updating the COG procedures during the first Carter White House staff meeting on January 21, 1977. See Garrett M. Graff, *Raven Rock: The Story of the U.S. Government’s Secret Plan to Save Itself – While the Rest of Us Die* (New York: Simon & Schuster, 2017), p. 240.

succession [would] be assembled.”⁵⁶ If all members in the line of succession planned to attend a State occasion, one or more designated official(s) would be requested not to attend the event in order to protect the succession.⁵⁷ Reagan’s inauguration provided the first opportunity to test the “designated survivor” program, which would become more detailed over time.⁵⁸ This Continuity of Government plan reflected the desire to protect the line of succession as nuclear tensions between the superpowers increased.

In his autobiography *An American Life*, Reagan later recalled the heightened nuclear anxiety in the spring of 1981. The U.S. was modernizing its nuclear weapons capabilities and sending weapons to its NATO allies so that they could defend themselves against Soviet missiles. It was imperative that the U.S. best its rival in the intensifying arms race. He concluded doomsday had come: “There didn’t seem any end to it, no way out of it.” War “would incinerate much of the world and leave what was left of it uninhabitable forever.”⁵⁹ The president was not only identifying his own nuclear anxiety, he was speaking for the nation as the tensions between the superpowers appeared to be approaching heights similar to those the U.S. had experienced exactly twenty years earlier.

⁵⁶ “Memorandum for the Record from William D. Baird, Assistant Associate Director for Government Preparedness, July 7, 1980,” Jimmy Carter Presidential Library, Staff Office Files, Hugh Carter, Subject Files, folder “Continuity of Gov’t Concerns II.”

⁵⁷ The special assistant to the president for administration and the assistant to the president for National Security Affairs would draft a memo for the president’s signature to determine the official who would sit the inauguration out. Carter’s outgoing defense secretary, Harold Brown, remained in office past noon (the standard transition time), to ensure continuity in the case of nuclear attack or another catastrophic event. “Memorandum for the Record from William D. Baird, Assistant Associate Director for Government Preparedness, July 7, 1980,” Jimmy Carter Presidential Library, Staff Office Files, Hugh Carter, Subject Files, folder “Continuity of Gov’t Concerns II.”

⁵⁸ Initial problems with the “designated survivor” program included the fact that no way to confirm the identity of the designated survivor was in place. Garrett M. Graff, “Who’s In Charge of America After A Catastrophe? Who Knows?” *Politico Magazine*, September 21, 2016. <http://www.politico.com/magazine/story/2016/09/designated-survivor-president-succession-doomsday-plans-214271>. Accessed September 21, 2016.

⁵⁹ Ronald Reagan, *An American Life* (New York; Simon & Schuster, 1990), p. 258.

On top of this apocalyptic threat, power struggles over who was in charge of the foreign policy agenda ensued. White House aides vied to influence the man whose finger was on the nuclear trigger. Secretary of State Alexander Haig had already had a taste of foreign policy decision-making control in the Nixon administration. He asked the president to sign “National Security Decision Directive 1,” which would have given him sole control over diplomacy and national security. When Reagan issued a statement saying that Vice President Bush and the National Security Council would handle foreign policy, Haig threatened to resign. Reagan placated Haig by issuing a statement that Haig was his “primary adviser” on foreign matters, but felt Haig wanted control over foreign affairs beyond even the president’s reach.⁶⁰

Against this backdrop, the power struggle over who was advising the president on life and death matters, on March 30, 1981, the nation nearly lost its president. Outside the Washington Hilton where Reagan had just delivered a speech to Construction Trades Council representatives, a twenty-five-year old man, John W. Hinckley, Jr., fired a handgun at the president, puncturing his left lung.⁶¹ By the time doctors got to Reagan at George Washington University Hospital’s emergency room, the lung had collapsed.⁶² The assassination attempt was caught on camera. Rallying around the wounded president,

⁶⁰ “Exchange with Reporters on Foreign and Domestic Crisis Management,” Ronald Reagan Presidential Library and Museum. <https://www.reaganlibrary.archives.gov/archives/speeches/1981/32581a.htm>. Accessed June 14, 2017. Control beyond the president’s reach: Reagan, *An American Life*, p. 270.

⁶¹ The last presidential assassination attempt took place in September 1975. Ironically, Ford had also just concluded a speech in front of the AFL—CIO building tradesmen when the attempt on his life took place. See David S. Broder, “Reagan Wounded by Assailant’s Bullet; Prognosis is ‘Excellent,’” *The Washington Post*, March 31, 1981.

⁶² Two others in his entourage – Press Secretary James Brady and Secret Service agent Tim McCarthy — and a Washington policeman, Thomas Delahanty, had also been shot. “Statement by the Vice President about the Attempted Assassination of the President, March 30, 1981,” Ronald Reagan Presidential Library and Museum. <https://www.reaganlibrary.archives.gov/archives/speeches/1981/33081e.htm>. Accessed June 14, 2017.

the nation was ready to believe television reports asserting that the president was conscious and still capable of conducting business.

Reporters were told that no formal transfer of presidential power was being considered. But officials in the White House Situation Room also were getting most of their information from TV. Vice President George Bush was on Air Force II between Dallas-Fort Worth and Austin, Texas, when the assassination attempt occurred. With press secretary James Brady also wounded in the shooting, reporters cornered deputy White House press secretary Larry Speakes on his way back to his office from the hospital. Speakes decided to hold an impromptu press conference⁶³ but when asked if the military had been put on higher alert readiness, who was running the government, and who would determine whether or not the vice president would take over as acting president, he failed to answer any of the questions with confidence. He said he was not aware of any increased military readiness, declined to answer the next question about who was heading up the government, and stated he did not know the details on the last. Shortly after arguing with Secretary of Defense Casper Weinberger over who was in charge of the country, Haig, shaking and sweating profusely, burst in on the press conference, suddenly live on camera. He said “constitutionally, gentlemen, you have the president, the vice president, and the secretary of State in that order.... As of now, I am in control here, in the White House, pending the return of the vice president and in close touch with him.” Haig’s assertion stunned not only those watching on television across the country, but the president’s advisors huddled in the Situation Room.

⁶³ Speakes had also been working on President Gerald Ford’s staff when two attempts were made on Ford’s life. Herbert L. Abrams, *“The President Has Been Shot:” Confusion, Disability, and the 25th Amendment in the Aftermath of Attempted Assassination of Ronald Reagan* (New York: W.W. Norton & Co., 1992), p. 104-105 fn.

Haig had informed the American people he was in charge; but not only was his statement incorrect, his physical appearance revealed a man who was not in control. Watching on television downstairs in the Situation Room, Secretary of the Treasury Donald T. Regan asked Weinberger: “Is he mad?”⁶⁴ Military National Command Authority went from the president to the secretary of Defense, known as the deputy commander in chief. However, the Twenty-Fifth Amendment dictated that Haig as secretary of State was fourth in the line of presidential succession after the vice president, speaker of the House, and Senate president pro tempore.⁶⁵ White House Counsel Fred Fielding had already told Weinberger that, in fact, Weinberger was correct: the Constitution did not dictate that Haig was now in charge.

Fielding rushed to his office to gather the prewritten letters to Speaker Tip O’Neill and Senate President Strom Thurmond that invocation of Section 4 of the Twenty-Fifth Amendment required, in case the Cabinet agreed that the president was inabled and a temporary transition of power was warranted. But when White House aide Richard Darman saw the papers, he removed them from the table and, after conferring by phone with his boss, Chief of Staff James A. Baker III, placed them in his personal safe with the intention of stopping the media from finding out the severity of the president’s injury.⁶⁶ Baker, an unelected staff member, one without Senate confirmation (as the

⁶⁴ Donald T. Regan, *For the Record: From Wall Street to Washington* (San Diego: Hartcourt Brace Jovanovich, 1988), p. 167.

⁶⁵ Alan Peppard, “Command and Control: Tested Under Fire,” *Dallas Morning News*, May 13, 2015. <http://res.dallasnews.com/interactives/reagan-bush/>. Accessed September 12, 2016.

⁶⁶ The bullet had come within an inch of the seventy-year-old president’s heart and, in addition to the collapsed lung, he had lost half his blood. He was being kept alive by transfusions. Baker was at the president’s side in the hospital and said that he and Counsel to the President Edwin Meese had rejected the idea of transferring power to Bush. It was after the call that Darman put the papers in his office safe. Del Quentin Wilber, *Rawhide Down: The Near Assassination of Ronald Reagan* (New York: Henry Holt and Company, 2011), p. 181.

president's staff are not required to go through that process) made a decision about presidential inability which could have had calamitous results. This unilateral action by the chief of staff circumvented the clear responsibility the amendment places on the president's Cabinet to make these decisions.

The president, for his part, had managed a convincing act; for those watching on television, he did not appear seriously inabled. He walked the twenty feet between the limousine and the building (only to collapse inside the front doors) and joked with the first lady and Dr. Joseph Giordanno, the chief of GW's trauma unit. Significantly, when he spied Baker, Counsel to the President Edwin Meese III, and Deputy Chief of Staff Michael K. Deaver at the hospital he quipped, "Who's watching the store?"⁶⁷ The triumvirate wielded authority on the president's behalf; their presence at the hospital meant that a power vacuum existed at the White House.⁶⁸

As Fielding's actions indicated, the Twenty-Fifth Amendment was designed to be invoked during a sudden crisis such as this: Vice President Bush should have assumed the duties of the presidency.⁶⁹ But the framers of the amendment, under Section 3, had left the decision to turn over the duties of the office in the president's own hands. Giordano told Baker and Meese that the president would not be able to function immediately

⁶⁷ Richard Reeves, *President Reagan: The Triumph of Imagination* (New York, Simon & Schuster, 2005), p. 38.

⁶⁸ Historian often refer to Baker, Deaver, and Meese as the "troika" or "triumvirate," because of the amount of power they wielded in the White House. Historian Richard Reeves argues, however, that Reagan was "staff-dependent" but not "staff-driven." The near assassination suggests otherwise. Reeves, *President Reagan*, p. 13.

⁶⁹ In the Situation Room prior to Haig's erroneous on-camera statement, Communications Director David Gergen argued with Haig about whether or not the president was on the operating table. Gergen was correct: the president was unconscious on the operating table fighting for his life. An unconscious president cannot discharge his powers and duties, but Section 4 of the Twenty-Fifth Amendment requires "the vice president and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide" to declare the president inabled. Gergen and Haig exchange: Reeves, *President Reagan*, pp. 38-39.

because the anesthesia would affect brain for a few days, potentially up to a week.

However, hospital spokesman Dennis O’Leary denied that Reagan was ever in danger of dying and stated his “prognosis for recovery was excellent.”⁷⁰ In retrospect, it appears as if O’Leary was following orders from the Reagan administration to downplay the seriousness of his condition, with the goal of allowing the president to retain his powers and duties. The president’s physician, Daniel Ruge, admitted that a “little pressure” “might have been applied” to make the situation seem slightly rosier than it actually was.⁷¹

Those close to, and appointed by, the president were unwilling to invoke Section 4 of the amendment, let alone risk a possible leak to the public that such measures should be considered. Those close to the president feared that the president’s physical weakness would be splashed across the papers in the days after the assassination attempt, forever imprinted on the minds of the public; and while he might recover from his punctured lung, his presidency would not survive the negative imagery. Darman, for example, thought that if the Twenty-Fifth Amendment was invoked, Reagan would never again be viewed by the public as a completely able president.⁷² So, they continued to mislead the public as to the president’s condition: the vice president was calling the president’s

⁷⁰ O’Leary was dean of clinical affairs at George Washington medical school. “Statement by the Vice President About the Attempted Assassination of the President, March 30, 1981,” Ronald Reagan Presidential Library and Museum.

<https://www.reaganlibrary.archives.gov/archives/speeches/1981/33081e.htm>. Accessed June 14, 2017.

