

# UNIVERSITY OF PITTSBURGH LAW REVIEW

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Vol. 76 • Fall 2014

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ISSN 0041-9915 (print) 1942-8405 (online) • DOI 10.5195/lawreview.2014.319  
<http://lawreview.law.pitt.edu>



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# JOHN F. KENNEDY AND CONSTITUTIONAL ASPECTS OF PRESIDENTIAL SUCCESSION

Julia L. Ernst\*

## I. INTRODUCTION

Last year marked the fiftieth anniversary of the assassination of President John F. Kennedy. Events held throughout the United States commemorated this tragic occurrence.<sup>1</sup> Clay Jenkinson, who helped organize one of these programs, invited me to speak about some of the constitutional aspects of presidential succession at a symposium entitled *The Kennedy Legacy: 50 Years Later* on November 5–7, 2013 at Bismarck State College in North Dakota.<sup>2</sup> This essay arises out of that presentation.

I would first like to thank Clay Jenkinson, Larry Skogen, and the other conveners of this three-day event exploring President Kennedy’s legacy to the nation. Conference attendees had an opportunity to view photographs depicting President Kennedy’s historic visit to North Dakota shortly before his assassination.<sup>3</sup> As part of that visit, on September 25, 1963, President Kennedy made an hour-long stop at the University of North Dakota (“UND”) in Grand Forks, delivering a speech discussing conservation and the development of natural

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<sup>1</sup> Olga Hajishengallis, *Cities Hold Events Commemorating 50th JFK Anniversary*, USA TODAY, Nov. 20, 2013, <http://www.usatoday.com/story/news/nation/2013/11/17/jfk-anniversary-events/3576133/>.

<sup>2</sup> The symposium was hosted in 2013 by Bismarck State College with The Dakota Institute of the Lewis & Clark Fort Mandan Foundation and the State Historical Society of North Dakota. Dr. Larry C. Skogen, President of Bismarck State College and Interim Chancellor of the North Dakota University System, also spearheaded the symposium. See *The Kennedy Legacy: 50 Years Later* (Nov. 5–7 2013), <http://jfk.bscsymposium.org/index.html>.

<sup>3</sup> Some of the photographs are available online. See *The Kennedy Legacy Gallery*, <http://jfk.bscsymposium.org/kennedy-legacy-gallery.html> (last visited May 8, 2014).

resources.<sup>4</sup> UND's Chester Fritz Library, through its Department of Special Collections, has compiled digital archives of photographs from this visit.<sup>5</sup> During his brief time at UND, President Kennedy received an honorary doctorate of laws degree from the UND School of Law.<sup>6</sup> That September 1963 stopover in Grand Forks was subsequently referred to as "One Magic Hour" and was chronicled within a book by that name.<sup>7</sup> With the news in November of President Kennedy's assassination, the students, staff, faculty, and administration at UND mourned in shock along with the rest of the nation.<sup>8</sup>

As Clay Jenkinson requested, my discussion examines some of the constitutional considerations surrounding the assassination of President Kennedy, particularly focusing on presidential succession. In the chaos surrounding assassination attempts—or other instances of presidential death or disability—the implications of the Constitution might be forgotten or misinterpreted. This essay explores questions such as when was the moment in which Vice President Lyndon Baines Johnson actually became President, and why was there such a commotion about his taking of the oath of office.<sup>9</sup> In other words, in addition to the ceremonial

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<sup>4</sup> President John F. Kennedy, *University of North Dakota Address by President John F. Kennedy*, JOHN F. KENNEDY PRESIDENTIAL LIBRARY AND MUSEUM (Sept. 25, 1963), <http://www.jfklibrary.org/Asset-Viewer/Archives/JFKPOF-046-050.aspx>; see also *UND JFK Digital Archives*, UNIVERSITY OF NORTH DAKOTA, <http://und.edu/john-f-kennedy-digital-archive/> (last visited May 8, 2014).

<sup>5</sup> *UND JFK Digital Archives*, *supra* note 4. To commemorate the forty-fifth anniversary of this historic visit, UND School of Law Professor Gregory Gordon spearheaded a conference on September 25–27, 2008, entitled "John F. Kennedy: History, Memory, Legacy: an Interdisciplinary Inquiry," at which Ted Sorenson served as a primary speaker. See *John F. Kennedy: History, Memory, Legacy: An Interdisciplinary Inquiry* (John Delane Williams, Robert G. Waite & Gregory S. Gordon eds., 2010), <http://www.und.nodak.edu/instruct/jfkconference/>. Dr. Crystal Alberts, Assistant Professor in the UND Department of English, organized the compilation of the digital archives. See *Crystal Albert's CV*, UNIVERSITY OF NORTH DAKOTA ENGLISH, ARTS & SCIENCES, [http://arts-sciences.und.edu/english/\\_files/docs/cv.alberts.pdf](http://arts-sciences.und.edu/english/_files/docs/cv.alberts.pdf) (last visited May 8, 2014).

<sup>6</sup> Cecil Stoughton, *John F. Kennedy at the University of North Dakota (Photograph)*, JOHN F. KENNEDY PRESIDENTIAL LIBRARY AND MUSEUM (Sept. 25, 1963), <http://www.jfklibrary.org/Asset-Viewer/Archives/JFKWHP-ST-C310-31-63.aspx>.

<sup>7</sup> See generally ONE MAGIC HOUR: JOHN F. KENNEDY VISITS THE UNIVERSITY OF NORTH DAKOTA (Univ. of North Dakota 1963).

<sup>8</sup> The UND Digital Archives depict the flag at half-mast outside the administration building and journalism students upon hearing the news of the assassination. *UND JFK Digital Archives*, *supra* note 4.

<sup>9</sup> STEVEN M. GILLON, THE KENNEDY ASSASSINATION 24 HOURS AFTER: LYNDON B. JOHNSON'S PIVOTAL FIRST DAY AS PRESIDENT 103–43 (Basic Books 2009).

and social healing importance of taking the oath, what does this act have to do with the transition of presidential power?<sup>10</sup> Additionally, I delve briefly into the history of presidential succession in the United States, to put into historical context various constitutional issues related to President Kennedy's assassination. For example, earlier in our country's history, John Quincy Adams indicated that a Vice President does not ascend to the Presidency, but instead merely becomes the interim President, until a new election can be held.<sup>11</sup> His view was more widely held then, but subsequently fell into disfavor.<sup>12</sup> Another important aspect involves the Twenty-Fifth Amendment to the Constitution. This Amendment addresses presidential succession and establishes procedures for dealing with presidential incapacity, as well as procedures for filling the position of Vice President when a vacancy occurs.<sup>13</sup> The following analysis inquires into these historical moments, which shed light upon the subject of presidential succession pertaining to the assassination of John F. Kennedy fifty years ago.

## II. JFK'S ASSASSINATION AND LBJ'S OATH OF OFFICE

First, let us turn to the issue of Lyndon Baines Johnson's taking the oath of office, and whether that affected the moment in which he became the next President of the United States. President Kennedy's assassination occurred before the adoption of the Twenty-Fifth Amendment in 1967, which clarified the

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<sup>10</sup> *Id.* at 107 ("For Johnson, the first order of business was the oath of office. Article II of the Constitution, which deals with the [E]xecutive [P]ower of the [P]residency, stipulates that before the [P]resident 'enter on the execution of his Office' he needs to take an 'oath or affirmation.' What Johnson did not know, and no one on the plane seemed to know, was whether it was necessary to take the oath before he assumed the responsibilities of the [P]residency. Was the oath a purely ceremonial act, designed to convey a sense of unity and symbolize the power of the [P]residency, or was it constitutionally mandated that he take the oath before becoming [P]resident?").

<sup>11</sup> Robert E. Gilbert, *Presidential Disability and the Twenty-Fifth Amendment: The Difficulties Posed by Psychological Illness*, 79 *FORDHAM L. REV.* 843, 844 (2010) (quoting CHARLES F. ADAMS, *MEMOIRS OF JOHN QUINCY ADAMS, COMPRISING PORTIONS OF HIS DIARY FROM 1795 TO 1848*, at 463 (Charles Francis Adams ed., Philadelphia, Pa., J.B. Lippincott & Co. 1876) (referring to John Tyler, who had been Vice President when President William Henry Harrison died in 1841, "John Quincy Adams, a member of the House of Representatives at the time, wrote in his diary, 'I paid a visit this morning to Mr. Tyler, who styles himself President of the United States, and not Vice-President, acting as President, which would be the correct style'").

<sup>12</sup> *Id.* at 845.

<sup>13</sup> U.S. CONST. amend. XXV.

procedure for presidential succession.<sup>14</sup> Prior to that Amendment, the Constitution formerly<sup>15</sup> provided:

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.<sup>16</sup>

This entire passage consists of one sentence, and it is quite convoluted and ambiguous.<sup>17</sup> While instructing the law students in my Legislation class, I emphasize that when they are drafting statutes (or any documents), if they write a sentence that cannot be read aloud without taking a breath, that sentence is considerably too long.<sup>18</sup> Such a complex sentence as the above provision is undoubtedly vague and almost certainly leads to confusion in its application.<sup>19</sup> So, when confronted with a situation where this passage of the Constitution must be interpreted and applied, it is understandable that people were not quite certain as to

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<sup>14</sup> HERBERT L. ABRAMS, *THE PRESIDENT HAS BEEN SHOT: CONFUSION, DISABILITY, AND THE 25TH AMENDMENT* 165 (Stanford Univ. Press 1994).