⁷¹ Abrams, “*The President Has Been Shot*”, p. 147.

⁷² Historian Lou Cannon notes other cases of Reagan’s advisors being hyperaware of the “public relations imperative of demonstrating that Reagan had his hand on the presidential throttle.” For example, one such incident occurred when, on August 19, 1981, U.S Navy F-14 fighters shot down two Soviet-made Libyan jets. Baker and Deaver were angered that Meese notified the vice president but failed to wake up the president. Darman: Wilber, *Rawhide Down*, p. 181. Baker and Meese: Lou Cannon, *President Reagan: The Role of a Lifetime* (New York: Public Affairs, 2000), p. 158.

recovery “amazing,”⁷³ but, in truth, soon after the first surgery, the doctors were considering a second. Historian Gil Troy argues that Reagan’s miraculous recovery stood as a “bookend” to Kennedy’s assassination, helping to elevate the national mood by lifting some of the “sixties defeatist spirit.”⁷⁴ But, although an assassin’s bullet did not kill the president and, instead, the president’s advisors and doctors reassuringly convinced Americans that the president could still do his job, the ever-present fear of nuclear attack had not dissipated. In fact, according to Troy, Americans “worried more than they had in years” about nuclear annihilation.⁷⁵ During this period of heightened nuclear anxiety, those around the president colluded to avoid invoking the amendment during a crisis of the type the amendment was clearly designed to be mitigate.

In the Situation Room, Haig and National Security Adviser Richard Allen were also concerned about a nuclear attack and wondered about the status of the “football,” a portmanteau that contained a little black book of nuclear launch codes and secret evacuation sites and remained with the president at all times.⁷⁶ Haig told Allen that the vice president had one football, and they hunted for another for themselves, which they found in the White House Military Office.⁷⁷ The public was not aware of this panic behind the scenes. The *New York Times* reassured Americans that Lieutenant Colonel Jose Muratti, who was in charge of the briefcase, had traveled in the president’s

⁷³ By Wednesday, April 1, the president had signed a farm bill (with a signature so weak it looked like a forgery). But then the president contracted a fever and Dr. Benjamin Aaron, George Washington’s chief of thoracic surgery, was considering another operation to remove the damaged lobe in his lung. This second surgery did not take place. Reeves, *President Reagan*, p. 46.

⁷⁴ Gil Troy, *Morning in America: How Ronald Reagan Invented the 1980s* (Princeton, NJ: Princeton University Press, 2005), p. 76.

⁷⁵ *Ibid.*, p. 140.

⁷⁶ Abrams, “*The President Has Been Shot*”, p. 127.

⁷⁷ Reeves, *President Reagan*, p. 38.

motorcade to the hospital and remained with the president.⁷⁸ The statement was true. However, once at the hospital, Muratti had lost control of the president's plastic card with the printed codes. It was taken by the FBI as "evidence."⁷⁹

The White House tried to keep up a "business as usual" appearance, but global tensions remained elevated. During his infamous press briefing, Haig had also informed reporters that no measures had been taken to raise the military alert after the shooting,⁸⁰ but during the briefing, Weinberger received a critical piece of intelligence: the two Soviet submarines that patrolled an area off the east coast of Poland had "multiplied and become four submarines."⁸¹ Though it turned out that the two new submarines were simply relieving the other two, a routine procedure on the last day of the month, Weinberger requested the "fly times." This distance of an adversary's submarines was measured in the amount of time it would take for a nuclear missile to reach Washington:⁸² thus, the request alone was an indication of increased tensions. U.S. government officials also were watching closely as troops massed on the Soviet border ostensibly to invade Poland. In fact, the last question Reagan fielded before being struck by Hinckley's bullet was from ABC News White House correspondent Sam Donaldson, who asked about Poland's status.⁸³ The Soviets did not invade Poland that spring, but the

⁷⁸ "Nuclear Code Briefcase Remained Near Reagan," *The New York Times*, March 31, 1981, p. A5,

⁷⁹ The FBI removed everything from the hospital as "evidence," including the president's dark blue suit containing his wallet with the codes. Although the vice president had a second card, and Secretary of Defense Weinberger a third, the president's card was not returned by the FBI for two days. Reeves, *President Reagan*, p. 36.

⁸⁰ David S. Broder, "Reagan Wounded by Assailant's Bullet; Prognosis is 'Excellent,'" *The Washington Post*, March 31, 1981.

⁸¹ Alexander M. Haig, Jr, *Caveat: Realism, Reagan and Foreign Policy* (New York: MacMillan Publishing, 1984).

⁸² Alan Peppard, "Command and Control: Tested Under Fire," *Dallas Morning News*, May 13, 2015, p. W11. <http://res.dallasnews.com/interactives/reagan-bush/>. Accessed September 12, 2016.

⁸³ In the months prior to the assassination attempt, an independent union of Polish workers, Solidarity, threatened the Polish government. Soviet General Secretary Leonid Brezhnev warned the new Prime

incident served as a reminder that a presidential inability could occur at any moment amid international crises.

Although Reagan's team continued to convey to the media that Reagan was working for multiple hours daily, this was not the case until at least nineteen days after he was shot.⁸⁴ The president remained hospitalized for thirteen days, and even when he returned to the White House residence, it seemed to some of his top aides that, like Edith Wilson after Wilson's (also undeclared) inability, Nancy Reagan was controlling and curtailing access to the president. This time, the assassination attempt made the president confront not just his own mortality, but consider the continuity of mankind. During this period of inability, the president came to the conclusion that he should do "whatever [he] could in the years God had given [him] to reduce the threat of nuclear war," suggesting that it was "perhaps the reason God had spared him."⁸⁵ A week after the assassination attempt, in a response to an earlier letter of Brezhnev's, Reagan felt compelled to warn his Soviet counterpart that the nations were teetering on the edge of nuclear disaster.⁸⁶

Minister, General Wojciech Jaruzelski, that time was running out to control the workers' strikes. In the week leading up to the assassination, the Soviets staged a landing operation on Poland's northwestern coast and contemplated an invasion to keep the Polish government in power. The U.S. warned of the "potential gravity" of the situation but encouraged the workers. On Sunday, April 5, Brezhnev made an unusual appearance at a Czech Communist Party meeting, where the nation's party leader Gustav Husak likened the situation in Czechoslovakia and Poland to those that led to Soviet invasions of East Germany in 1953, Hungary in 1956, and Czechoslovakia in 1968. Reagan sent a message that if Poland were to be invaded, U.S.-Soviet arms negotiations would be "dealt a serious and lasting blow." See Abrams, "*The President Has Been Shot*", p. 40.

⁸⁴ Reagan, *An American Life*, p. 267.

⁸⁵ Historian James Mann, in *The Rebellion of Ronald Reagan: A History of the End of the Cold War*, argues that Reagan was "horrified by the possibility of nuclear war," even during his first term. He suggests Reagan's aversion to nuclear war can be dated even further back, to his 1976 Republican National Convention speech, which Mann characterizes as "more an expression of anxiety about nuclear weapons than a specific call for their abolition." Reduce the threat: Reagan, *An American Life*, p. 268. Horrified about the possibility: James Mann, *The Rebellion of Ronald Reagan: A History of the End of the Cold War* (New York: Viking, 2009), p. 35. Anxiety about nuclear weapons: Mann, *The Rebellion of Ronald Reagan*, p. 40.

⁸⁶ Reagan, *An American Life*, p. 267.

Nuclear war continued to be at the forefront of political planning and public debate. On January 16, 1982, in an article entitled the “U.S. Could Survive War in Administration’s View,” *Los Angeles Times* staff writer Robert Scheer interviewed Thomas K. “T.K.” Jones, deputy undersecretary of defense for strategic and nuclear forces, and observed, “As tension increases between the superpowers... there seems to be an inclination, at least within the administration, to look upon nuclear conflict as something less than a terminal holocaust (or the biblical prediction for Armageddon).”⁸⁷ In May 1982, Pentagon correspondent Richard Halloran of the *New York Times* broke a story about a five-year plan based on a “protracted” nuclear war, signed by Weinberger.⁸⁸ At the same time that this contentious five-year plan was brought to light, Reagan issued National Security Decision Document 13 (NSDD 13), written to proclaim that U.S. strategic forces must be able to win a protracted nuclear war.

Despite the disclosure of the five-year plan and NSDD 13, in 1991, CNN first uncovered a secret presidential directive signed by Reagan that would have circumvented the 1947 Presidential Succession Act and the Twenty-Fifth Amendment in the event of nuclear war.⁸⁹ William Arkin, a nuclear weapons scholar featured on the CNN segment,

⁸⁷ Robert Scheer, “U.S. Could Survive War in Administration’s View,” *Los Angeles Times*, January 16, 1982.

⁸⁸ Jones, having studied Soviet civil defense manuals at a previous job with Boeing, described how Americans could survive. After millions of Americans had been evacuated from the cities to the countryside, fallout shelters should be dug deep underground and, once closed, piled with three feet of dirt. “It is the dirt that does it,” a measured Jones assured Scheer. Richard Halloran, “Pentagon Draws Up First Strategy For Fighting a Long Nuclear War: 5-Year Overall Plan Gives Insight Into Thinking of Administration’s Senior Defense Officials Pentagon Draws Up Plans for Long Nuclear War,” *The New York Times* (May 30, 1982). T.K. Jones interview: Robert Scheer, “U.S. Could Survive War in Administration’s View,” *Los Angeles Times*, January 16, 1982.

⁸⁹ David Lewis, “Doomsday Government,” *CNN Special Assignment*, Cable News Network, November 17, 1991. See also “The Armageddon Plan” as described in James Mann, *Rise of the Vulcans: The History of Bush’s War Cabinet*, Chapter 9. In his first footnote, he explains that he gleaned the information on Reagan’s secret directive from “three separate individuals who were participants in the secret exercises.” He dates the

said that the Constitution did not allow for the flexibility necessary to ensure that the line of succession would survive nuclear attack. Because of the existence of nuclear weapons, “we’re going to have to fudge on the Constitution,”⁹⁰ he said. In his 2017 work, *Raven Rock: The Story of the U.S. Government’s Secret Plan to Save Itself – While the Rest of Us Die*, historian and journalist Garrett M. Graff revealed additional information about this COG plan code-named TREETOP, that the National Program Office called the Presidential Successor Support System (PS3).⁹¹ This highly classified program was designed to reestablish the executive branch in the event of the president and vice president’s deaths. Under this secret order, Congress was elided from the line of succession in favor of an executive line of succession—almost certainly illegally.⁹²

According to the plan, key advisors to the president would run the entire government in Reagan’s stead, their fingers on the nuclear trigger. Each team contained a Cabinet secretary and at least one of Reagan’s trusted advisors. The Cabinet secretary would be the “new president,” but was really a puppet of one of Reagan’s men who would be giving the strike orders. Foreign policy expertise was not a requirement of the Cabinet member that was slated to become the new president, but it was one of the distinguishing traits of the advisors on each team. Those chosen based on their judgement for team leader, such as Dick Cheney and Donald Rumsfeld, had already held top

interviews to 2002. James Mann, *Rise of the Vulcans: The History of Bush’s War Cabinet* (New York: Penguin Books, 2004), p. 389 fn.

⁹⁰ As quoted in Graff, *Raven Rock*, p. 315.

⁹¹ Graff, *Raven Rock*, p. 314.