<sup>15</sup> This clause was absent from the Constitution when it was initially signed in 1787, but was added in 1790 when the thirteen endorsements from the states were obtained to ratify Article II, § 1, Clause 6. See ROSE McDERMOTT, *PRESIDENTIAL LEADERSHIP, ILLNESS, AND DECISION MAKING* (2008).

<sup>16</sup> U.S. CONST. art. II, § 1, cl. 6.

<sup>17</sup> ABRAMS, *supra* note 14, at 168–69.

<sup>18</sup> For a critique of long sentences, see Wayne Schiess, *The Art of Consumer Drafting*, 11 SCRIBES J. LEGAL WRITING 1, 3–4 (2007) (quoting RUDOLF FLESCH, *HOW TO TEST READABILITY* 46 (Harper & Bros. 1951)). Rudolf Flesch, an author and expert on readable writing, identified sentence length as a problem in legal writing in 1951. See RUDOLF FLESCH, *HOW TO TEST READABILITY* 46 (Harper & Bros. 1951) (“The main trouble with most legal writing is that the sentences are far too long.”). It is difficult to pick up a book on legal writing today that does not encourage lawyers to keep sentences short. See, e.g., RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* 33 (5th ed., Carolina Academic Press 2005) (“Use short sentences.”); MARTHA FAULK & IRVING M. MEHLER, *THE ELEMENTS OF LEGAL WRITING* 5 (Macmillan 1994) (“Use short sentences for complicated thoughts.”); STEVEN D. STARK, *WRITING TO WIN: THE LEGAL WRITER: THE COMPLETE GUIDE TO WRITING STRATEGIES THAT WILL MAKE YOUR CASE—AND WIN IT* 33 (Main Street Books 1999) (“The basic rule is this: The more complicated your information is, the shorter your sentences should be.”).

<sup>19</sup> ABRAMS, *supra* note 14, at 168–69.

how the transition of power was to be effectuated, or exactly how much power would devolve, and for what length of time.<sup>20</sup> This is particularly true in such an urgent, tragic, and shocking situation as the immediate aftermath of the assassination of a sitting President, when the people at the highest levels of government are thrown into turmoil.<sup>21</sup> In the context of an assassination, the first part of the constitutional passage can be boiled down to the following: “In the case of the . . . Death [of the President], . . . the Powers and Duties of the said Office . . . shall devolve on the Vice President.”<sup>22</sup> Under one interpretation of this language, it appears that the Vice President immediately assumes the powers and duties of the President. Following this logic, the person who had been serving as Vice President automatically becomes President, and therefore does not need to take the presidential oath of office before exercising presidential powers and duties.

However, as described below, every Vice President that has succeeded a President who has been assassinated has been sworn in by a judge administering the presidential oath of office.<sup>23</sup> These actions beg the question as to whether the oath of office must be taken before the Vice President becomes the President, or whether the oath of office under such circumstances is merely a formality, yet one which every person in this position is likely to undertake for purposes of tradition and to consolidate the perceived legitimacy for the public.<sup>24</sup> Article II, Section 1, Clause 8 of the Constitution provides:

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”

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<sup>20</sup> *Id.*

<sup>21</sup> See, e.g., GILLON, *supra* note 9, at 82–83 (describing the immediate reaction to President Kennedy’s assassination by his closest advisors and other high-level officials).

<sup>22</sup> U.S. CONST. art. II, § 1, cl. 6.

<sup>23</sup> For a description of such successions, see RUTH C. SILVA, PRESIDENTIAL SUCCESSION 14–31 (Greenwood Press 1968).

<sup>24</sup> *Id.* at 37 (“On each of the seven occasions when a President has died, the Vice President has taken the oath which the Constitution prescribes for a President. It has never been seriously argued that taking this oath transforms a Vice President into a President, but such a doctrine has often been implied. For example, the Congressional Directory dates the beginning of a Vice President’s presidential term from the time he took the oath rather than from the date on which the preceding possessor of the power died.”).

This clause indicates that a person must take the oath of office prior to “enter[ing] the Execution of his Office,” but what exactly does that phrase mean? If the office of the Presidency is thrust upon him by operation of another clause of the Constitution (i.e., the Succession Clause when the prior President is assassinated), is he prohibited from taking any actions until a copy of the oath of office can be found and the ceremony can take place? Is the country deprived of a Commander-in-Chief until such steps can be taken?

With respect to another ambiguity concerning the original constitutional provision addressing succession, a question also arises as to the status of the person who had been serving as the Vice President.<sup>25</sup> Does this person remain the Vice President and simply acquire the powers and duties of the President in addition to his<sup>26</sup> vice-presidential duties; does he cease to be the Vice President and become the acting President; or does he cease to be the Vice President and officially become the next sitting President?<sup>27</sup> Another complication arises in instances where the President has not died, resigned, or been removed from office (i.e., impeached), but instead faces an “Inability to discharge the Powers and Duties of the said Office,” such as a temporary disability.<sup>28</sup> In what position does this leave the Vice President regarding the three options delineated above? And does this determination affect the way in which the first question is answered, regarding the situation where the prior President no longer holds that position (due to death, removal, or resignation)?

The second part of the passage adds another layer of complexity to this analysis. It can be boiled down to the following paraphrase: “If both the President and Vice President are removed, die, resign, or become incapacitated, then Congress may declare who shall ‘act as President’ until the disability is removed (in the case of incapacitation), or until a President is elected (in the case of death, removal, or resignation).” This restatement of the original constitutional provision seems to indicate that such a person may only “act as President,” and is therefore the acting President, yet this is not necessarily the only plausible interpretation.<sup>29</sup>

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<sup>25</sup> *Id.* at 1–13.

<sup>26</sup> For purposes of clarity, consistency, and brevity, this essay uses masculine pronouns when referring to the positions of President and Vice President, since men have historically held these positions.

<sup>27</sup> Gilbert, *supra* note 11, at 844. *See generally* SILVA, *supra* note 23.

<sup>28</sup> SILVA, *supra* note 23, at 1–13.

<sup>29</sup> *Id.*

But if the phrase is interpreted in this way, does this mean that the prior phrase in the passage also means that the Vice President shall serve as the acting President (which would give both phrases a parallel construction), which seems to be a plausible reading? Or since the term “act as President” was not used in the prior phrase, does this mean that the Vice President in fact becomes the President (recall the wording that “the Powers and Duties of the said Office . . . shall devolve on the Vice President”)?<sup>30</sup>

One rule used in interpreting ambiguous documents is that when a word or phrase is used in one part of the document but not in another part, that phrase should not be read into the provision where it is absent.<sup>31</sup> Under this rule of construction, since the first phrase of the constitutional provision does not indicate that the Vice President will merely “act as President,” the Vice President becomes the President. The Twentieth Amendment to the Constitution also supports the interpretation that the Vice President becomes the actual President when the prior President has passed away: “If, at the time fixed for the beginning of the term of the President, if the President elect shall have died, the Vice President elect *shall become President.*”

These are all questions without clear answers, at least from a direct reading of the text of the Constitution. In light of the above questions, it may well be that in the aftermath of President Kennedy’s assassination, Lyndon Baines Johnson wanted to affirm, solidify, and legitimize his claim to the Presidency through the ceremony of taking the presidential oath of office as soon as possible after President Kennedy’s death. The act of taking the oath would also help to stem the possibility of heightening unrest and instability under which the country was already reeling due to the tragedy. His assumption of the Presidency would provide a stabilizing factor to which the American public could cling and regain its constancy. It would also assure the continuity of strong leadership at the helm of

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<sup>30</sup> *Id.* at 26 n.61 (“Senator Fessenden’s conclusion that Johnson actually was the President had two bases: (1) The succession clause makes a distinction between a Vice President upon whom the presidential *office devolves* and an officer designated by Congress to *act as President*. (2) Both Tyler and Fillmore took the oath of President, assumed the name and designation, and were recognized as President with the universal assent of the nation.”).

<sup>31</sup> WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT; *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 867 (4th ed. 2007) (“A wedding of *expressio unius* and consistent usage is the rule that [w]here Congress includes particular language in one section of a statute but omits it in another, . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” (internal quotations and citations omitted)).



the government, to prevent other nefarious forces, whether domestic or foreign, from attempting to take advantage of the situation. And of course, it may also have been, in part, a result of a very powerful and ambitious politician seizing the moment and grasping the reins of the Presidency when they became unexpectedly available. Moreover, as we shall see, Lyndon Baines Johnson was following in the footsteps of previous Vice Presidents who succeeded to the Presidency as a result of an assassination or the death of a President for other reasons.

### III. HISTORICAL PRECEDENTS FROM PRIOR PRESIDENTIAL ASSASSINATIONS AND DEATHS

In order to put President Kennedy's death into historical context, let's briefly consider other moments in time when the nation has faced a crisis of succession due to a presidential assassination. Of course we are all very familiar with the assassination of the sixteenth President, Abraham Lincoln, by John Wilkes Booth at the Ford Theater in Washington, D.C. on April 14, 1865, at the end of the Civil War.<sup>32</sup> General Robert E. Lee had surrendered to Lieutenant General Ulysses S. Grant only five days before.<sup>33</sup> As a Confederate sympathizer, Booth hoped that the death of President Lincoln would alter the government's policy toward the Southern states.<sup>34</sup> His coconspirators planned to kill both Vice President Andrew Johnson and Secretary of State William Seward, intending to eliminate the three most powerful federal officials and cause chaos within the United States government.<sup>35</sup> Although President Lincoln died within ten hours of being shot, Secretary Seward survived his wound, and Vice President Johnson's would-be assailant changed his mind and fled, leaving Johnson to ascend to the Presidency.<sup>36</sup> Chief Justice Salmon P. Chase of the United States Supreme Court presided over Andrew Johnson's swearing-in just a few hours after President Lincoln's death, with most of President Lincoln's Cabinet members in attendance.<sup>37</sup> During his term

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<sup>32</sup> Kyndra Rotunda, *A Comparative Historical Analysis of War Time Procedural Protections and Presidential Powers: From the Civil War to the War on Terror*, 12 CHAP. L. REV. 449, 451 (2009).

<sup>33</sup> Richard L. Aynes, *The 39th Congress (1865–1867) and the 14th Amendment: Some Preliminary Perspectives*, 42 AKRON L. REV. 1019, 1028–29 n.49 (2009).

<sup>34</sup> *Id.* at 1028–29; *see also id.* at n.49.

<sup>35</sup> *Id.* at 1028–29; *id.* at n.49; *see also* Rotunda, *supra* note 32, at 451.

<sup>36</sup> Michal R. Belknap, *Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 CAL. W. L. REV. 433, 462–63 (2002); Rotunda, *supra* note 32, at 451.

<sup>37</sup> Robert F. Blomquist, *The Presidential Oath, The American National Interest and a Call for Presiprudence*, 73 UMKC L. REV. 1, 7 n.82 (2004).

as President, from April 15, 1865 through March 4, 1869, the position of Vice President remained vacant.<sup>38</sup>

Perhaps less well remembered is the assassination of James Garfield, the twentieth President, less than four months after he assumed office. He was shot on July 2, 1881 by Charles J. Guiteau, who had unsuccessfully tried to persuade President Garfield to give him an ambassadorial appointment.<sup>39</sup> The assassination took place at the Baltimore and Potomac Railroad Station in Washington, D.C.<sup>40</sup> Secretary of War Robert Todd Lincoln, who was with President Garfield at the train station to see him off on his trip, was President Abraham Lincoln's son and experienced deep personal suffering through these two assassinations.<sup>41</sup> President Garfield survived for eleven weeks, during which he held one Cabinet meeting and completed one official act—the signing of an extradition paper.<sup>42</sup> During those eighty days of his convalescence, Congress was not in session, as it traditionally did not meet during the hot summer months, so President Garfield's incapacity did not pose a significant obstacle to the functioning of the federal government.<sup>43</sup> Although Secretary of State James G. Blaine suggested that the Cabinet should declare Chester A. Arthur to be acting President, both the Cabinet and Vice President Arthur declined.<sup>44</sup> Garfield eventually succumbed to infections caused by his wounds on September 19, 1881.<sup>45</sup> Chester Arthur was in New York City at his home when he received the official news of President Garfield's death. A New York Supreme Court Justice administered the presidential oath of office. When Arthur returned to Washington, D.C., he took the oath of office a second time, administered by Chief Justice Morrison R. Waite, so it would be confirmed in the

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<sup>38</sup> David A. Erhart, "I am in Control Here": *Constitutional and Practical Questions Regarding Presidential Succession*, 51 U. LOUISVILLE L. REV. 323, 345–46 (2013); see also Richard K. Neumann Jr., *The Revival of Impeachment as a Partisan Political Weapon*, 34 HASTINGS CONST. L.Q. 161, 225 (2007).

<sup>39</sup> Patrick W. Kelley, *The Right of Federal Employees to Sue Their Supervisors for Injuries Consequent Upon Constitutional Violations*, 108 MIL. L. REV. 211 (1985).

<sup>40</sup> William F. Baker & Beth A. FitzPatrick, *Presidential Succession Scenarios in Popular Culture and History and the Need for Reform*, 79 FORDHAM L. REV. 835, 841 (2010).

<sup>41</sup> See generally JASON EMERSON, *GIANT IN THE SHADOWS: THE LIFE OF ROBERT T. LINCOLN* (2012).

<sup>42</sup> John D. Feerick, *Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment*, 79 FORDHAM L. REV. 907, 919 (2010).

<sup>43</sup> *Id.* at 840–41.

<sup>44</sup> *Id.* at 840.

<sup>45</sup> Kelley, *supra* note 39, at 211.

official records of the United States Supreme Court.<sup>46</sup> During his term in office, from September 19, 1881 through March 4, 1885, President Arthur did not have a Vice President.<sup>47</sup> In fact, raising even more troubling questions of presidential succession, “[w]hen Vice President Arthur succeeded to the Presidency, there was no Vice President, no President *pro tempore* of the Senate, and no Speaker of the House of Representatives—in short, no constitutional successor to the Presidency.”<sup>48</sup>

The twenty-fifth President, William McKinley, was shot on September 6, 1901 by an assassin, Leon Czolgosz, a self-proclaimed anarchist.<sup>49</sup> President McKinley had been attending the Pan-American Exposition at the Temple of Music in Buffalo, New York.<sup>50</sup> After doctors performed surgery to remove the bullet, they provided an optimistic prognosis. Thereafter, his Vice President, Theodore Roosevelt, and the cabinet members who had gathered in Buffalo dispersed.<sup>51</sup> President McKinley died eight days later on September 14.<sup>52</sup> Vice President Theodore Roosevelt had been vacationing deep in the woods in the Adirondacks, miles from any form of communication, and a ranger was sent to find him.<sup>53</sup> United States District Judge John Hazel subsequently swore him in as President.<sup>54</sup> At the time, Roosevelt was only forty-two years old.<sup>55</sup> For the remainder of his first term in office, he had no Vice President, and Charles Warren Fairbanks served as President Roosevelt’s Vice President during his second term.<sup>56</sup> As a result of this

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<sup>46</sup> SILVA, *supra* note 23, at 27–28.

<sup>47</sup> Richard Albert, *The Evolving Vice Presidency*, 78 TEMP. L. REV. 811, 866 n.387 (2005).

<sup>48</sup> Feerick, *supra* note 42, at 919; *see also* MCDERMOTT, *supra* note 15, at 198.

<sup>49</sup> *See generally* LeRoy Parker, *The Trial of the Anarchist Murderer Czolgosz*, 11 YALE L.J. 80 (1901).

<sup>50</sup> *Id.* at 80.

<sup>51</sup> William F. Brown & Americo R. Cinquegrana, *The Realities of Presidential Succession: “The Emperor Has No Clones,”* 75 GEO. L.J. 1389, 1396 n.23 (1987).

<sup>52</sup> Parker, *supra* note 49, at 80.

<sup>53</sup> Brown & Cinquegrana, *supra* note 51, at 1396 n.23; Henry S. Cohn, *Colonel Roosevelt by Edmund Morris*, FED. LAW., Mar./Apr. 2011, at 70, 71 (book review).

<sup>54</sup> SILVA, *supra* note 23, at 28 (A cabinet member, Elihu Root, “thought it ‘vastly important’ that Roosevelt be sworn in as President, as Arthur had been, so that there would be no opportunity for ‘misunderstanding or misrepresentation in the then naturally excited condition of public feeling.’”).

<sup>55</sup> Cohn, *supra* note 53, at 71.

<sup>56</sup> Albert, *supra* note 47, at 866 n.388.

third assassination of a sitting President, Congress decided to provide a full-time security detail to the President, charging the United States Secret Service, which had originally been created to prevent counterfeiting, with this additional responsibility.<sup>57</sup>

These three assassinations preceded the death of President John F. Kennedy, the thirty-fifth President, in Dallas in 1963. Numerous other Presidents have survived assassination attempts, both before and since President Kennedy. During the last century, nearly half of the men serving as President experienced physical assaults.<sup>58</sup> At least fifteen attempts to murder Presidents-elect, sitting Presidents, and presidential candidates have been made public.<sup>59</sup> For example, some years after he left the office of the President, Theodore Roosevelt decided to run for President once again. During his campaign, he was shot immediately prior to a major speech he was to deliver in Milwaukee, Wisconsin on October 14, 1912.<sup>60</sup> The bullet penetrated his metal eyeglasses case, as well as his folded fifty-page speech, before coming to rest in his chest.<sup>61</sup> Instead of being deterred, the wounded Teddy Roosevelt continued on to give an hour and a half speech with blood seeping through his shirt before departing to seek treatment. Former President Roosevelt reportedly opened his talk with the comment: “Ladies and gentlemen, I don’t know whether you fully understand that I have just been shot; but it takes more than that to kill a Bull Moose.” Although he did not win the election, he survived the assault, and since it was safer to leave the bullet where it was than to remove it, he carried the bullet in his chest for the rest of his life, until his passing on January 6, 1919 when he was sixty years old.

Additional Presidents who have survived assassination attempts include Andrew Jackson, Herbert Hoover, Franklin D. Roosevelt, Harry S. Truman,

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<sup>57</sup> Stephen M. Rochford, Jr., *To Protect and Suppress: Why a Protective Function Privilege Is Bad for America*, 20 WHITTIER L. REV. 987, 996 (1999) (“Public outcry over a third presidential assassination in thirty-six years led President Theodore Roosevelt, shortly after succeeding McKinley, . . . [to assign] the Secret Service to provide around-the-clock protection for the President.”) (quoting GEORGE MATUSKY & JOHN P. HAYES, *KNOW YOUR GOVERNMENT: THE U.S. SECRET SERVICE* 34 (Nancy Toff ed., 1988)).

<sup>58</sup> ROBERT E. GILBERT, *THE MORTAL PRESIDENCY: ILLNESS AND ANGUISH IN THE WHITE HOUSE* 1 (1998).

<sup>59</sup> Frederick M. Kaiser, *Direct Assaults Against Presidents, Presidents-Elect, and Candidates*, CRS REPORTS FOR CONGRESS (Jan. 7, 2008), <http://fas.org/sgp/crs/misc/RS20821.pdf>.