⁹² James Mann, *Rise of the Vulcans: The History of Bush’s War Cabinet* (New York: Penguin Books, 2004).

positions in the executive branch and had enough experience in national security to carry out the elaborate exercises.⁹³

In the event of an attack, the leaders were responsible for moving the new president, along with complicated communications equipment, to undisclosed locations to protect the line of succession. Although the U.S. government had built underground bomb shelters at Mount Weather, in the Blue Ridge Mountains of Virginia, and near Camp David, no guarantee existed that the president would make it to these shelters in time. Like the shelters for the president, the bomb shelter under the Greenbrier Hotel in the Allegheny Mountains of West Virginia was designed for Congress, but the unidentified individuals who devised Reagan's program decided that if enough members of Congress were killed so that a quorum could not be convened, decision-making would move forward without the legislative branch.⁹⁴ After all, the election of a new speaker of the House would likely create rival claims to the presidency.⁹⁵

Without doubt, the highly classified program was both unconstitutional and illegal.⁹⁶ No matter how far the elastic clause is stretched, nowhere in the Constitution

⁹³ Both Cheney and Rumsfeld were regular team leaders, often disappearing for a week at a time, leaving their wives mysterious phone numbers with Washington, D.C. area codes to contact in case of emergency. Both had already served in the executive branch. Cheney became secretary of Defense under President George H.W. Bush and both would serve again in official positions under President George W. Bush, but when Reagan's highly classified program began, Cheney was on Capitol Hill and Rumsfeld was a CEO of a Chicago-based pharmaceutical company. Other team leaders included James Woolsey, who became a CIA director, and Kenneth Duberstein, one of Reagan's chiefs of staff. See Mann, *Rise of the Vulcans*.

⁹⁴ Ted Gup, "The Ultimate Congressional Hideaway," *The Washington Post*, May 31, 1992. <http://www.washingtonpost.com/wp-srv/local/daily/july/25/brier1.htm>. Accessed September 12, 2016.

⁹⁵ In 2011, *Fordham Law Review* interviewed the author of the Twenty-Fifth Amendment, asking Bayh to share his thoughts on this clandestine order for reestablishing the executive branch in the event of a nuclear war. He responded that he "still like[d] the idea of someone like [at the time of the interview in 2011, House Majority Leader] Steny Hoyer being at the Greenbrier when the State of the Union is given."⁹⁵ Naturally, the senator believed input from Congress, the only branch of government allowed to declare war, was crucial in the event of a nuclear attack. See "A Modern Father of Our Constitution: An Interview with Former Senator Birch Bayh," 79 *Fordham L. Rev.* 781 (2011), p. 797.

⁹⁶ Nevertheless, Reagan poured hundreds of millions of dollars per year into the new government agency called "The National Program Office," a front for the program. James Mann, *Rise of the Vulcans: The History of Bush's War Cabinet* (New York: Penguin Books, 2004).

does it allow the president to establish a process for designating a new president. These Continuity of Operations Planning (COOP) exercises were happening without the knowledge of the other two branches of government as well as out of the view of the public while nuclear anxiety continued to build. In fact, while these secret exercises were underway, the tension peaked on June 23, 1982, when the largest anti-war demonstration in American history took place in New York's Central Park. Carrying signs that read "arms are for hugging" and other similar slogans, a million people rallied for nuclear disarmament prior to the opening of the United Nations Special Session on Disarmament.

The general public was not alone in its desire to put an end to manage nuclear anxiety. Journalists on both sides of the ideological divide, such as the *New York Review of Books*, *the New Republic* and *the National Review*, published major pieces on nuclear issues in the early 1980s. Television shows and movies such as *War Games*, *The Apocalypse Game*, *Threads* and an episode of the NBC's *Lou Grant* dramatized the effects of the nuclear threat. Reagan's Strategic Defense Initiative, announced in March 1983, conjured up images of the popular movie "Star Wars" because it was designed to use laser beams to destroy incoming missiles.⁹⁷ The president himself screened the television drama *The Day After* in November 1983, a couple of weeks before 100 million people viewed it on ABC. Reagan wrote in his diary that the show, which portrayed the

⁹⁷ Despite claims by Reagan's top scientists that the initiative would not work, \$17 billion was spent on the program by the time he left office. Robert Scheer, *With Enough Shovels: Reagan, Bush and Nuclear War* (New York: Random House, 1982), p. 14.

effects of nuclear war on Lawrence, Kansas, was “very effective and left me greatly depressed.”⁹⁸ Protests continued across the globe.⁹⁹

Amid this tense atmosphere, just six months into Reagan’s second term, on July 13, 1985, the president underwent an operation at Bethesda Hospital to remove polyps from his colon. Although he could have invoked the Twenty-Fifth Amendment, he did not. Vice President Bush was “standing by” in Kennebunkport, Maine. During the surgery, the doctors found that Reagan needed major abdominal surgery to remove two feet of intestine around a polyp that was infected with cancer.¹⁰⁰ General anesthesia was required. Still, White House spokesman Speakes stated that no plans had been made to invoke the Twenty-Fifth Amendment.¹⁰¹ Reagan informed Congress via identical letters to O’Neill and Thurmond as is required in Section 3 of the Twenty-Fifth Amendment that he would be transferring presidential powers to the vice president. In the letter, however, Reagan specifically stated that he was enforcing a “long-standing agreement” between himself and Vice President Bush; he was not invoking the Twenty-Fifth Amendment: “I do not believe that the drafters of this amendment intended its application to situations

⁹⁸ In one of his next entries, the president noted that a Situation Room briefing had included a “scenario for a sequence of events that could lead to the end of civilization as we knew it.” (This reference was most likely to ABLE ARCHER, a November 1983 NATO exercise.) Reagan, *An American Life*, p. 585.

⁹⁹ “The Bombing of the Rainbow Warrior,” *Greenpeace International*, <http://www.greenpeace.org/international/en/about/history/the-bombing-of-the-rainbow-war/>. Accessed August 29, 2016.

¹⁰⁰ The Constitution stipulates that presidents must be at least thirty five years of age to assume the presidency – and senators must be thirty and representatives twenty five -- perhaps the commonality of this operation for someone of his age should have raised questions about an ending temporal boundary on service in office. Yet the major papers only questioned why the cancer was not discoverable sooner.

¹⁰¹ Speakes had taken over from the gravely injured Brady. “President to have operation today,” *The San Francisco Chronicle*, July 13, 1985. <http://infoweb.newsbank.com.proxy.libraries.rutgers.edu/resources/doc/nb/news/0EB4ED0AB7B6D1D1?p=AWNB&dref=news/0EB72474A1C752A0&drefertype=mlt>. Accessed September 27, 2016.

such as the instant [sic] one,” he added.¹⁰² Bayh later criticized Reagan administration officials, stating they “were acting unconstitutionally when they did not invoke [the Twenty-Fifth] when the president went under anesthesia.”¹⁰³ Although this continues to be a source of debate for constitutional law scholars, because a letter was sent to the speaker and president pro tem and duties were temporarily transferred to the vice president, the Twenty-Fifth Amendment was invoked de facto if not de jure.

Situations such as this one were exactly what Bayh had in mind when crafting Sections 3 and 4 of the amendment; but one potential flaw in the amendment was becoming increasingly clear: presidents do not like to voluntarily give up power.¹⁰⁴ In an interview, Bayh pointed out that Reagan, “absolutely refused to recognize that in a situation where he was going to be non-compos mentis, somebody else should be running the shop.”¹⁰⁵ While Section 4 of the amendment allows the vice president and a majority of the Cabinet to declare the president inabled, both Nixon and Reagan’s Cabinets hesitated to do so. Like Edith Wilson, First Lady Nancy Reagan chose to keep her husband’s health as private as possible and may have curtailed access to the president. During their administrations, loyal advisors, motivated to retain the status quo in the

¹⁰² “Letter from President Ronald Reagan to the President Pro Tempore of the Senate and the Speaker of the House on the Discharge of the President's Powers and Duties during His Surgery”, July 13, 1985. Ronald Reagan Presidential Library.

<https://reaganlibrary.archives.gov/archives/speeches/1985/71385b.htm>. Accessed August 26, 2016.

¹⁰³ “Birch Bayh, telephone interview with [Herbert L. Abrams], June 7, 1990,” as quoted in Abrams, “*The President Has Been Shot*”, p. 293.

¹⁰⁴ In the Working Group on Presidential Disability which first met in January 1995, Dr. Herbert L. Abrams, author of *The President Has Been Shot*, argued that certain circumstances such as the use of general anesthesia by the president should automatically trigger the Twenty-Fifth Amendment. See James F. Toole and Robert A. Joynt, *Presidential Disability: Papers, Discussions, and Recommendations on the Twenty-Fifth Amendment and Issues of Inability and Disability among Presidents of the United States*, (New York: University of Rochester Press, 2001).

¹⁰⁵ This was Bayh’s response after he asked Fielding, “Fred, how did you ever let the president sign a letter like that?” Fielding responded that “it was the only thing we could get him to sign.” “A Modern Father of Our Constitution: An Interview with Former Senator Birch Bayh,” 79 *Fordham L. Rev.* 781 (2011), p. 797.

White House, also had undue influence in the moment as to whether the Twenty-Fifth should be invoked. Therefore, those around the president are more likely to cover up the president's condition, rather than encourage the president to invoke the amendment.

Thus, Vice President George Bush became "acting president" from 11:28 a.m. to 7:22 p.m., but Reagan resumed his presidential duties within eight hours; the White House communications team, as well as the "football," both nearby at all times in case of need.¹⁰⁶ The president remained in the hospital for seven days.¹⁰⁷ Reagan's autobiography later contained his admission that he "signed a letter invoking the Twenty-Fifth Amendment, making George Bush acting president during the time [he] was incapacitated under anesthesia."¹⁰⁸ At the time of the surgery, however, Reagan avoided appearances of invoking the amendment. Bayh concluded the reason Reagan did not invoke the amendment was a "tenacious" desire to retain power and a decision "not to trust" anyone else to wield that power.¹⁰⁹ This is true, but it was more than that: as after the assassination attempt, Reagan and those around him, did not want the public, or foreign leaders, to question the physical and mental capabilities of the oldest man chosen for Commander in Chief. This would be a public relations nightmare; once the lid on this line of questioning was opened, it would be hard to close it again for the remainder of his term.

During the first five years of Reagan's presidency, three Soviet leaders had died (all septuagenarians like Reagan),¹¹⁰ and with a new Soviet premier, Mikhail Gorbachev,

¹⁰⁶ Abrams, *"The President Has Been Shot"*, p. 204.

¹⁰⁷ Reagan returned to the hospital in early August to have skin cancer removed. Again, the Twenty-Fifth Amendment was not invoked.

¹⁰⁸ Reagan, *An American Life*, p. 500.

¹⁰⁹ As quoted in Abrams, *"The President Has Been Shot"*, p. 212.

¹¹⁰ Leonid Brezhnev died on November 10, 1982. Yuri Andropov died on February 9, 1984. Konstantin Chernenko died on March 10, 1985, not long before Reagan's surgery.

in power, American political commentators increasingly called on Moscow and Washington to do more to ease nuclear tensions. In an article that month entitled “Reagan’s Ticking Clock,” *New York Times* columnist James Reston linked rumors of the potential amelioration of nuclear tensions with Reagan’s advanced age, concluding that at age seventy-five, Reagan should ensure that his legacy on disarmament included more than just a “wave and a smile.”¹¹¹ After years without a summit, Reagan and Gorbachev met in Geneva, Switzerland in November 1985, and then again on October 11-12, 1986, in Reykjavik, Iceland, to discuss the reduction of nuclear arms.¹¹² The ultimate result of this summit meeting was the signing of the Intermediate Range Nuclear Forces Treaty to eliminate all land-based missiles.

The year 1987 began with investigations into Iran-contra by the Tower Commission, and the congressional Iran-contra hearings began on May 5. The commission examined decisions that had been made by the White House during the president’s inability that could have led to the president’s impeachment. The joint committee chairman, Senator Daniel Inouye of Hawaii, stated that he believed the president was aware of the funneling of funds to the contras,¹¹³ but in the end, nothing stuck: his closest aides took the fall.¹¹⁴ Chief of Staff Don Regan resigned. When Howard

¹¹¹ Reston, James. “Reagan’s Ticking Clock,” *The New York Times*, September 24, 1986, p. A31.