<sup>60</sup> Cohn, *supra* note 53, at 71.

<sup>61</sup> *Id.*

Richard Nixon, Gerald Ford,<sup>62</sup> and Jimmy Carter, among others more recently, who are discussed briefly below.

There have been other instances of presidential succession upon the death of a President as well, the first of which occurred in 1841 when William Henry Harrison became the first sitting President to perish.<sup>63</sup> After President Harrison died, “Vice President Tyler had insisted on assuming the *office* of the [P]residency,”<sup>64</sup> instead of merely assuming the powers and duties of the President as Vice President, or merely becoming acting President.<sup>65</sup> Notably, “[a]lthough Tyler thought himself qualified to exercise presidential power without any oath other than the one he had taken as Vice President, he took the presidential oath so that doubt could not arise concerning the legality of his acts as Chief Executive.”<sup>66</sup> Thus, John Tyler became the tenth President of the United States on April 4, 1841. Through this action, he established the “Tyler Precedent” that when a Vice President succeeds to the Presidency, he becomes the next official President of the United States,<sup>67</sup> despite the fact that the Constitution as written did not make this transition entirely clear.<sup>68</sup>

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<sup>62</sup> GILBERT, *supra* note 58, at 266.

<sup>63</sup> GILLON, *supra* note 9, at 62. *See also* SILVA, *supra* note 23, at 14–25.

<sup>64</sup> ABRAMS, *supra* note 14, at 169; *see also* SILVA, *supra* note 23, at 14–25.

<sup>65</sup> Robert E. Gilbert, *Presidential Disability and the Twenty-Fifth Amendment: The Difficulties Posed by a Psychological Illness*, 79 *FORDHAM L. REV.* 843, 844 (2010); *see also* SILVA, *supra* note 23, at 14–25.

<sup>66</sup> SILVA, *supra* note 23, at 168. Interestingly, the Constitution does not provide for an oath of office for the Vice President, so Congress created the vice presidential oath via statute. JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* 30 (3d ed. 2014) (“In contrast to its prescribed oath of office for the President, the Constitution prescribed no oath for the Vice President; one had to be created by an act of Congress of June 1, 1789.”).

<sup>67</sup> GILBERT, *supra* note 58, at 845; *see also* SILVA, *supra* note 23, at 14–25.

<sup>68</sup> *See* McDERMOTT, *supra* note 15, at 197 (“This section of the Constitution does not discuss the [V]ice [P]resident taking over the [P]resident’s job in full, but rather as serving temporarily until the [P]resident recovers or a presidential election is held.”); *id.* at 198 (“In 1841 Vice President John Tyler took the oath of office after William Harrison died exactly one month after he caught pneumonia at his inauguration, thus overriding the earlier understanding of temporary service and setting a precedent for full succession.”); *see also* GILBERT, *supra* note 58, at 267 (“Presidential death was anticipated and provided for by the Framers of the Constitution who established the principle of vice-presidential succession. It was not clear, however, whether the Framers intended the [V]ice [P]resident, in the case of presidential death, to assume the office of the [P]residency itself or only the ‘powers and duties’ of the office as acting [P]resident. While it would certainly appear that the latter was the case, this constitutional ambiguity was effectively resolved by the first [V]ice [P]resident to replace a [P]resident who had died in office. In 1841, John Tyler insisted, after William Henry Harrison’s untimely death, that he had

#### IV. PRESIDENTIAL SUCCESSION STATUTES AND THE TWENTY-FIFTH AMENDMENT

Congress enacted statutes in 1792, 1886, and 1947 to establish a longer line of succession in the event that both the President and the Vice President should die in office.<sup>69</sup> According to the Presidential Succession Act of 1792, which was signed into law by President George Washington, the President pro tempore of the Senate<sup>70</sup> and the Speaker of the House of Representatives<sup>71</sup> became next in the line of succession.<sup>72</sup> The President pro tempore of the Senate is traditionally the most senior member of the majority party.<sup>73</sup>

The Presidential Succession Act of 1886 followed upon challenges that arose during several experiences with the line of succession in the mid-1800s. The assassination of President Garfield gave rise to the Presidency of Chester Arthur in 1881, and President Grover Cleveland's Vice President died in office in 1885.<sup>74</sup> In both circumstances, neither chamber of Congress had elected their senior officers due to political disputes.<sup>75</sup> Therefore, the positions of President pro tempore of the

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inherited the office itself and was, therefore, President of the United States rather than acting [P]resident. He even took the presidential oath to symbolically demonstrate that he had become the tenth President of the United States. When Tyler's assertion went essentially unchallenged by Congress, it created a powerful precedent which Millard Fillmore, Andrew Johnson, Chester Arthur, Theodore Roosevelt, Calvin Coolidge, Harry Truman, and Lyndon Johnson all followed upon the death of their predecessors." (footnotes omitted); *see also* SILVA, *supra* note 23, at 14.

<sup>69</sup> Erhart, *supra* note 38, at 329.

<sup>70</sup> Under the Constitution, "The Vice President of the United States shall be President of the Senate but shall have no Vote, unless they be equally divided. The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States." U.S. CONST. art. 1, § 3, cl. 4–5.

<sup>71</sup> Under the Constitution, the members of the House select the Speaker: "The House of Representatives shall chuse their Speaker and other Officers. . . ." U.S. CONST. art. 1, § 2, cl. 5.

<sup>72</sup> Erhart, *supra* note 38, at 330.

<sup>73</sup> Richard Albert, *The Constitutional Politics of Presidential Succession*, 39 HOFSTRA L. REV. 497, 506 (2011) (footnotes omitted) ("The post of Senate President pro tempore has historically been held by the senior-most Senator of the majority party, and it is perhaps no secret why. When the Senate's presiding officer is absent from the chamber, the duties of presiding over the Senate fall to the Senate President pro tempore, who fills those shoes 'for the time being' while that officer is away. Insofar as the Constitution names an officeholder of great stature as the official President of the Senate—the Vice President of the United States—it therefore demands someone of significant stature to replace him, and there can be fewer more appropriate candidates than the majority party's elder member.").

<sup>74</sup> Erhart, *supra* note 38, at 330–31.

<sup>75</sup> *Id.*; *see also* MCDERMOTT, *supra* note 15, at 198.

Senate and Speaker of the House of Representatives were also vacant, leaving no one in the line of succession.<sup>76</sup> As a result of this disruption of the line of succession, Congress passed new legislation establishing that the next official in line after the Vice President was the Secretary of State, and thereafter came the other members of the President's cabinet in the order in which their departments had originally been formed.<sup>77</sup>

When President Franklin D. Roosevelt died, leaving Harry Truman as his successor, President Truman proposed a revision to the presidential succession legislation, bringing back the highest congressional officials into the line of succession but switching their order.<sup>78</sup> Under the Presidential Succession Act of 1947,<sup>79</sup> the Speaker of the House of Representatives is next in line after the Vice President, then the President pro tempore of the Senate.<sup>80</sup> The line of succession then moved to the cabinet in the order in which the departments were created, which has been updated by more recent amendments to the act: State, Treasury, Defense (previously named the Department of War), Justice, Interior, Agriculture, Commerce, Labor, Health and Human Services, Housing and Urban Development, Transportation, Energy, Education, Veterans Affairs, and Homeland Security.<sup>81</sup> Bringing elected congressional officials back into the line of succession responded to concerns that having unelected members of the President's cabinet serve as acting President was undemocratic, since they had not been chosen via elections.<sup>82</sup> However, doing so may have reinstated a potential constitutional quandary, since the Constitution indicates that: "Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected."<sup>83</sup>

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<sup>76</sup> Erhart, *supra* note 38, at 330–31; *see also* MCDERMOTT, *supra* note 15, at 198.

<sup>77</sup> Erhart, *supra* note 38, at 330–31.

<sup>78</sup> *Id.* at 332.

<sup>79</sup> Presidential Succession Act, 3 U.S.C. § 19 (2012).

<sup>80</sup> Erhart, *supra* note 38, at 333.

<sup>81</sup> ABRAMS, *supra* note 14, 113–120, 167; Erhart, *supra* note 38, at 349 (citing Brown & Cinquegrana, *supra* note 51, at 1431).

<sup>82</sup> MCDERMOTT, *supra* note 15, at 198; *see also* GILBERT, *supra* note 58, at 268.

<sup>83</sup> BRIAN C. KALT, CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES 83–105 (2012); *see generally* Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113 (1995).

The contention is that the term “Officer” signifies an official in the Executive Branch, and that members of Congress are not “Officers” within the meaning of this term; therefore, their inclusion in the presidential succession statutes is unconstitutional.<sup>84</sup> As a practical matter, it may also be easier for a person serving as a top official in the Executive Branch to assume the presidential duties than it would be for a member of the Legislative Branch.<sup>85</sup> Furthermore, having only officials from the Executive Branch in the line of succession would prevent a situation in which a member of the other party would take over the Executive Branch (potentially causing disruption, as well as greater reluctance to invoke the provision), as could easily happen with members of Congress being in the line of succession.<sup>86</sup> Moreover, since members of Congress would have to give up their positions in Congress in order to become the acting President, however temporarily, this may lead to reluctance on their parts to do so.<sup>87</sup> Since the members of Congress are only elected by constituents within their own states or districts, and not via national elections, the claim that they would better represent the democratic process is also questionable, especially since the President is now able to nominate a Vice President to fill that vacancy.<sup>88</sup> These problems have led scholars such as Brian Kalt, Akhil Reed Amar, and Vikram David Amar to call for a revision to the presidential succession legislation to remove the members of Congress from the line of succession.<sup>89</sup>

As noted previously, numerous questions remained unanswered by the constitutional provision dealing with presidential succession as it was originally written, as well as by the Presidential Succession Acts. This was aptly highlighted near the beginning of the country’s founding by John Quincy Adams’ assertion that Vice Presidents only act as interim Presidents and do not officially assume the Presidency.<sup>90</sup> Although prior assassinations and deaths had resulted in Vice Presidents taking the office of the Presidency, this ambiguity could in the future

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<sup>84</sup> KALT, *supra* note 83, at 83–105; *see generally* Amar & Amar, *supra* note 83.

<sup>85</sup> KALT, *supra* note 83, at 83–105; *see generally* Amar & Amar, *supra* note 83.

<sup>86</sup> KALT, *supra* note 83, at 83–105; *see generally* Amar & Amar, *supra* note 83.

<sup>87</sup> KALT, *supra* note 83, at 83–105; *see generally* Amar & Amar, *supra* note 83.

<sup>88</sup> KALT, *supra* note 83, at 83–105; *see generally* Amar & Amar, *supra* note 83.

<sup>89</sup> KALT, *supra* note 83, at 83–105; *see generally* Amar & Amar, *supra* note 83.

<sup>90</sup> SILVA, *supra* note 23, at 21 (“Old John Quincy Adams certainly did not agree with Tyler on his interpretation of the succession clause.”).



create a legal limbo if not addressed explicitly.<sup>91</sup> Moreover, as we have seen, the Constitution failed to provide for the selection of a new Vice President in the event that the sitting Vice President assumed the Presidency or if the Vice President in office was otherwise removed.<sup>92</sup> Since there was still no procedure for filling the office of the Vice Presidency, this position had therefore been left vacant under numerous Presidencies.<sup>93</sup> Another problem was that “neither the Constitution nor the Succession Act provided for a temporarily disabled [P]resident to relinquish the powers of his office, and then reclaim them if and when his condition improved.”<sup>94</sup> The problem of presidential incapacity was highlighted, for example, after President Woodrow Wilson’s stroke left him incapacitated for the last eighteen months of his Presidency, whereupon “Edith Boling Galt, Wilson’s second wife, with the acquiescence of his doctor, Cary T. Grayson, essentially ran, or in many cases failed to run, the U.S. government in his stead.”<sup>95</sup> President Dwight D. Eisenhower was also concerned that his health problems would result in a vacuum in presidential leadership. He therefore initiated an arrangement memorialized in a letter to Vice President Richard Nixon, whereby the Vice President would “make the decision to take over in the event he ever became so disabled as to be unable to recognize it. His letter became the basis for similar arrangements by Presidents Kennedy and Johnson, and the inspiration for the Twenty-Fifth Amendment.”<sup>96</sup>

To address these concerns, after the assassination of John F. Kennedy in 1963, Congress adopted the Twenty-Fifth Amendment in July of 1965.<sup>97</sup> The full

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<sup>91</sup> ABRAMS, *supra* note 14, at 169 (“What was needed was a law that confirmed the Tyler precedent in cases of the death or resignation of the [P]resident, but allowed for the interim assumption of presidential power in the event of temporary presidential inability.”).

<sup>92</sup> GILBERT, *supra* note 58, at 270.

<sup>93</sup> *Id.* (“Between 1789 and 1967, vacancies in the [V]ice [P]residency were not uncommon. Seven [V]ice [P]residents died in office during that time period (George Clinton, Elbridge Gerry, William King, Henry Wilson, Thomas Hendricks, Garret Hobart, and James Sherman), one resigned (John Calhoun), and eight vacated the office to succeed to the [P]residency (Tyler, Fillmore, Andrew Johnson, Arthur, Theodore Roosevelt, Coolidge, Truman, and Lyndon Johnson). During this time, therefore, the [V]ice [P]residency was vacated on sixteen occasions, and it remained vacant until the next election.” (footnotes omitted)).

<sup>94</sup> ABRAMS, *supra* note 14, at 167.

<sup>95</sup> MCDERMOTT, *supra* note 15, at 46.

<sup>96</sup> CLARENCE G. LASBY, EISENHOWER’S HEART ATTACK: HOW IKE BEAT HEART DISEASE AND HELD ON TO THE PRESIDENCY 245 (1997).

<sup>97</sup> ABRAMS, *supra* note 14, at 176. For comprehensive overviews and critiques of the Twenty-Fifth Amendment, see generally Rodney Brazier, *Defects in the Twenty-Fifth Amendment to the United States*

text of the Twenty-Fifth Amendment is somewhat long, but reading it in its entirety can be helpful. It provides 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 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

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*Constitution*, 8 ANGLO-AM. L. REV. 261 (1979); Fordham University School of Law's Clinic on Presidential Succession, *Ensuring the Stability of Presidential Succession in the Modern Era*, 81 FORDHAM L. REV. 1 (2012); Jim Ronan, *One Heartbeat from Disaster: The Dangerous History of Presidential Succession and the Creation of the 25th Amendment* (2011), available at [http://citation.allacademic.com/meta/p525242\\_index.html](http://citation.allacademic.com/meta/p525242_index.html); Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155 (1995); THOMAS H. NEALE, CONG. RESEARCH SERV., RL31761, PRESIDENTIAL AND VICE PRESIDENTIAL SUCCESSION: OVERVIEW AND CURRENT LEGISLATION (2004); John D. Feerick, *The Twenty-Fifth Amendment: An Explanation and Defense*, 30 WAKE FOREST L. REV. 481 (1995).

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.

This Amendment illuminates the process and result of presidential succession. For example, when a President dies in office, is removed from office, or resigns from office, the amendment elucidates that “the Vice President shall become President” in such circumstances.<sup>98</sup> This provision clarifies the prior language, which, as discussed above, had provided that “the Powers and Duties of the said Office . . . shall devolve on the Vice President.”<sup>99</sup> To this date, this provision has been utilized one time, when President Richard Nixon resigned in the face of his impending impeachment, leading to Gerald Ford becoming the next President.<sup>100</sup> Interestingly, neither the Twenty-Fifth Amendment nor the presidential succession statutes provide for a catastrophic situation, such as a nuclear attack, in which all of the people in the entire line of succession are killed or incapacitated.<sup>101</sup>

In Section 2, the Twenty-Fifth Amendment provides that “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.”<sup>102</sup> This addressed a significant gap in the Constitution that had not been dealt with previously, resulting in several Presidents serving without the benefit of having Vice Presidents. This provision has been used twice thus far, both in the context of Nixon’s Watergate scandal.<sup>103</sup> When Vice President Spiro Agnew was implicated as participating in allegedly criminal activities, he resigned, and Nixon nominated Gerald Ford to be the new Vice President.<sup>104</sup> Upon Nixon’s resignation, as noted above, Gerald Ford became President (as the first President never to have been elected in a national campaign—either as President or as Vice

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<sup>98</sup> U.S. CONST. amend. XXV, § 1; ABRAMS, *supra* note 14, at 176.

<sup>99</sup> U.S. CONST. art. II, § 1, cl. 6.

<sup>100</sup> MCDERMOTT, *supra* note 15, at 201.

<sup>101</sup> *Id.* at 218. See also THOMAS H. NEALE, CONG. RESEARCH SERV., RL32969, PRESIDENTIAL SUCCESSION: AN OVERVIEW WITH ANALYSIS OF LEGISLATION PROPOSED IN THE 109TH CONGRESS I (2005). This report provides a thorough analysis of the Twenty-Fifth Amendment and an overview of issues concerning presidential succession that remain unresolved.

<sup>102</sup> U.S. CONST. amend. XXV, § 2; ABRAMS, *supra* note 14, at 176–77.

<sup>103</sup> MCDERMOTT, *supra* note 15, at 201; see also GILBERT, *supra* note 58, at 270.

<sup>104</sup> MCDERMOTT, *supra* note 15, at 201.

President).<sup>105</sup> Ford then selected Nelson Rockefeller to become his Vice President.<sup>106</sup> They served as the only unelected executive branch officials to date.<sup>107</sup>

The amendment also provides for a process to be followed if a President should become incapacitated. To recap this provision, it indicates that:

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.<sup>108</sup>

This provision has proven to be more controversial, and its usage more political, than it might seem at first glance. Since its ratification, this provision has been employed twice, once in 1985 during President Ronald Reagan's surgery for colon cancer (although whether it was officially invoked is contested), and once in 2002 during President George Bush's colonoscopy.<sup>109</sup>

Finally, if the President cannot declare himself unable to discharge the powers and duties of his office, or if he is unwilling to do so, the Vice President along with a majority of cabinet officials may transmit to the congressional leaders a written declaration of the President's incapacity.<sup>110</sup> In this instance, "the Vice President shall immediately assume the powers and duties of the office as Acting President."<sup>111</sup> The President can refute this declaration with his own written declaration that he is fit to serve as President.<sup>112</sup> If a dispute results between the President and the Vice President over the fitness of the President, then the matter is

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> U.S. CONST. amend. XXV, § 3. For an excellent analysis of the Twenty-Fifth Amendment and presidential incapacity, see generally *MANAGING CRISIS: PRESIDENTIAL DISABILITY AND THE 25TH AMENDMENT* (Robert E. Gilbert ed., 2000).

<sup>109</sup> MCDERMOTT, *supra* note 15, at 201–05.

<sup>110</sup> U.S. CONST. amend. XXV, § 4; ABRAMS, *supra* note 14, at 177.