¹¹² Although Reagan and Gorbachev privately discussed eliminating all nuclear weapons, they did not arrive at a deal. Reagan refused to put limits on the development of his Strategic Defense Initiative; Gorbachev’s proposals hinged on this one condition. James Mann, *The Rebellion of Ronald Reagan: A History of the End of the Cold War* (New York: Viking, 2009), p. 45.

¹¹³ Bayh saw a lesson in this: “We learned from talking to doctors that anybody who has been heavily sedated should never make a decision of any consequence within forty-eight hours. It takes that long for the brain to clear. During that period of time, he signed the Iran-contra documents.” “Birch Bayh, telephone interview with [Herbert L. Abrams], June 7, 1990,” as quoted in Abrams, “*The President Has Been Shot*”, p. 293.

¹¹⁴ Reagan earned the nickname “the Teflon president.” Some, including the *National Journal*, charged that Regan, as well as the First Lady, had been running the country like First Lady Edith Wilson and Wilson’s doctor earlier in the century. Regan suggested that Nancy Reagan was instrumental in his departure. She

Baker replaced Regan, members of the outgoing chief's team told Baker that he should read the Twenty-Fifth Amendment in case he needed to claim the president had been inabled when arms deal decisions were made after the president's cancer surgery.¹¹⁵ Baker arranged for observations of the president to judge his ability to discharge the duties of his office. These evaluations only convinced Baker that Reagan was mentally fit. Therefore, he did not recommend that the vice president and Cabinet invoke the Twenty-Fifth Amendment. Later it would become known that Reagan was suffering from a mental inability: he was in the early stages of Alzheimer's disease, though it remains unclear whether that significantly affected his abilities while he was in office.

Fielding suggested that during these periods of presidential inability the Cabinet had avoided the use of the Twenty-Fifth Amendment. Fielding related his experiences with the Twenty-Fifth Amendment during Reagan's presidency to the Miller Center Commission on Presidential Disability and the Twenty-Fifth Amendment Commission established by the White Burkett Miller Center of Public Affairs at the University of Virginia in 1985. The Commission was co-chaired by former U.S. Attorney General Brownell and Bayh and included health and legal experts. Fielding made the Commission aware of the existence of an emergency book that he drafted after Cabinet members "eyes

was known to tell her husband whom she did and did not trust within the administration. At times the president would listen to her, while at other times, she would use her network of friends and aides as backchannels to convince the president not to rely on those on her blacklist. Regan also suggested that the first lady was reliant on a San Francisco astrologer for White House scheduling, even when choosing the date for signing the intermediate-range nuclear forces treaty. Reagan denied his wife's influence in a televised speech on March 4: "The idea that she is involved in governmental decisions and so forth and all of this, and being a kind of dragon lady — there is nothing to that.... That is fiction, and I think its despicable fiction." Reeves, *President Reagan*, p. 386. See also: Donald T. Regan, *For the Record: From Wall Street to Washington* (San Diego: CA: Harcourt Brace Jovanovich, 1988).

¹¹⁵ Reeves, *President Reagan*, p. 392.

glazed over”¹¹⁶ when he mentioned the need to invoke the Twenty-Fifth Amendment during Reagan’s surgery after the assassination attempt. The book contains potential scenarios in which the amendment might need to be used and has been handed down to future administrations.¹¹⁷ After six sessions, the Commission issued a final report of its findings in 1988, concluding that America “must be better prepared to cope with the frailties of man in this nuclear age; the national interest demands it; the Twenty-Fifth Amendment can help.”¹¹⁸ Among the many recommendations the Commission put forth was that Americans, as well as presidential candidates, should familiarize themselves with the amendment.

Because Section 4 of the Twenty-Fifth Amendment is vague, in an effort to provide direction to Congress, the Miller Commission also took a close look at the players involved in determining inability, identifying two that the framers of the amendment had not: the first lady and the White House physician. The commission recommended consultations with the president’s partner on ability-related matters, a hitherto unmentioned suggestion.¹¹⁹ The group then argued that the White House

¹¹⁶ “Report of The Miller Center Commission on Presidential Disability and the Twenty-Fifth Amendment,” White Burkett Miller Center of Public Affairs at the University of Virginia (VA: University Press of America, Inc., 1988), p. 7.

¹¹⁷ Presumably, these include nuclear holocaust scenarios. The author was unable to procure this highly classified book from Fielding. The Miller Commission’s findings influenced George H.W. Bush’s press secretary Marlin Fitzwater to dedicate part of a press briefing to the Twenty-Fifth Amendment on April 28, 1989. During the press conference, Fitzwater referred to an April 18 meeting at which the president “ma[d]e sure all those involved in this process are aware of the procedures, and that everyone was aware of the consultations that would have to be made [in a case of presidential inability].” Feerick, *The Twenty-Fifth Amendment*, p. 200.

¹¹⁸ “Report of The Miller Center Commission on Presidential Disability and the Twenty-Fifth Amendment,” White Burkett Miller Center of Public Affairs at the University of Virginia (VA: University Press of America, Inc., 1988), p. 3.

¹¹⁹ These points are summarized in Feerick, *The Twenty-Fifth Amendment*, p. 223. See also “Report of The Miller Center Commission on Presidential Disability and the Twenty-Fifth Amendment,” White Burkett Miller Center of Public Affairs at the University of Virginia (VA: University Press of America, Inc., 1988).

physician fulfill two roles. The first was the “traditional role” of a confidential doctor-patient relationship, one in which the president could confide his medical concerns to a physician and receive advice that would not be made known to others. The second role, the commission suggested, was that the White House physician be a representative “in strictly non-political terms” of the interests of the nation.

In 1993, former president Jimmy Carter, along with the historian Arthur S. Link, convened another study group to examine the potentially conflicting roles of the White House physician.¹²⁰ The group, called the Working Group on Presidential Disability, recommended that not only should a formal obligation be put in place so that the facts are released to Congress, but the White House physician should be overseen on final decisions regarding disability by an official consultation group. Carter’s conclusion, that the president’s subordinates – including the White House physician who is below the president in the military chain of command – have an inclination to “hide from the public the extent of any disabilities from which the president might suffer,” appears to be correct.¹²¹

Concern over nuclear attacks and succession and inability planning continued during George W. Bush’s administration. This subject was of such particular interest to Vice

¹²⁰ The panel first met in 1995, although it was formed two years earlier. “Report of The Miller Center Commission on Presidential Disability and the Twenty-Fifth Amendment,” White Burkett Miller Center of Public Affairs at the University of Virginia (VA: University Press of America, Inc., 1988), p. 3.

¹²¹ Other panelists, such as James F. Toole, built on these ideas by suggesting presidential candidates should submit to certain physical and mental health exams that be made available to the public. Ten months after the Carter Center conference, the Working Group reconvened at Wake Forest University. This time former president Gerald Ford addressed the committee. He stated he was of the opinion that the Twenty-Fifth Amendment worked in the orderly transition of presidential power, whether temporary or permanent, though he was not opposed to discussions particularly on the idea of a plan being put into place before the inauguration of a new administration and on the White House physician being “upgraded in the White House staff structure.” James F. Toole and Robert A. Joynt, *Presidential Disability*.

President Cheney, who had been intimately involved in Reagan's secret directive, that just sixty-seven days into Bush's presidency, on March 28, 2001, Cheney wrote a "pending" resignation letter in the event that a heart attack left him inabled. The Twenty-Fifth Amendment does not provide for vice presidential inability, but by September, the letter looked increasingly necessary. On the morning of September 11, 2001, Cheney's cardiologist Jonathan Reiner had received the results of a blood test showing his potassium levels were dangerously high. Then came the terrorist attacks of September 11, 2001.¹²² Planes hit the World Trade Center in New York. When word that one hijacked plane was headed to the White House (it eventually struck the Pentagon), the Secret Service for the first time implemented the procedures in place to protect the presidential line of succession. Cheney was taken to a bunker under the White House. Next in line of succession, House Speaker Dennis Hastert, was taken to Andrews Air Force Base. In line after the Speaker, the president pro tempore of the Senate, Robert Byrd, went home, refusing to be moved to a secure location.¹²³

The president's security was of paramount import. Bush was taken to Air Force One and U.S. air space was closed. He eventually recorded a public address from Barksdale Air Force Base in Louisiana before returning to the White House, though not

¹²² For diverse interpretations of the September 11th attacks see, for example: Peter L. Bergen, *The Longest War: The Enduring Conflict between America and Al Qaeda* (New York: Free Press, 2011). Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* (London: Simon & Schuster, 1996). John C. Miller, Michael Stone and Chris Mitchell; *The Cell: Inside the 9/11 Plot, and Why the CIA and FBI Failed to Stop It* (New York: Hachette Books, 2002). National Commission on Terror Attacks Upon the United States, *The 9/11 Commission Report* (New York: W.W. Norton & Co., 2004). Bassam Tibi, *Islamism and Islam* (New Haven: Yale University Press, 2012). Lawrence Wright, *The Looming Tower - Al Qaeda and the Road to 9/11* (New York: Alfred A. Knopf, 2006).

¹²³ Dick Cheney, *In My Time: A Personal and Political Memoir* (New York: Threshold Editions, Simon & Schuster, 2011), p. 6. The refusal of an individual in the line of succession to follow security procedures during a crisis should have raised the following question, but did not: should a statute be passed requiring those in the line of succession to follow security directions in cases of attack?

before he was criticized by the media and the public for failing to evoke an image of strong leadership in the midst of the crisis.¹²⁴ When the president returned, Cheney was transferred to Camp David to ensure that they were not in the same location should more attacks occur. Secretary of Defense Donald Rumsfeld raised the nation's Defense Condition level from DEFCON IV to DEFCON III. National Security Advisor Condoleezza Rice made a call to Russian President Vladimir Putin advising him of this fact; Putin agreed to halt all military exercises in light of the attacks. As Cheney wrote in his memoir *In My Time*, "We had all lived through the Cold War and knew the possibility of a mistaken nuclear launch had to be kept in mind."¹²⁵ The friction between the importance of preserving the presidential line of succession and the need to visibly convey to the world that a competent president was in full command of the country during an attack was evident.

Later in his presidency, Bush became the first president to formally give up his powers, albeit briefly, under the Twenty-Fifth Amendment.¹²⁶ Knowing that unlike the

¹²⁴ The president was reading to school children in Florida when the country was attacked. Coincidentally, Barksdale Air Force Base in Shreveport, Louisiana, where the president's plane was diverted, was already on the highest alert because it was in the middle of a nuclear training exercise. Jean Edward Smith, in *Bush*, says the president was "not happy" about the Secret Service's insistence that he stay away from Washington, insisting that fears about his security were being "overblown." Jean Edward Smith, *Bush* (New York: Simon & Schuster, 2016), p. 220.

¹²⁵ Cheney had also lived through a heart attack at the age of 37 (on June 18, 1978). In a *60 Minutes* segment that aired in October 2013, Cheney discussed the fact that in 2007, when he needed his implanted cardioverter-defibrillator (ICD) replaced, Reiner ordered the manufacturer to disable the wireless feature due to concern a terrorist could assassinate the vice president by sending a signal to the device, telling it to shock his heart into cardiac arrest. On December 2, 2012, an episode of the fictional television series *Homeland* centered on that very plot – a terrorist gained control of the vice president's pacemaker, accelerating the machine until the vice president suffered a heart attack. The entertainment news media debated the plot's plausibility. Cheney's ICD, which was designed to sound an alarm and shock the heart back into a normal rhythm should it stop beating at regular intervals, did not go off once during the eight years he was vice president. Because the vice president's health did not deteriorate suddenly, the fact that the Twenty-Fifth Amendment does not provide for vice presidential inability did not receive a lot of national attention. Cheney, *In My Time*, p. 7.