<sup>111</sup> U.S. CONST. amend. XXV, § 4; ABRAMS, *supra* note 14, at 177.

<sup>112</sup> U.S. CONST. amend. XXV, § 4; ABRAMS, *supra* note 14, at 177.

to be resolved by Congress.<sup>113</sup> The Amendment requires a two-thirds vote in both congressional chambers to declare that the President remains unable to discharge the powers and duties of his office, in which case the Vice President would continue to serve as acting President.<sup>114</sup> Otherwise, the President resumes the powers and duties of his office.<sup>115</sup> Some ambiguities remain in this provision regarding who is in charge while the dispute is playing out, but at least it provides more certainty than the previous provision.<sup>116</sup>

The requisite number of states—thirty-eight—ratified the Amendment on February 10, 1967.<sup>117</sup> On February 23 of that year, the ratification of the Twenty-Fifth Amendment was certified.<sup>118</sup> Nine additional states subsequently ratified the Amendment after its coming into force. Only three states—Georgia, South Carolina, and North Dakota—have not ratified the Twenty-Fifth Amendment, but of course it remains in effect throughout the country nonetheless.

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<sup>113</sup> U.S. CONST. amend. XXV, § 4; ABRAMS, *supra* note 14, at 177.

<sup>114</sup> U.S. CONST. amend. XXV, § 4; ABRAMS, *supra* note 14, at 177.

<sup>115</sup> U.S. CONST. amend. XXV, § 4; ABRAMS, *supra* note 14, at 177.

<sup>116</sup> One scholar has asserted, “[d]uring the interval of congressional review, the [V]ice-[P]resident would continue to serve as acting [P]resident.” ABRAMS, *supra* note 14, at 177. That may be the prevailing belief, yet I would suggest that the language contains sufficient ambiguity that a President could challenge that assessment. Consider the following provision: “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.” U.S. CONST. amend. XXV, § 4 (emphasis added). According to this language, the President immediately resumes the powers and duties of his office, unless his decision is contested within four days. Who is in charge between the time the President has reclaimed his powers and duties and the deadline—up to four days later—by which the Vice President and cabinet officials contest that determination? Does the Vice President remain in charge until the deadline lapses? Or does the President regain his powers until the Vice President and others transmit the proper documentation? If so, once the documentation is submitted, do the powers then revert from the President back to the Vice President, or does the President retain his powers until a contrary decision is made by two-thirds of both chambers of Congress? The phrasing at the end of the section seems to indicate that the Vice President acts as President during this time (“the Vice President shall *continue* to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office”), but a plausible argument to the contrary could also be made. *Id.*; see also KALT, *supra* note 83, at 61–82.

<sup>117</sup> ABRAMS, *supra* note 14, at 176.

<sup>118</sup> *Id.*

The use of the Twenty-Fifth Amendment during instances of presidential incapacity has been inconsistent.<sup>119</sup> As we know, the most recent assassination attempt that resulted in injury to a sitting President involved President Ronald Reagan on March 30, 1981, who was the first sitting President to survive such an attempt.<sup>120</sup> One account describes that:

[a]s the news of the attack on the [P]resident spread rapidly to all corners of the country, no reaction was more universally experienced than the recall of the picture of the mortally wounded John Kennedy in 1963. Everywhere, the fear and horror that the nation would once more undergo the agony of a lost [P]resident dominated the thinking and consciousness of the people.<sup>121</sup>

Although the Twenty-Fifth Amendment could have been invoked during President Reagan's surgeries and convalescence in the aftermath of the shooting, it was not, although some claim that it should have.<sup>122</sup> Later in his Presidency, Reagan did invoke the Twenty-Fifth Amendment to have George H.W. Bush serve as acting President while Reagan underwent colon surgery.<sup>123</sup> As noted above, President George W. Bush also utilized the Twenty-Fifth Amendment during his colonoscopy in 2002.<sup>124</sup>

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<sup>119</sup> Moreover, questions remain about the topic of incapacity as a path to temporary succession. When is the moment of succession in the case of incapacity? Is it the moment the incapacity occurs, or is it when Congress approves the transfer of power? If the President is shot and unresponsive, is it the moment he is shot, or the moment it becomes clear that an acting President is required, or the moment Congress receives notice? Do those minutes, hours, or days matter? Consider, for example, who has the power to act as Commander-in-Chief during this time period? Who would respond to a nuclear attack, if hostile forces decided to take advantage of the situation? I appreciate the insights of my Burtness Scholar Research Assistant, Kendra Olson, who prompted these questions. As their answers are beyond the scope of this essay, their exploration must await another paper. For an interesting examination of presidential incapacity, see Adam R.F. Gustafson, *Presidential Inability and Subjective Meaning*, 27 *YALE L. & POL'Y REV.* 459 (2009).

<sup>120</sup> GILBERT, *supra* note 58, at 2.

<sup>121</sup> ABRAMS, *supra* note 14, at 81.

<sup>122</sup> *Id.* at 9.

<sup>123</sup> *Id.* at 179–80; see also MCDERMOTT, *supra* note 15, at 201–05.

<sup>124</sup> MCDERMOTT, *supra* note 15, at 204–05.

## V. LINGERING QUESTIONS ABOUT PRESIDENTIAL SUCCESSION AND THE OATH OF OFFICE<sup>125</sup>

Despite the clarifications made by the Twenty-Fifth Amendment, questions concerning presidential succession remain.<sup>126</sup> One scholar, for example, has noted that “[u]ncertainty exists, in the case of the death or incapacity or term expiration of a President, whether the presidential oath is necessary, or whether there is ‘an automatic constitutional vesting.’”<sup>127</sup> Some scholars have asserted that a President-elect must take the oath—which must be said exactly as it is written in the Constitution—before becoming the next President.<sup>128</sup> As one scholar has written,

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<sup>125</sup> In addition to the articles mentioned elsewhere in these footnotes, several other fascinating articles have been written addressing the presidential oath of office. See generally Paul Horwitz, *Honor’s Constitutional Moment: The Oath and Presidential Transitions*, 103 NW. U. L. REV. COLLOQUY 259 (2008), <http://www.law.northwestern.edu/lawreview/colloquy/2008/47/LRColl2008n47Horwitz.pdf>; Frederick B. Jonassen, *Kiss the Book . . . You’re President . . . : “So Help Me God” and Kissing the Book In the Presidential Oath of Office*, 20 WM. & MARY BILL RTS. J. 853 (2012); Gary Lawson, *Everything I Need to Know About Presidents I Learned from Dr. Seuss*, 24 HARV. J.L. & PUB. POL’Y 381 (2001); Vic Snyder, *You’ve Taken an Oath to Support the Constitution, Now What? The Constitutional Requirement for a Congressional Oath of Office*, 23 U. ARK. LITTLE ROCK L. REV. 897 (2001).

<sup>126</sup> In addition to questions about the oath of office, others remain as well. See, e.g., ABRAMS, *supra* note 14, at 217 (“[I]t is this question that remains the central dilemma of the Twenty-Fifth Amendment. What is ‘disability’? What is ‘inability’? At what level of cognitive alteration is the country likely to be endangered?”). Another question regards how much confidentiality should be accorded to a President with respect to health issues. *Id.* at 231 (“Given the [P]resident’s responsibilities and power, and the dictates of the Twenty-Fifth Amendment, it is not defensible to preserve absolute confidentiality regarding the [P]resident’s physical and mental health. . . . Breaching the [P]resident’s confidence on the grounds of national interest is essential, if the alternative is to allow a disabled [P]resident to retain authority.”). Yet the Twenty-Fifth Amendment does not directly address this issue, and Abrams has issued a call to strengthen it. *Id.* at 311–12 (“If the health of the [P]resident is too important to be left to the White House staff, then the Twenty-Fifth Amendment needs strengthening and clarification. If the health of the candidates is a proper concern for all Americans, then the rules for disclosure and screening must be articulated, codified, and institutionalized.”). For an interesting account of gaps in the Twenty-Fifth Amendment as depicted in fictional film and television, see generally William F. Baker & Beth A. FitzPatrick, *Presidential Succession Scenarios in Popular Culture and History and the Need For Reform*, 79 FORDHAM L. REV. 835 (2010).

<sup>127</sup> Blomquist, *supra* note 37, at 38 & n.209 (listing sources further discussing this issue). Similar questions have arisen as to whether an acting President during a period of presidential disability under the Twenty-Fifth Amendment must take the presidential oath of office. See *id.* at 41–42 & n.222 (listing sources further discussing this issue).

<sup>128</sup> See, e.g., SILVA, *supra* note 23, at 168 (discussing inconsistencies in the Constitution, various interpretations of it, and its application in practice, Silva notes “[i]t is assumed that the presidential oath is a prerequisite to the exercise of presidential power and that taking this oath transforms a Vice President into a President. At the same time it is argued that an officer designated by Congress does not

“[b]y law, of course, there is no ‘transition’—only a point in time: ‘A new [P]resident assumes authority and responsibility totally and abruptly the moment he finishes reciting the oath of office.’”<sup>129</sup> Recall the kerfuffle surrounding Supreme Court Justice John Roberts’ swearing-in of President-elect Barack Obama.<sup>130</sup> Since Roberts (and therefore Obama in repeating after him) misquoted the wording of the oath, questions were raised as to whether Obama actually became President, leading to his retaking the oath.<sup>131</sup> Discussions about the oath in this context address presidential succession under a normal transition of power, when the nation is not undergoing a crisis of losing a President to a violent assassination during the middle of his term. Moreover, this argument would suggest that the nation was effectively leaderless during this time period, and that any action Barack Obama took as President during that time was possibly both invalid and unconstitutional.<sup>132</sup>

Taking into consideration another factor that may have bearing on this issue, the Twentieth Amendment to the Constitution provides that: “The terms of the President and the Vice President shall end at noon on the 20th day of January, . . . and the terms of their successors shall then begin.”<sup>133</sup>

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become President but only acts in this capacity, although presumably he also would have to take the presidential oath before he could exercise presidential power.”); *see also* Bruce Peabody, *Imperfect Oaths, the Primed President, and an Abundance of Constitutional Caution*, 104 NW. U. L. REV. COLLOQUY 12 (2009), <https://www.law.northwestern.edu/lawreview/Colloquy/2009/26/LRColl2009n26/Peabody.pdf> (discussing but dismissing this proposition, in favor of a “primed [P]residency” theory, under which President-elect becomes the new President automatically once the constitutionally prescribed term begins, but that his authority to execute the powers and duties of the office do not begin until he has recited the oath verbatim).