¹²⁶ Dr. Herbert L. Abrams, author of *The President Has Been Shot*, participated in the Carter Commission: he argued that certain circumstances such as the use of general anesthesia by the president should

era of President Cleveland, no way existed to shield the public from the knowledge that he needed general anesthesia, he invoked the amendment twice for colonoscopies on June 29, 2002, and again on July 21, 2007.¹²⁷ In both cases, he followed Section 3 of the amendment, submitting letters to the House speaker and Senate president pro tem. Cheney, Acting President for about two hours each time, spent his second shift as Acting President not in DC, but in Maryland. The public was not informed as to the exact time the procedure was taking place and Cheney was temporarily in power. In both circumstances, Bush took back presidential powers the same day, again underscoring the fact that presidents do not like to give up power. Bush sought to portray an image of excellent health and would not relinquish presidential powers and duties short of being rendered completely unconscious by anesthesia.¹²⁸ Prior to the events of September 11, 2001, presidents and those close to the president avoided invoking the Twenty-Fifth Amendment even during times when the president was unconscious during surgery and the world knew the exact time an absence at the helm would occur.

The September 11th terrorist attacks had brought fears of presidential discontinuity and nuclear anxiety to the fore. After the attacks, nuclear anxiety drove

automatically trigger the Twenty-Fifth Amendment. Bush may have known about this recommendation. See James F. Toole and Robert A. Joynt, *Presidential Disability*.

¹²⁷ In 2002, Bush transmitted letters to House speaker Hastert and president pro tem Byrd. In 2007, he did the same to House Speaker Nancy Pelosi and to Byrd again. In 2007, five polyps were found during the colonoscopy, but all were determined to be benign.

¹²⁸ Bush, 55, was inabled two additional times during his tenure, but was not put under general anesthesia and, therefore, made the decision not to invoke the amendment. The first time, he underwent surgery for the removal of skin lesions on his face. Shortly thereafter, in January 2002, he briefly lost consciousness after choking on a pretzel when alone in the living quarters of the White House. During the latter case, the public was not informed for two and a half hours. The White House quickly released the facts that Bush, just five months earlier had a complete physical exam at which time it was determined that the president was very healthy for his age. The White House also released details of his exercise regimen, which included running at a quick pace. James Gerstenzang and Thomas H. Maugh II, "Choking on Pretzel, Bush Faints Briefly," *Los Angeles Times*, January 14, 2002. <http://articles.latimes.com/2002/jan/14/news/mn-22490>. Accessed October 10, 2016.

activity on succession planning within the executive branch. In November 2001, *The New York Times* assessed the threat. A team of reporters interviewed officials, such as John Bolton, the State Department's top arms control official, who stated he and others were "significantly more concerned" than ever about the possibility of a nuclear attack.¹²⁹ The article went on to say that Osama bin Laden's Al Qaeda group, which had carried out the attacks, had tried unsuccessfully to purchase nuclear materials in the mid-1990s. This attempt was seen as a clear indication of Al Qaeda's intentions. Separately, Vice President Dick Cheney confirmed that "even a 1 percent chance of terrorists gaining weapons of mass destruction now had to be treated as a certainty."¹³⁰ *The New York Times* authors reminded their readers that "nuclear terrorism may represent the darkest fear of all, simply because of the degree of destruction and huge number of casualties that are possible."¹³¹

The heightened anxiety led a number of foundations to join together to form a Continuity of Government Commission to study succession and disability issues. Former presidents Ford and Carter were honorary chairs.¹³² The commission's report began with

¹²⁹ William J. Broad, Stephen Edelberg, and James Ganz, "Assessing Risks, Chemical, Biological, Even Nuclear: The Threats: Assessing New Risks from Nuclear Weapons to Chemicals and Germs," *The New York Times* (November 1, 2001), A1.

¹³⁰ As quoted in David Greenberg. Review of John M. Schuessler, *Deceit on the Road to War: Presidents, Politics, and American Democracy*," H-Diplo, H-Net Reviews, July, 2016. <http://www.h-net.org/reviews/showrev.php?id=46082>.

¹³¹ An expert on nuclear proliferation, David Albright, president of the Institute for Science and International Security in Washington stated in the article: "After September 11, experts began taking a fresh look at studies that largely ruled out the possibility that terrorists could obtain a nuclear device." William J. Broad, Stephen Edelberg, and James Ganz, "Assessing Risks, Chemical, Biological, Even Nuclear: The Threats: Assessing New Risks from Nuclear Weapons to Chemicals and Germs," *The New York Times*, November 1, 2001, A1.

¹³² Many notable individuals familiar with the drafting, passage, ratification, or implementation of the Twenty-Fifth, as well as those involved in COOP, took part in the Commission including: Kenneth M. Duberstein, chief of staff to President Reagan, former House speaker Thomas Foley of Washington state, Professor Charles Fried of Harvard Law School, former House speaker Newt Gingrich of Georgia, former deputy attorney general of the U.S. Jamie S. Gorelick, former U.S. attorney general Nicholas deB Katzenbach, former House minority leader Robert H. Michel of Illinois, former White House chief of staff

a potential crisis scenario – an attack on Washington during the State of the Union address – in order to illustrate the problems they found with the line of succession. A salient problem the commission identified was that those in line of succession are based in Washington, D.C. An attack with a nuclear weapon would potentially wipe out a large geographical radius, encompassing all of the Washington metro area, if not the eastern seaboard. Despite the influence of the commission’s members and the panel’s bipartisan nature, none of the recommendations in the commission’s reports of 2003 and 2009 were implemented. Congressmen have continued to leave decisions to temporarily give up presidential powers during instances of inability to the president and the vice president and Cabinet, leaving the nation vulnerable to danger.

Some congressmen, such as Republican Senator Trent Lott of Mississippi, felt strongly that succession law needed to be altered to deal with these new problems. Several bills were introduced in the 108th Congress proposing major changes in succession law (such as H.R. 2749, S. 2073 and S. Res. 419). On September 16, 2003, the Senate Committees on the Judiciary and Rules and Administration held a joint hearing to debate the merits of the succession system. The committee hearing commenced with Lott’s statement that the nation had been living under the threat of a nuclear attack since 1947, and that responsible senators must prepare for “a dirty bomb or a nuclear bomb or some other travesty that could occur.”¹³³ Lott’s co-chair, Republican Senator John Cornyn of Texas, also believed in the need for revisions to the amendment. Cornyn

Leon Panetta, and former secretary of Health and Human Services Donna E. Shalala, and Dean John Feerick of Fordham University.

¹³³ *Joint Hearing Before the Committee on the Judiciary and Committee on Rules and Administration, United States Senate, Ensuring the Continuity of the United States Government: The Presidency, 108th Cong., 1st sess., September 16, 2003. Serial No. J-108-40. (Washington: U.S. Government Printing Office, 2008). <https://www.gpo.gov/fdsys/pkg/CHRG-108shrg45948/pdf/CHRG-108shrg45948.pdf>*

reiterated the Continuity of Government Commission's concern that most individuals in the line of succession resided in Washington, and, therefore, could all be killed at the same time in the event of a nuclear attack. During House hearings on October 6, 2004, many of the same questions were debated.¹³⁴ Bayh was invited back to testify. The author of the Twenty-Fifth Amendment explained that the framers of the amendment envisioned the following nuclear scenario as a reason why an amendment was needed in the 1960s: "The president's plane goes down on a deserted island, there's no communication, you can't find him, and missiles are being launched."¹³⁵ Later, Bayh was questioned in a *Fordham Law Review* interview about rumors of a classified plan that involved a secret government. He was asked: "Even if a law providing for the president to set up a shadow government was passed on to [future administrations]... what has Congress's role been in approving this plan? What is their knowledge of this plan?" Bayh responded, "The question is: what is the plan?"¹³⁶ The lack of transparency around succession planning for a nuclear attack was troubling. And yet it was also a feature of nuclear preparedness in succession planning.

Bayh's pointed answer underscoring the fact that presidents have kept the public in the dark about succession planning highlights the fact that modern presidents and their advisors have made unchecked decisions regarding inability and succession, in large part

¹³⁴ Congressional Research Service staffer Thomas F. Neale, an expert witness, explained that the hearings were necessary because of proposals made after 9/11 seeking to prevent "decapitation" of the U.S. government "by a terrorist attack or attacks, possibly involving the use of weapons of mass destruction." Thomas H. Neale, "Presidential and Vice Presidential Succession: Overview and Current Legislation," Congressional Research Service Report for Congress. Library of Congress (Updated September 27, 2004). http://www.whitehousetransitionproject.org/wp-content/uploads/2016/04/POTUS-VP-Succession_092704-1.pdf. Accessed October 1, 2016.

¹³⁵ Birch Bayh, Interview with Author, November 11, 2014.

¹³⁶ "A Modern Father of Our Constitution: An Interview with Former Senator Birch Bayh," 79 *Fordham L. Rev.* 781 (2011), p. 812-813.

to avoid even the temporary transfer of presidential power. Public opinion concerns, and the personal ambitions of those close to the president, have stymied the use of the Twenty-Fifth Amendment as its framers had intended. Even with the advice of experts, Congress has not been able to address the new perils created, in part, by the framers' intention of leaving the surrendering and retaking of executive power in the hands of the president himself. Pressure stemming from the fear of nuclear attack lead administrations to cling to the appearance of control under any circumstances, especially during chaotic moments when presidents wanted to convey to the public the appearance that order and stability was emanating from the White House. Thus, the nation remains at risk of a contested, or otherwise unsuccessful, sudden transition of presidential power in the event of a nuclear attack. Examining cases of inability through the magnifying glass of nuclear anxiety identifies circumstances in which the amendment is less likely to be invoked. While some historical accounts have studied the effect of political machinations on the implementation of the Twenty-Fifth Amendment, these accounts have not considered the cultural climate. This revisionist history provides a greater appreciation of the fact that the Constitution, a timeless instrument, is subject to both the political and cultural mood.

Conclusion: The Next Stages: Nuclear Anxiety and the Amendment

With the Twenty-Fifth Amendment's ratification on February 10, 1967, the nuclear anxiety of the era became ingrained in the Constitution itself. After 179 years without a presidential succession and inability amendment, the framers of the Twenty-Fifth Amendment adjusted America's foundational document not as dictated by a momentary whim, but by the exigencies of the times.¹ With a goal of expanding the field of legal history by examining cultural and political factors, this dissertation argues that nuclear anxiety provides another important explanation for the incorporation of the amendment. But inscribing the variegated forms of nuclear anxiety into the Constitution did not relieve the stress over a nuclear apocalypse, nor did it solve all the issues pertaining to succession and inability. Studying the amendment in practice has revealed some formative and unpredictable effects including not only gaps and vagaries² in the amendment but also that presidents, already wielding the god-like power to push the button, also had the power to avoid the intention of the law. Presidents, who, in America's democratic republic, rule thanks to the will of the people, have taken this avoidance a step further, devising covert and extralegal Continuity of Government (COG) plans to insure their hold on power in events of disaster, especially nuclear devastation. In fact, the higher the nuclear anxiety, the less like the Twenty-Fifth amendment will be invoked. Fifty years after the amendment's ratification, nuclear weapons have

¹ In *Explicit and Authentic Acts*, Kyvig engages in the debate over whether the Constitution continues to serve as the "sovereign will of the people as to their governance" or if it is "unable to check the momentary whims and excess of transitory power." See David E. Kyvig, *Explicit and Authentic Acts: Amending the Constitution, 1776-1995* (Lawrence, Kansas: University Press of Kansas, 1996), p. xviii.

² Some of these gaps and vagaries were intentional on the part of the framers. See Chapter 3.

proliferated to other countries and potentially to non-state actors (terrorists) as well.

Public concern over the temperament and mental ability of U.S. presidents now approaches the high levels reached in the 1960s, 1980s, and after the attacks of September 11, 2001.

Understanding the Constitutional revision as a product of nuclear anxiety broadens our thinking about the 1960s, the decade of the amendment's conception and ratification. Among the symbols of the decade, Americans recognized the circular peace sign divided into three triangles. But another well-known circular symbol also containing three triangles is the emblem designating a fallout shelter.³ The hopeful attitude that came to be associated with the youth movement of the "hippies," was in part a reaction to the reality that the world could come to an end in an instant. Sociologist and former president of Students for a Democratic Society Todd Gitlin writes about the bomb as the "underside" of the positivity of the 1960s. According to Gitlin, if Americans believed "Everything might be possible . . . So might annihilation."⁴ The bomb was "the shadow hanging over all human endeavor." Shedding light on the effects of this shadow helps garner a greater understanding of the turbulent decade. This feeling of despair and a lack of control over the bomb was depicted in pop and political culture: one could not escape the representations, just as one could not escape from one's own shadow, nor from a nuclear disaster if one should occur. Americans prepared their bomb shelters, talked

³ The peace sign can be dated to 1958 and attributed to Gerald Holtom who created the sign for the British Campaign for Nuclear Disarmament. See Kathryn Wescott, "World's Best-Known Protest Symbol Turns Fifty," *BBC News* (March 20, 2008). http://news.bbc.co.uk/2/hi/uk_news/magazine/7292252.stm.

⁴ Gitlin was also a founder of Harvard University's nuclear disarmament student group, Tocsin, in the early 1960s. Todd Gitlin, *The Sixties: Years of Hope, Days of Rage* (New York: Bantam Books, 1987), pp. 22-23.

about these shelters at P.T.A meetings, and looked to their leaders for a sense of security from a sudden attack.⁵

Gitlin writes about one just one of a myriad of strains of nuclear anxiety, the fear surrounding the fragility of life on earth, which could come to an abrupt end due to the bomb. But lawmakers also needed to secure the line of succession in case of a strike to ensure that a president's hand was always on the button. A president of sound mind must be in place to make and execute decisions that could affect billions. And yet another facet of this anxiety was the fear that a president could go crazy, Dr. Strangelove-style,⁶ and launch nuclear weapons bringing about a retaliatory response. In the amendment, all of these strains of anxiety became a permanent part of American law.

In fact, the Twenty-Fifth Amendment can be seen as part of a broader movement, at the state, not just the federal level, to put in place bulwarks against a nuclear-related leadership crisis. Fear of nuclear attack convinced many states to reevaluate and expand their succession provisions by passing "disaster acts" in the 1960s.⁷ All fifty state constitutions now designate an official who is next in line for gubernatorial succession. California, which became the tenth state to ratify the Twenty-Fifth Amendment on October 21, 1965, adopted Article V, Section 10 of its Constitution on November 8, 1966. It named the lieutenant governor as next in line to become governor, further clarifying succession law, and creating the Commission on Governorship to oversee the transitions. State legislatures have continued to revisit their succession plans. Decades

⁵ Allan M. Winkler, *Life Under a Cloud: American Anxiety About the Atom* (New York: Oxford University Press, 1993), p. 9.

⁶ Stanley Kubrick's 1964 movie *Dr. Strangelove or How I Stopped Worrying and Learned to Love the Bomb* is the archetypal movie about a president who volunteers to launch a nuclear strike on New York after an insane U.S. general launches one on Moscow, in order to avoid additional nuclear reprisals.

⁷ Ariz. Laws 1964, ch. 56 as quoted in John Feerick, *From Failing Hands*, p. 284.

later in New York, for example, The Nelson A. Rockefeller Institute of Government convened a forum to consider changes to the line of succession. New York Assemblyman Robin Schimminger suggested looking to the federal government's solution: the Twenty-Fifth Amendment. During the forum, Columbia Law School professor Richard Briffault posed a question: "Why do we care?" Yes, it's the governor, but it's only the governor and he doesn't have nuclear weapons under his control. So, why should we worry?"⁸ The professor was implying succession law was a matter of greatest import at the national level because the president held the nuclear codes.

Questions about these gaps and vagaries arose during, and just after, the first uses of the amendment. During confirmation proceedings, congressmen questioned Rockefeller seventeen times, and afterwards debated the proper extent of congressional inquiry into the president's nomination of a vice president under Section 2 versus that individual's right to privacy.⁹ After the confirmation, experts on the amendment, including Bayh and former chair of the Junior Conference of the American Bar Association John Feerick, agreed that a simple statute would fix some of the inadequacies. Members of Congress began to introduce legislation to that end.¹⁰ The first

⁸ As recently as May 2008, after the resignation of New York Governor Eliot Spitzer and the ascension to power of Lt. Gov. David Paterson, legislators reopened the question of who should succeed the lieutenant governor. The goal of the Nelson A. Rockefeller Institute of Government's forum was to begin a discourse that would ensure that the executive branch positions of governor, lieutenant governor, as well as attorney general and comptroller, remained filled at all times. See "Gubernatorial Succession and the Powers of the Lieutenant Governor: A Public Policy Forum," The Nelson A. Rockefeller Institute of Government (May 28, 2008). http://www.rockinst.org/pdf/public_policy_forums/2008-05-29-public_policy_forum_gubernatorial_succession_and_the_powers_of_the_lieutenant_governor.pdf.

⁹ This line of congressional questions included Rockefeller's policies on nuclear weapons, as Chapter 4 reveals.

¹⁰ Pastore introduced very specific legislation (S.J. 26): should a repeat of vice presidential and presidential resignations in the same administration occur, the vice president would serve as president only until a president elected in a special election took the oath of office as president. Senator William Hathaway introduced legislation (S. 2678) calling for a general election, rather than allowing the vice president to fill the president's shoes for the remainder of the term of four years as the Twenty-Fifth prescribed, for example. Both bills died in committee.

invocations tested Sections 1 and 2 of the amendment, but notably did not test Sections 3 and 4, those dealing with inability, where additional questions lay. Thus, while the amendment answered John Dickinson's question dating back to 1787 – Who is to be the judge of inability?¹¹ – Congress would have to interpret the meaning and effect of the amendment's purposefully vague term of art, "inability." Now, in a crisis, a previously agreed-upon government "official" was always in charge, but Bayh admitted that putting the amendment into practice revealed challenges. Bayh concluded: "It is easy to find fault with the amendment. It is much more difficult to envision an alternative solution which does not possess greater imperfections."¹² Bayh also acknowledged that the current political process is polarized, but asserted his belief that Congress will fix any gaps in succession and inability law for the good of the people in case of nuclear disaster.¹³

It is worth repeating that Bayh stated that nuclear anxiety was "on the forefront, not back of, his mind"¹⁴ at all times. A pragmatist, Bayh viewed the Constitution as a tool

¹¹ According to the copious notes taken by James Madison, John Dickinson asked this question of the framers assembled at the Constitution Convention in 1787, referring to the succession clause in Article II of the Constitution. He failed to receive an answer.

¹² U.S. Government Printing Office. Hearing Before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary United States Senate Ninety-Fourth Congress First Session on S.J. Res. 26 Proposing Modification of the Twenty-Fifth Amendment of the Constitution of the United States. Printed for the use of the Committee on the Judiciary, (Washington: U.S. Government Printing Office, 1976), p. 18.

¹³ Today's Congress stands in stark contrast to the one that passed the Twenty-Fifth Amendment. Bayh, in videotaped interviews with his official biographer Bob Blaemire, a former staff member, reminisced fondly about the recreational baseball games played between Democratic and Republican Senators at RFK Stadium in D.C in the mid-1960s. From 1961-1968, just beyond the temporal boundaries of the Twenty-Fifth Amendment's drafting, passage and ratification, RFK Stadium was known as the "District of Columbia" Stadium. Ira Shapiro, in *The Last Great Senate*, paints a similar picture of camaraderie and suggests that this was an era of compromise in the name of the institution of the Senate, which was larger than any one individual. Perhaps the grass now growing in the upper areas of the stadium seats is analogous to the lack of bipartisan spirit in today's Congress. Congressmen can't see the ball for the weeds. The author has confirmed the presence of a tree, grass, and weeds. The upper deck press box has completely deteriorated as well. Bayh's assertion that Congress will fix: "A Modern Father of Our Constitution: An Interview With Former Senator Birch Bayh," 79 *Fordham Law Review* 781 (2011), p. 814. Weeds: Garrett Quinn, "Brokedown Palace: RFK Stadium is a National Treasure Cracks and All," *Washington City Paper* (June 5, 2013), <http://www.washingtoncitypaper.com/news/city-desk/blog/13067348/brokedown-palace-rfk-stadium-is-a-national-treasure-cracks-and-all>. Accessed December 14, 2016.

¹⁴ Birch Bayh, Interview with author, November 11, 2014.

to address both predictable and unknown dangers. He understood that anxiety – an amorphous concept that ebbs and flows but is ever-present – contributed to a concrete law that allowed for a clearer sense of presidential continuity. Here we see the politician who got the job done – the architect of multiple amendments to the Constitution that ushered the Twenty-Fifth through the ratification process from inception to completion – convinced that because the succession and inability issue is of incredible importance, Congress will act.

In his 2015 book, *Living Dangerously: The Uncertainties of Presidential Disability and Succession*, political scientist James Ronan harbors a more critical viewpoint of the likelihood that a statute filling in the Twenty-Fifth Amendment's gaps will be passed by Congress.¹⁵ Ronan's main thesis is that succession solutions are based solely on the level of attention the public gives to the issue. Attention is paid to the line of succession only if a crisis occurs. Yet this one-dimensional argument fails to capture the fact that the Twenty-Fifth Amendment was ratified almost four full years after Kennedy's sudden death, suggesting that other factors played a role in moving the ratification process forward. Ronan also furthers a traditional argument: that Congress passed the amendment because the nation suffered fourteen harrowing months without a vice president. He concludes that the inadequacies of the amendment will not be addressed absent a crisis situation akin to the "urgency and public attention that Kennedy's death had lent the problem."¹⁶ Ronan leaves the definition of the term "crisis" vague. He does not explain in depth how or why this period of time without a vice president constitutes a

¹⁵ James M. Ronan, *Living Dangerously: The Uncertainties of Presidential Disability and Succession* (New York, Lexington Books, 2015).

¹⁶ Ronan, *Living Dangerously*, p. 54.

crisis.¹⁷ Although he mentions in passing that concerns about nuclear war gave way to fears of terrorism after the attacks of September 11, 2001, Ronan views ratification in a political bubble, virtually eliding these cultural anxieties.

The heightened nuclear anxiety that moved the ratification process forward in the mid-1960s did not disappear, nor was it “replaced” by terrorism. Instead, what is significant about the events of September 11th is that they compounded the existing fear: in addition to the states that had the known capability to launch a nuclear Armageddon, non-state actors in the form of terrorists were attempting to acquire the materials to build small nuclear bombs, or “dirty” bombs. The proliferation of unaccounted for nuclear material, particularly in unsecured locations in the former Soviet Union, made their acquisition by terrorists a very real possibility.¹⁸ Policymakers at the top echelons of the executive branch were forced to use even the minute possibility that terrorists might acquire weapons of mass destruction as a basis for decision-making.¹⁹

On September 11th, the pre-rehearsed COG drills to ensure the continuation of the executive branch called for in President Ronald Reagan’s top-secret directive were carried out. Reagan had issued this directive during another period of heightened nuclear anxiety in the 1980s. Circumventing the Twenty-Fifth Amendment and Congress’ input, Reagan had teams of loyal advisors in place to direct whichever Cabinet member had

¹⁷ For a definition of “crisis” see Gregory M. Herek, Irving L. Janis, and Paul Huth “Decision Making During International Crisis: Is Quality of Process Related to Outcome?” *Journal of Conflict Resolution* Vol. 31, Issue 2 (June 1, 1987). (<http://journals.sagepub.com/doi/abs/10.1177/0022002787031002001>). Accessed July 3, 2017.