<sup>129</sup> ABRAMS, *supra* note 14, at 34–35 (citing FREDERICK C. MOSHER ET AL., *PRESIDENTIAL TRANSITIONS AND FOREIGN AFFAIRS* 35 (1987)); *id.* at 35 (the quotation continues “Eisenhower preferred to use the word ‘turnover’ because it more accurately described the change as occurring in an instant—not as a process”).

<sup>130</sup> *See generally* Peabody, *supra* note 128.

<sup>131</sup> *See, e.g., Obama retakes oath of office after Roberts’ mistake*, CNN.COM (Jan. 22, 2009, 10:01 AM), [http://www.cnn.com/2009/POLITICS/01/21/obama.oath/index.html?eref=rss\\_mostpopular#](http://www.cnn.com/2009/POLITICS/01/21/obama.oath/index.html?eref=rss_mostpopular#).

<sup>132</sup> Peabody, *supra* note 128, at 12 (“The errors in the oath-taking prompted immediate and widespread speculation and commentary: did problems with the administration and recitation of the presidential oath somehow render it invalid? If so, had Obama failed to become President, perhaps leaving us with some other Chief Executive, or even no President at all?”); *id.* at 23–24 (“The pivotal question, then, is whether Obama’s deviation from the precise language of the presidential oath was sufficient to render his oath invalid. If so, serious questions about Obama’s (mis)use of executive power between January 20 at noon, and his retaking of the oath on January 21, may arise.”).

<sup>133</sup> U.S. CONST. amend. XX.



Under this constitutional provision, the term of the new President begins precisely at noon on the twentieth day of January. Therefore, the transition of power does not transfer immediately upon recitation of the oath of office, since the oath could be said at any time before noon on January 20, and yet the transition would still take place precisely on January 20 at noon. Furthermore, this constitutional mandate automatically confers the Presidency at the stated date and time. According to this provision, it is not conditional upon the taking of the oath at that time—the term begins regardless. Thus, whether the oath is taken before that moment or after that moment, the term of the new Presidency begins at that moment; and therefore the President-elect becomes the President at that moment.<sup>134</sup> A subsequent clause in the Twentieth Amendment supports this reading. Section 3 indicates: “If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect *shall become President*.”<sup>135</sup> Again, the person becomes President by virtue of the occurrence of the beginning of the term—not by virtue of the person taking the oath of office.

Under ideal circumstances, the President-elect would take the oath of office precisely at noon on January 20, whereby both the oath and the transition of power would happen simultaneously. Of course, this is what normally happens.

In contrast to the claims that the oath must be recited before the transition of the presidential office or authority occurs, other experts contend that the oath, itself, does not confer the Presidency upon a person.<sup>136</sup> The contention that a person who has served as Vice President does not need to take the oath of office when the

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<sup>134</sup> *But see* Peabody, *supra* note 128, at 13–14. For an interesting discussion of the Twentieth Amendment and the timing of the oath of office, see MATTHEW A. PAULEY, *I DO SOLEMNLY SWEAR: THE PRESIDENT’S CONSTITUTIONAL OATH: ITS MEANING AND IMPORTANCE IN THE HISTORY OF OATHS* 222–23 (1999).

<sup>135</sup> U.S. CONST. amend. XX, § 3 (emphasis added).

<sup>136</sup> SILVA, *supra* note 23, at 38 n.103 (“It is Corwin’s thesis that the taking of the oath by one *elected to the Presidency* does not make the man President—it is merely his first duty. Corwin thinks he is already President when he takes the oath. As Corwin indicates, the Constitution says it is *the President*, not the President-elect, who shall take the oath. He also points out that the Act of March 1, 1792, assumed that Washington became President on March 4, 1789, although he did not take the oath until April 30. In the analogous case of a coronation oath[,] succession does not depend on an heir’s taking the oath. In fact, administration of the oath in monarchical states is sometimes deferred for years. . . .); *see also* Blomquist, *supra* note 37, at 34 (quoting George W. Bush’s Inaugural Address on January 20, 2001, in which he stated that the “inaugural ceremony” is “[l]ike a coronation,” which “symbolically invests [P]residents with the power of their office”); *see also* Brazier, *supra* note 97, at 272 (“Some writers take the view that the [p]residential oath is of ceremonial, rather than legal significance,” citing EDWARD DUMBAULD, *THE CONSTITUTION OF THE UNITED STATES* 275–76 (1964)).

person serving as President has died in office may be particularly strong. Under extraordinary circumstances, such as the death of a sitting President—particularly in the instance of a sudden, unexpected death—one cannot expect that arrangements would already have been made for the new President immediately to recite the oath of office. This is especially true if he or she must attend to emergency situations such as international or domestic threats to the nation. This more challenging question concerns the constitutional mandate that converts the person who had been serving as Vice President into the President upon the death of a sitting President (implicitly under the original Constitution and explicitly under the Twenty-Fifth Amendment). Must the new President take the oath of office before “execut[ing] the office of President”? The answer is not entirely clear.<sup>137</sup> Some constitutional law experts have indicated that, although John Tyler established the precedent of a Vice President taking the presidential oath of office upon the death of the sitting President, this practice is not constitutionally mandated.<sup>138</sup> Although this question is not without controversy,<sup>139</sup> I would suggest that the oath is not a prerequisite to the transition of power under such circumstances.<sup>140</sup> Today, we live in a world in which the President has immense

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<sup>137</sup> See, e.g., SILVA, *supra* note 23, at 28 (“When news of [President Harding’s] death reached [Calvin] Coolidge, he examined the Constitution to see what might be necessary to qualify as President. For he did not consider it ‘clear’ that an additional oath was required beyond that taken as Vice President.”); *id.* at 37–38 (“The Constitution requires *the President* to take this oath. In the case of an acting President, however, one may ask whether he takes the oath because of a legal obligation or because of mere custom. The most nearly correct view probably is that taking the oath does not make anyone President and adds nothing to his powers. If it has any effect, it is merely to put his conscience within the bounds of law. . . . In any case, succeeding Vice Presidents must have thought the presidential oath was important. For all seven took it, and Arthur and Coolidge took it twice.”).

<sup>138</sup> See, e.g., Brown & Cinquegrana, *supra* note 51, at 1398 n.29 (indicating that Tyler “was responsible for beginning the tradition of administering the presidential oath to a Vice President who succeeds to the [P]residency, an event that serves as a symbol of the transfer of authority, but which is not based on any constitutional requirement”).

<sup>139</sup> GILLON, *supra* note 9, at 107 (“Even among constitutional scholars there was, and remains, no clear consensus about the oath. Some have argued that Johnson became [P]resident in title only until he took the oath; that he could not initiate any action or sign any laws. Others claim that it was unnecessary because he had taken an identical oath when he became [V]ice [P]resident.”); see also PAULEY, *supra* note 134, at 232–34.

<sup>140</sup> See Peabody, *supra* note 128, at 22 (“As a practical matter, then, even the problems posed by a crisis that disrupts the normal oath process can be seen as an argument for the primed President model; at a minimum, this understanding of the relationship between the oath and presidential power makes clear that a President-elect automatically becomes President at the start of his or her term. Ordinarily, we ask individuals to recite the presidential oath before executing the powers of the office of the President. If fulfilling that obligation is temporarily impossible or impractical due to an emergency, however, we

powers and must be prepared to react immediately to potentially colossal threats to the nation. As aptly described by one scholar:

[t]he President of the United States is at once the head of state of the world's preeminent nation, the chief executive of one of the largest and most complex governments ever created, and [Commander-in-Chief] of military forces sufficiently powerful to destroy the entire planet. Since World War II, the President's role has become absolutely crucial in a federal government whose duties and responsibilities have increased immeasurably, in a world that has grown increasingly more complicated and interrelated, and in an international political and military environment where the speed, accuracy, and destructiveness of weaponry have reduced the time available for ultimate decisions to a matter of minutes.<sup>141</sup>

In such a world, under extraordinary circumstances such as the death in office of a sitting President, I would argue that the presidential mantle automatically descends—instantaneously—upon the person who had been serving as Vice President, immediately making him or her the new President with all presidential powers, which he or she can use as necessary until the oath can be taken.<sup>142</sup> Such an interpretation would enable the new President to take immediate action as Commander-in-Chief in emergency situations when there has not yet been time to take the oath of office. The Constitution should be interpreted in a manner that would not leave the nation without a President.<sup>143</sup> Of course, the person will want to take the oath as soon as possible for legitimacy, tradition, and healing of the nation, but in the meantime I would assert that the person is, indeed, already serving as President of the United States.<sup>144</sup>

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might presume that a President's commitment to sustained executive leadership and preservation of the nation would trump our concerns about constitutional literalism.”).