¹⁸ Nine states now have nuclear capabilities: the United States, Russia, the United Kingdom, France, China, Israel, India, Pakistan, and North Korea. See Hans M. Kristensen and Robert S. Norris, “Nuclear Notebook: Nuclear Arsenals of the World,” *Bulletin of the Atomic Scientists*. <http://thebulletin.org/nuclear-notebook-multimedia>. Accessed July 6, 2017.

¹⁹ Cheney: As quoted in David Greenberg. Review of John M. Schuessler, *Deceit on the Road to War: Presidents, Politics, and American Democracy*, ” H-Diplo, H-Net Reviews (July, 2016). <http://www.h-net.org/reviews/showrev.php?id=46082>.

survived a nuclear attack and was Acting President. The terrorist attacks of September 11th, the first attacks during the nuclear age on American soil, generated a revival of interest in the presidential line of succession, and COG plans took on an added urgency.²⁰ COG plans have been continually exercised and updated, at great expense to the taxpayer, and without transparency.²¹

When President Barack Obama took the reins of power from George W. Bush, he reiterated the hope that the proliferation of nuclear weapons, and therefore, the nuclear threat, would come to an end. Instead, some argue that the threat has increased because smaller yet more numerous bombs were created during his administration. General James E. Cartwright, a retired vice chairman of the Joint Chiefs of Staff and key advisor to Obama on nuclear weapons, stated: “what going smaller does... is to make the weapon more thinkable.”²² Significantly, the last time nuclear weapons became “more thinkable”

²⁰ This was particularly true of the “designated survivor,” a Cabinet official in the line of succession who would remain in office through the inauguration of the new president on Inauguration Day and not attend the festivities celebrating the president’s annual State of the Union Address. Gerhard Peters, a co-founder of the American Presidency Project, which tracks data including designated survivors, said of the designated survivor program: “it’s sort of a Cold War relic from the fear of a nuclear attack.” Devin Dwyer, “State of the Union ‘Designated Survivor’ Demystified,” *ABC News* (January 27, 2014). <http://abcnews.go.com/Politics/state-union-designated-survivor-demystified/story?id=21637341>. Accessed September 26, 2016.

²¹ Valerie Jarrett, a senior adviser to President Barack Obama informed Bayh that in the case of sudden disaster, the president had “a very comprehensive contingency plan.”²¹ This plan is classified, although with nuclear and other catastrophic threats still lingering, the public has asked for more transparency and clarity around Continuity of Operations Plans (COOP). The line between transparency and security has been proven difficult to walk. Obama provided a modicum of transparency with his webpage, <https://www.whitehouse.gov/omb/contingency-plans>, which contains links to contingency plans for agencies across the federal government. Critics feel that the information the President has provided is not nearly enough disclosure. “Agency Contingency Plans,” Office of Management and Budget. <https://www.whitehouse.gov/omb/contingency-plans>. Accessed October 11, 2016. See also Garrett M. Graff, *Raven Rock: The Story of the U.S. Government’s Secret Plan to Save Itself – While the Rest of Us Die* (New York: Simon & Schuster, 2017), p. 393.

²² William J. Broad and David E. Sanger, “As US Modernizes Nuclear Weapons, ‘Smaller’ Leaves Some Uneasy,” *The New York Times* (January 11, 2016). At the conclusion of Obama’s term, the American arsenal consisted of 5,000 nuclear warheads and new, multi-billion dollar plans to build a new generation of nuclear weapons were in the works. Garrett M. Graff, *Raven Rock: The Story of the U.S. Government’s secret Plan to Save Itself – While the Rest of Us Die* (New York: Simon & Schuster, 2017), p. 405.

was during the Reagan administration when senior officials suggested that Americans could survive a nuclear war. At that point, the Bulletin of Atomic Scientists' Doomsday Clock stewards moved the Doomsday Clock hands to three minutes to midnight.²³ The Doomsday Clock stewards, which include 16 Nobel Laureates, assert that Americans are now on the brink of nuclear apocalypse. They "believe the world is as close to total catastrophe today as it was at the worst point in the Cold War."²⁴ In 2015 – coinciding with the beginnings of the U.S. presidential race and international tensions which found Russia and the U.S. on opposite sides of the Syrian conflict²⁵ – the Bulletin of Atomic Scientists moved the Doomsday Clock from five minutes to midnight to three minutes to midnight. In 2016, they kept the clock at three minutes to midnight, denoting a high probability of catastrophe. "The Clock ticks. Global danger looms. Wise leaders should act — immediately," urged the stewards.²⁶ These Nobel Laureates are not alone in arguing that nuclear tensions have increased since 2015.²⁷

²³ The Doomsday Clock was designed in 1945 as a predictor of nuclear catastrophe with midnight being the Apocalypse.

²⁴ Charlotte Alter, "Doomsday Clock Puts Us at Three Minutes Away from Midnight," *Time* (January 23, 2015). <http://time.com/3680932/doomsday-clock-three-minutes/>. Accessed November 28, 2016.

²⁵ In September 2014, the U.S. and five Arab allies launched air strikes against the Islamic State in Aleppo and Raqqa. For a timeline of the Syrian crisis see: "Syria-Timeline" *BBC* (July 2017). <http://www.bbc.com/news/world-middle-east-14703995>.

²⁶ The movement of the clock to three minutes to midnight was matched in 1984, during the Reagan years, and one other time, in 1949, when the Soviet Union detonated its first atomic bomb. The current status is only one minute away from the closest the Doomsday Clock has ever been to midnight: it reached two minutes to midnight in 1953, when the U.S. detonated the first hydrogen bomb. Bulletin of the Atomic Scientists. <http://thebulletin.org/timeline>. Accessed November 28, 2016.

²⁷ The media has regularly made these assertions accompanied by a similar clarion call to reduce tensions. For example, William J. Broad and David E. Sanger of *The New York Times* argue that nuclear war is more likely now than at any time since the Cold War. In an article entitled "Cold War 2.0: How Russia and the West Reheated a Historic Struggle" in *The Guardian*, authors Patrick Wintour, Luke Harding and Jullian Borger cite Russian president Vladimir Putin's assertion that Russia would open military bases in Cuba as proof of the coming of a second Cuban missile crisis. The authors conclude from the British vantage point that a new Cold War has begun. They quoted both the former head of M16 Sir John Sawers and the German foreign minister Frank-Walter Steinmeier stating that this new Cold War is more dangerous than the first. The article said that "[t]he reasons for this anxiety are not hard to find." More likely: William J. Broad and David E. Sanger, "As US Modernizes Nuclear Weapons, 'Smaller' Leaves Some Uneasy," *The New York Times* (January 11, 2016). Russian in Cuba: Patrick Wintour, Luke Harding and Jullian Borger,

In addition to the fear that terrorist organization will gain access to, and detonate, a nuclear weapon, nuclear anxiety has increased in recent years because rogue nations such as North Korea and Iran have pursued nuclear and long-range missile capabilities, and nuclear states, in particular Pakistan, have shown instability, raising fears of their takeover by dangerous forces. Pakistan has developed its nuclear triad, and, unlike its neighbors, India and China, does not have a “no first strike” policy.²⁸ But the greater fear exists over North Korea: Secretary of Defense James Mattis has called North Korea’s accelerated efforts to develop a nuclear missile capable of hitting the United States a “clear and present danger.”²⁹ Experts believe North Korean leader Kim Jung-Un will have nuclear missiles capable of reaching all major U.S. cities at his disposal by spring 2018.³⁰

Further, renewed tensions with an old enemy, Russia, has only increased since President Donald Trump’s inauguration. In a *Reuters* interview a month after the inauguration, continuing to employ the tough rhetoric he had used during the presidential campaign, Trump stated that he planned to increase nuclear weapons capabilities to ensure that the U.S. is at “the top of the pack.”³¹ At the end of October 2016, Clinton had capitalized on Trump’s own statements about nuclear weapons by using clips of them in

“Cold War 2.0: How Russia and the West Reheated a Historic Struggle,” *The Guardian* (October 24, 2016). <https://www.theguardian.com/world/2016/oct/24/cold-war-20-how-russia-and-the-west-reheated-a-historic-struggle>. Accessed October 24, 2016.

²⁸ See, for example: Rahmatullah Nabil, “The World Must Secure Pakistan’s Nuclear Weapons,” *The New York Times* (April 20, 2017). See also: Adrian Levy and Catherine Scott-Clark, *Deception: Pakistan, the United States, and the Global Nuclear Weapons Conspiracy* (New York: Atlantic Books, 2007).

²⁹ Robert Burns, “Mattis: North Korea a ‘Clear and Present Danger’ to World,” *AP Newswire* (June 1, 2017).

³⁰ Brad Lendon, “U.S. Slams North Korea Missile Test as Kim Claims “Whole U.S. Mainland” in Reach,” (July 30, 2017). *CNN* <http://www.cnn.com/2017/07/29/asia/north-korea-intercontinental-ballistic-missile-test/index.html>. Accessed July 30, 2017.

³¹ “Trump Tells Reuters He Wants to Expand Nuclear Arsenal to Make Us Top of the Pack,” *CNBC*. (February 23, 2017). <http://www.cnn.com/2017/02/23/trump-tells-reuters-he-wants-to-expand-nuclear-arsenal-make-us-top-of-the-pack.html>. Accessed February 23, 2017.

attack ads. One Clinton ad featured Monique Corzilius Luiz, the girl who had starred in the 1964 Daisy ad, now a woman in her late 50s. Luiz said, “The fear of nuclear war that we had as children, I never thought our children would have to deal with that again.”³² Clinton believed that Luiz’s concern would appeal to the majority of voters. Pointing to the president’s continued tough rhetoric and call for a nuclear arms buildup, Cold War Soviet leader Mikhail Gorbachev summed up the current situation by stating: “it all looks as if the world is preparing for [nuclear] war.”³³ Daily media coverage has led the average American to the same conclusion.

Coupled with the heightened nuclear anxiety is the anxiety circulating in the media and Washington not only about Kim’s sanity, but about President Trump’s mental ability. Politicians question Trump’s judgement and temperament daily, suggesting that he may be impaired.³⁴ The questioning of Trump’s mental abilities began during the 2016 presidential election cycle, if not before. Democratic nominee Hillary Clinton and others argued that the Republican nominee was not temperamentally fit to make split-second decisions controlling the launch of nuclear weapons.³⁵ A litany of diplomats and national

³² Maya Rhodan, “Hillary Clinton Uses ‘Daisy Girl’ in Ad Criticizing Trump,” *Time* (October 31, 2016). <http://time.com/4551744/hillary-clinton-daisy-girl-donald-trump-ad/>. Accessed November 30, 2016.

³³ Mikhail Gorbachev, “It All Looks as if the World is Preparing for War,” *Time* (January 26, 2017). <http://time.com/4645442/gorbachev-putin-trump/>. Accessed January 26, 2017.

³⁴ See, for example: Aaron Blake, “David Petraeus’s Damning Nonresponse on Trump’s Fitness to Serve,” *The Washington Post* (July 5, 2017). Lisa Hagen and Ben Kamisar, “Pelosi: Is Trump Fit to Be President?” *TheHill.com* (May 16, 2017). <http://thehill.com/homenews/house/333596-pelosi-is-trump-fit-to-be-president>. Accessed July 5, 2017. *The Atlantic* is among those that have questioned the president’s physical fitness, or lack thereof. See Stephanie Hayes, “The Unfit President,” *The Atlantic* (April 3, 2017). <https://www.theatlantic.com/health/archive/2017/04/trump-is-relatively-unfit-to-serve/521121/>. Accessed July 6, 2017. Moreover, popular culture outlets such as *MAD Magazine* have satirized his mental abilities. See *MAD About Trump: A Brilliant Look at Our Brainless President*. (June 14, 2017). <http://www.madmagazine.com/books/mad-about-trump>.