<sup>141</sup> Brown & Cinquegrana, *supra* note 51, at 1391.

<sup>142</sup> This interpretation was also espoused by John Tyler, who became the first Vice President to assume the Presidency due to the death of the prior sitting President, as discussed above. See SILVA, *supra* note 23, at 17 (“[Tyler] thought that he had become President at the very moment of Harrison's death”); *id.* at 17 n.14 (quoting the certificate of Judge William Cranch, who had administered the presidential oath of office to Tyler: “John Tyler personally appeared before me this day, and although he deems himself qualified to perform the duties and exercise the powers and office of President on the death of William Henry Harrison, late President of the United States, without any other oath than that which he has taken as Vice President, yet as doubts may arise, and for greater caution, took and subscribed the foregoing oath before me”). Of course, this viewpoint was not universally held. See *id.* at 17–19.

<sup>143</sup> See *id.* at 1 (“There should be no interruption in the exercise of executive power.”).

<sup>144</sup> Note also that in the context of an acting President, “[t]he Constitution can be interpreted as not requiring acting [P]residents to take the oath of office.” See U.S. CONST. art. II, § 1, cl. 8. “Nevertheless, it doesn't forbid them from taking the oath, and the powerful symbolism it would afford would almost

In the immediate aftermath of the assassination of John F. Kennedy, some of the people working closely with both Kennedy and Lyndon B. Johnson apparently also held this belief. For example, after another Secret Service agent signaled that Kennedy may be dead, “[r]ealizing that Johnson may now be the [P]resident, Agent Emory Roberts . . . instructed two agents . . . to protect LBJ.”<sup>145</sup> Once he understood that Kennedy had died, “[h]e immediately switched his mission to protecting Johnson. ‘My commission book directs me ‘to protect the President of the United States,’ and I regarded Johnson as the President.”<sup>146</sup> Others began addressing Johnson as “Mr. President” and treating him as the [P]resident, even before the swearing-in ceremony took place.<sup>147</sup> CBS anchorman Walter Cronkite, announcing the death of President Kennedy to millions of television viewers across the country, concluded “Lyndon B. Johnson, now President of the United States.”<sup>148</sup> Kenneth O’Donnell, who was a top aide to President Kennedy, believed that “there was no need, he felt, for LBJ to take the oath so soon after the assassination. ‘He is the [P]resident of the United States the minute they say, ‘You’re dead,’ with all the powers of the [P]residency. He never has to be sworn in ever in his life.”<sup>149</sup> Upon learning of the assassination, Secretary of State Dean Rusk announced to five other members of the Kennedy cabinet, who were flying to Japan, “[l]adies and gentlemen, we have received official confirmation that President Kennedy is dead. I am saddened to tell you this grievous news. We have a new [P]resident. God bless our new [P]resident and our nation.”<sup>150</sup> Moreover, the Warren Commission considered the timing of Kennedy’s death to be “vitally important . . . to understanding the timing of the transfer of power.”<sup>151</sup> An expert on the aftermath of the Kennedy assassination has indicated in a seminal book on the

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certainly lead someone to take the oath if he or she was claiming the [P]residency for the rest of the term.” KALT, *supra* note 83, at 103.

<sup>145</sup> GILLON, *supra* note 9, at 49.

<sup>146</sup> *Id.* at 56.

<sup>147</sup> *See id.* at 93, 139 (referring to Press Secretary Malcolm Kilduff); *id.* at 104 (referring to Air Force One Captain James Swindal); *id.* at 105 (referencing that people aboard Air Force One “stood at attention” when Johnson entered); *id.* at 105–06 (referring to Congressman Albert Thomas).

<sup>148</sup> *Id.* at 106. *See generally* Garrett M. Graff, *Angel is Airborne*, THE WASHINGTONIAN, <http://www.washingtonian.com/projects/JFK-AF1/layout1.html> (last visited May 8, 2014).

<sup>149</sup> GILLON, *supra* note 9, at 131.

<sup>150</sup> *Id.* at 84 (quoting DEAN RUSK, AS I SAW IT 296 (1991)).

<sup>151</sup> *Id.* at 80 n.15 (citing THE REPORT OF THE PRESIDENT’S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY 55 (New York, Doubleday 1964)).

subject that “[t]echnically, the powers of the [P]residency transferred to Johnson at 12:30 p.m. when the fatal third bullet shattered Kennedy’s brain.”<sup>152</sup> Concurring, the editor-in-chief of *The Washingtonian* magazine and political expert Garrett M. Graff recently wrote in a two-part series on the JFK assassination: “[a]t 1 pm Central Standard Time, John Fitzgerald Kennedy, age 46, was pronounced dead at Dallas’s Parkland Hospital from a gunshot wound to the head. At that moment, Lyndon Baines Johnson, 55, officially became President.”<sup>153</sup> But of course, due to an abundance of caution to affirm his legitimacy as the new President, and to assure the nation and the world that the United States continued to have a leader and Commander-in-Chief under a ceremony publicly symbolizing the transition of power, Johnson insisted on taking the oath of office aboard Air Force One before it left Dallas and returned to Washington, D.C.<sup>154</sup>

In light of the above, I would suggest that the Vice President becomes the next President the moment in which the previous President dies. Out of respect for tradition, to ensure legitimacy, and to aid in the healing of the nation from the trauma of losing its leader, the person assuming the office of the Presidency will undoubtedly take the oath of office as soon as practically possible.<sup>155</sup> I would argue, however, that any actions he takes prior to the administration of the oath—for example, actions as Commander-in-Chief he must take in defense of the nation immediately after the assassination—are entirely legitimate and constitutional.

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<sup>152</sup> *Id.* at 82.

<sup>153</sup> Graff, *supra* note 148.

<sup>154</sup> GILLON, *supra* note 9, at 108 (“LBJ may have believed he automatically became [P]resident as soon as Kennedy was declared dead, but he did not want any ambiguity or uncertainty about his presidential powers. He also understood the symbolic value of the oath: it would send a reassuring signal to the nation that he was in charge and the government was still functioning. For these reasons, he wanted to take the oath sooner rather than later.”); *see also* Blomquist, *supra* note 37, at 29 n.145 (citing a Joint Congressional Committee report on Inaugural Ceremonies, which states “[t]he period between the death of a President and the swearing in of his successor remains a gray area. [After President John F. Kennedy’s assassination] there was some question whether Lyndon B. Johnson should take the oath immediately in Dallas or wait until his return to Washington. Attorney General Robert F. Kennedy advised that the oath should be administered immediately, and it was, by federal district judge Sarah Hughes aboard *Air Force One*.”).

<sup>155</sup> *See* GILBERT, *supra* note 58, at 273 (discussing a related concept concerning vice presidential reluctance to invoke Section 4 of the Twenty-Fifth Amendment and noting that “[w]hat is constitutionally permissible is, after all, sometimes politically and/or logically prohibitive”). By like token, unless circumstances mandate otherwise, it is likely that a person serving in the office of Vice President would take the oath of office as soon as possible after a presidential assassination, even though it may be constitutionally permissible not to do so.

Furthermore, the constitutionality of actions by any of the three branches of government must be determined first by the officeholders within that branch. Such actions are not unconstitutional unless and until the United States Supreme Court, in utilizing its powers of judicial review, rules upon arguments brought in a case before it regarding the constitutionality of such actions. In the event of a presidential assassination, if the new President takes an emergency action—that only the President has the authority to take—before he is able to take the oath of office, it is likely that the nation will rally around the President’s efforts to protect the country. It is, therefore, unlikely that such actions will be challenged. However, one could imagine a situation in which such actions could be challenged. For example, the Kennedy family and other loyalists who were begrudged by Johnson’s ascendency to the Presidency may have challenged his actions as President if he had not taken the oath as soon as possible. Yet even if the President’s actions are challenged, it is questionable whether the Supreme Court would even consider the lawsuit, since the court may deem the issue to be a non-justiciable political question that is better left to the determination of the other branches of government.<sup>156</sup> Furthermore, even if the Supreme Court held the issue to be justiciable, it may well find that the better interpretation of the ambiguities raised by these constitutional clauses points toward sanctioning the argument that the Vice President becomes President immediately upon the death of his predecessor. We can only hope that these questions will remain hypothetical, and that we never face them, as the answers would only be determined as a result of future tragedies.

## VI. CONCLUSION: PRESIDENTIAL SUCCESSION AND THE KENNEDY LEGACY

Assassination attempts have continued, including upon Presidents Ronald Reagan, George H.W. Bush, Bill Clinton, George W. Bush, and Barack Obama. Although we will likely see such attempts on into the future,<sup>157</sup> if one is ever successful, the process of succession in the United States Constitution—although

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<sup>156</sup> Peabody, *supra* note 128, at 29 n.72 (“[I]t is easy to imagine that courts would not be interested in passing judgment on a dispute over an oath and would cite either non-justiciability or the political question doctrine to avoid reviewing the matter.”).

<sup>157</sup> ABRAMS, *supra* note 14, at 251 (“No one can view Hinckley’s attack on Reagan in a vacuum. It is part of a continuum, a discrete example of a series of events that have characterized American history from the earliest days of the Republic. It is predictable that it will happen again. . . . In a society in which mental illness abounds, in which drug and alcohol abuse are virtually insoluble social problems on a wide scale, and in which political fanaticism and terrorism exist as in all nations, we must anticipate that the assassin will appear again.”).

not entirely unambiguous—is now much better delineated. The clarification to the process of presidential succession set forth in the Twenty-Fifth Amendment is one of the many historic legacies that have been left to the nation by President John F. Kennedy.