³⁵ With a lack of substantial policy information to point to, and because of his middle-of-the-night rants via social media site Twitter, Clinton repeated “A man you can bait with a tweet is not a man we can trust with nuclear weapons.” See @HillaryClinton, *Twitter.com* (July 28, 2017). <https://twitter.com/hillaryclinton/status/758864218439286784?lang=en>. Accessed July 6, 2017.

security experts came forward during the campaign to agree with her assessment. In October 2016, ten former nuclear launch officers who held the keys to launch on the president's order signed an unprecedented open letter questioning Trump's judgment and temperament. These officers insisted that Trump should not be entrusted with the nuclear codes.³⁶ But concerns about the mental ability of the next president whose finger would be on the nuclear button is not a new phenomenon.³⁷

Tying Trump's potential control over a nuclear apocalypse with the possibility of invoking the Twenty-Fifth Amendment, an article by New York-based writer and seminarian Ben Brenkert in *The Hill* urged Americans to familiarize themselves with the Twenty-Fifth Amendment. Brenkert said, "To me, it is more likely than ever before that [Section 4] of the [Twenty-Fifth] Amendment could be enacted during a Trump

³⁶ The American Psychiatric Association established a "Goldwater Rule" forty years ago when *Fact* magazine published the findings of a survey of 12,356 psychiatrists: out of 2,417 respondents, 1,189 believed that Goldwater was unfit to assume the presidency. The act of commenting on a candidate's mental health from afar can be viewed as potentially compromising to the integrity of the psychiatry profession. The Association believes this may have affected the results of the 1964 election. Offering an opposing viewpoint, family therapist and University of Minnesota psychology professor Bill Doherty's online manifesto "Citizen Therapists Against Trumpism," was the focus of a WNYC "On the Media" segment. Doherty insisted that, for the public good, he must violate the Goldwater Rule by condemning Trump's fear-mongering and questioning his mental health. Nuclear Launch Officers: Carol Morello, "Former Nuclear Launch Officers Sign Letter: 'Trump Should Not Have His Finger on the Button,'" *The Washington Post* (October 13, 2016). Compromising to the profession: Maria A. Oquendo, "The Goldwater Rule: Why Breaking It is Unethical and Irresponsible," *American Psychiatric Association* (August 3, 2016). <https://www.psychiatry.org/news-room/apa-blogs/apa-blog/2016/08/the-goldwater-rule>. Doherty: "Therapists Against Trumpism," *On the Media*, WNYC (August 26, 2016). http://www.wnyc.org/story/therapists-againsttrumpism/?utm_source=local&utm_medium=treatment&utm_campaign=daMost&utm_content=da-mostviewed&utm_source=Newsletter%3A+This+Week+on+WNYC&utm_campaign=fd87921265-This+Week+on+WNYC+7%2F12%2F16&utm_medium=email&utm_term=0_0473b3d0b8-fd87921265-72906689&mc_cid=fd87921265&mc_eid=5a2a58b93e. Accessed August 26, 2016

³⁷ During both the 1964 and 2016 presidential elections, the Republican nominee made statements implying that he would not hesitate to launch nuclear missiles; their extreme language led some Americans to believe they were mentally off-balance. See Chapter 2.

presidency.” Calling Trump “a false prophet,” he wrote of his grave concern that Trump would have access to the nuclear codes.³⁸ Brenkert’s prediction is unlikely to be realized.

My research indicates that the higher the nuclear anxiety, the less likely that Sections 3 and 4 of the amendment will be invoked.³⁹ Although Bayh and the framers of the amendment designed Section 3 to allow the president to willingly invoke the amendment when inabled and then take back powers when the period of inability ended, presidents infrequently relinquish power willingly. The need for a finger on the trigger at all times conflicted with political concerns, namely the president’s desire to project an image of health and competency.⁴⁰ Presidents made the determination that the latter, an image of a competent – though temporarily absent – president would be more reassuring to the nation, but by failing to follow through on the intention of Section 3 of the amendment, presidents have consistently failed to put the safety of the nation over their personal desire to hold on to power.⁴¹

Section 4 provides a back-up plan, if the president does not, or cannot, recognize his inability: the vice president and a majority of the Cabinet can declare the president

³⁸ Ben Brenkert, “Better Brush Up on the Twenty-Fifth Amendment if Trump Wins,” *The Hill* (August 3, 2016). <http://thehill.com/blogs/pundits-blog/presidential-campaign/290204-better-brush-up-on-the-25th-amendment-if-trump-wins>.

³⁹ It is difficult to predict when Sections 1 and 2 of the amendment might be invoked, particularly in the event of a resignation or assassination. That does not stop conspiracy theorists from attempting to locate patterns in the frequency of assassination attempts. For example, one popular theory is that every twenty years, when a president is elected in a year that ends in zero, he will either be killed or die of natural causes while in office. See “Presidential 20 Year Death Curse,” <http://www.snopes.com/history/american/curse.asp>. Accessed July 6, 2017.

⁴⁰ For a study on the history of an image, see: David Greenberg, *Nixon’s Shadow: The History of an Image* (New York: W.W. Norton & Company, 2003).

⁴¹ When he underwent surgery later in his presidency, Reagan followed the procedures outlined in the Twenty-Fifth Amendment, by writing the speaker and president pro tem, but he specifically stated in these official letters that he *was not* invoking the Twenty-Fifth Amendment. He followed the procedures called for in Section 3 of the amendment but called into question the section’s premises. The entire world knew when the president would be operated on and, therefore, an absence in the top seat of government would occur, but he irresponsibly, some argue, put his image and related political concerns over the welfare of the people. See William Safire, “Taking the 25th: Why the Legalistic Flimflam?” *The New York Times* (July 15, 1985).

inabled. However, the vice president and Cabinet have been reluctant to do so, also bowing to political pressures. Instead, those around the president, such as the White House physician, first lady, and presidential advisors have helped the president conceal his inabilities. Cleveland hid his jaw surgeries – performing them on a yacht in the middle of Buzzard’s Bay, Massachusetts and swearing his doctors to secrecy. Wilson downplayed his condition after his stroke with the help of his friend, Dr. Grayson and the first lady, Edith Bolling. These are examples from an age when presidents and those close to them had the luxury of time: no foreign policy decisions needed to be made instantly and, though some decisions might cause great loss of life, none would bring about the end of mankind. In the nuclear age, presidential decisions, at least those related to nuclear weapons, had to be made instantaneously. The logical conclusion would be that Section 4 of the amendment would be invoked when necessary. Instead, the president’s coterie have not only blocked access to the president in times of inability, but have even decided to raise the Defense Condition (DEFCON) level during times of high nuclear tensions.⁴²

With the heightened nuclear anxiety and concerns about Trump’s mental health and potentially illegal activity,⁴³ the debate over the continuing challenges of the Twenty-Fifth Amendment that began immediately after the first applications of the amendment

⁴² Nixon’s advisors raised the DEFCON level during the Yom Kippur war of October 1973. In 1981, as Soviet troops amassing on the Polish border suggested nuclear war might be imminent, President Reagan was seriously wounded in an assassination attempt, but, even as surgeons searched desperately inside the president’s lung for the bullet, the vice president and Cabinet did not invoke the amendment. See Chapter 4.

⁴³ As the possibility of nuclear war looms ever closer, the possibility that Section 1 of the Twenty-Fifth Amendment will be invoked due to impeachment has been raised in Washington and in the media. Trump’s refusal to distance himself from his business operations that deal with Russia, led Trump’s critics to point to Article 1, Section 9, Clause 8 of the Constitution (forbidding U.S. officeholders from accepting emoluments from foreign states) and call for his removal. On May 17, 2017, the Justice Department named Robert Mueller special counsel to oversee the department’s investigation into the role of Russia in the 2016 presidential election. See, for example: See Tal Kopen, “Who is Robert Mueller?” *CNN* (May 18, 2017). <http://edition.cnn.com/2017/05/17/politics/who-is-robert-mueller/index.html>. Accessed July 2, 2017.

bill has twenty-one cosponsors, but it is too early in the legislative process to determine whether it will receive the support necessary to become law in the 115th Congress.

Renewed interest in the issue of succession and inability is evident not only in the media and in Congress, but in scholarly works and popular culture. Several forthcoming memoirs will reflect on the framers' participation five decades after the amendment's ratification.⁴⁷ Popular movies and TV shows exploit the lack of transparency around the designated survivor program, creating outlandish scenarios stemming from the invocation of the Twenty-Fifth Amendment as a result of a nuclear attack. One example is the first season of "Designated Survivor" which aired on television in autumn 2016. Actor Kiefer Sutherland, star of the TV series *24* (which also aired an episode dealing with a presidential succession crisis), plays a Housing and Urban Development Secretary chosen as the designated survivor during the president's inaugural address. The secretary finds himself ushered into the White House bunker as an explosion, possibly from a nuclear missile, engulfs the Capitol building.⁴⁸ This portrayal echoes the real anxieties that have existed since the dawn of the nuclear age around sudden presidential transitions.

We still live, as President John F. Kennedy said, "under the nuclear sword of Damocles... capable of being cut at any moment by accident, or miscalculation, or by

⁴⁷ Many of these soon-to-be-published works are memoirs of the individuals who framed the amendment. Former Bayh staff member Bob Blaemire is writing a Bayh biography. Blaemire will emphasize the fact that Bayh has more amendments to his name than any individual since James Madison. (Bayh can be credited with two amendments: the Twenty-Fifth and Twenty-Sixth Amendments. The Equal Rights Amendment, also sponsored by Bayh, came just a few states short of ratification.) Bob Blaemire, "Interview with Author," September 25, 2015. Feerick, too, is working on an autobiography covering his memories of the process of the Twenty-Fifth Amendment's journey and the debates over the decades that followed to dismantle or change it. Feerick will highlight the role ABA leaders played in the passage and ratification process. The goal of these works is to pass this history down to the next generation. (Some of these leaders, such as Dale Tooley, have died.) These retrospectives are a recognition of the magnitude of what was accomplished by the ratification.

⁴⁸ The trailer pictured a small mushroom cloud rising from the vicinity of the Capitol, but did not reveal further detail. See "Designated Survivor," *Abc.com* http://abc.go.com/shows/designated-survivor/video/most-recent/VDKA0_c9oq232r. Accessed July 7, 2017.

madness.”⁴⁹ The historical patterns revealed by this study of the intersection of nuclear anxiety and presidential continuity indicate that as nuclear tensions rise, government activity around the search for solutions to succession and inability problems will intensify – though we are less likely to see Sections 3 and 4 of the Twenty-Fifth Amendment invoked in cases of “madness.” The continuity of the institution of the presidency is of greater importance than any one man, and as Feerick urges, the “gaps that persist are serious and must be addressed because mass [nuclear] catastrophe, illness, or some other happenstance can occur at any time.”⁵⁰ The Bulletin of Atomic Scientists reminds us: “the Clock ticks.” Constitutional law experts, government officials, policy analysts, political scientists, and think tanks have been dominating the debate on how to remedy the remaining succession and inability issues since the Twenty-Fifth Amendment’s first invocations in the 1970s. It is time historians engaged in this dialogue.⁵¹

⁴⁹ “Address by President John F. Kennedy to the UN General Assembly,” *Department of State* (September 25, 1961), <http://www.state.gov/p/io/potusunga/207241.htm>. Accessed November 20, 2015.

⁵⁰ “Report: Ensuring the Stability of Presidential Succession in the Modern Era,” Vol. 81 No. 1, *Fordham Law Review* (October 2012), p. 25.

⁵¹ I will begin to participate in the dialogue as I have accepted John Feerick’s invitation to join a panel of constitutional law experts, political scientists, and possibly the architect of the amendment himself on September 27, 2017 at Fordham Law School.

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