

SYMPOSIUM: 50 YEARS WITH THE 25TH AMENDMENT

**THE ROLE OF THE WHITE HOUSE COUNSEL IN THE
TWENTY-FIFTH AMENDMENT: ADVISING ON
PRESIDENTIAL DISABILITY**

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Discussion of the Twenty-fifth Amendment often focuses on the actions of the President, the Vice-President, the Cabinet, and Congress in examining the drafting and the history of the amendment. However, when use of the amendment is under consideration, members of the White House staff also play important, advisory roles. Most prominently among those is the chief of staff to the President, but even more influential is the White House Counsel—a far less visible but key institutional player responsible for organizing and guiding the behind-the-scenes activity that occurs in the White House when the issue of presidential disability arises.

The Counsel is often described as the lawyer for the institution of the presidency, separate and distinct from a President's private attorneys.¹ Individual Presidents are temporary, short-term occupants of the office, and might, at some time, need the legal advice of a *personal* lawyer. The institution, however, endures long beyond any single occupant, and the Counsel's two-fold task is to advise the President in his constitutional capacities while protecting the long-term prerogatives and institutional integrity of the office of the presidency.

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1. MaryAnne Borrelli, et al., *The White House Counsel*, THE WHITE HOUSE TRANSITION PROJECT at 6, <http://whitehousetransitionproject.org/wp-content/uploads/2016/03/WHTP2017-29-Counsel.pdf> [<https://perma.cc/V6RR-DFPY>].

This article explores Section 3 of the Twenty-fifth Amendment, the part that provides a process for a President to determine that he is temporarily unable to carry out the duties of the office.²

Government lawyers of all types have played a major role in the history of the Twenty-fifth Amendment, beginning with a proposal by Eisenhower's Attorney General Herbert Brownell in 1957 and continued by his successor, William Rogers. Rogers was responsible for promoting early efforts to provide for an orderly course of action in cases of Presidential disability by facilitating an exchange of informal letters between a President and a vice-president, beginning with Eisenhower and Nixon, and followed by Kennedy and Johnson, Johnson and Humphrey, and even later presidential-vice presidential teams of George H.W. Bush and Dan Quayle, and Clinton and Gore.³ The White House Counsel, because of his proximity to the President and his institutional role of advising the President on constitutional matters, is at the center of orchestrating this exchange of letters between the two principals and of guiding the full process of the Twenty-fifth Amendment.⁴

Much of the information for this article comes from personal interviews with past Counsels, conducted through the Presidential Oral History Project at the University of Virginia's Miller Center of Public Affairs⁵ and the White House Transition Project.⁶ The White House Transition Project is an undertaking by a group of presidency scholars to smooth the transition to power for incoming White House staff members, most of whom have never served in a White House previously, and who often come straight off of the campaign trail and may be unfamiliar with the operations of government.⁷ Scholars have interviewed former staff members from the last seven administrations and have prepared briefing materials to give to the transition teams of both political parties during the

2. U.S. CONST. amend. XXV, § 3.

3. Nancy Kassop, *When Law and Politics Collide: Presidents and the Use of the Twenty-Fifth Amendment*, 35 *PRESIDENTIAL STUD. Q.* 147, 152 (2005).

4. See *President Donald J. Trump Announces Appointments for the Executive Office of the President*, THE WHITE HOUSE, (Feb. 2, 2019), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-appointments-executive-office-president-4/> [<https://perma.cc/X6T6-5PTE>] (Pat A. Cipollone currently serves as White House Counsel).

5. *Presidential Oral History Program*, UNIVERSITY OF VIRGINIA MILLER CENTER OF PUBLIC AFFAIRS, <http://www.millercenter.org/the-presidency/presidential-oral-histories> [<https://perma.cc/VLP2-YV8C>].

6. *White House Transition Project*, MOODY FOUNDATION, www.whitehousetransitionproject.org [<https://perma.cc/8U7E-KJ56>].

7. See generally, *White House Transition Project*, (2018), http://www.whitehousetransitionproject.org/wp-content/uploads/2018/10/Kumar_Assistants_to_the_President_Turnover_10-02-2018.pdf

presidential campaign and to a new President's incoming White House staff members after the election to bring them up to speed on what they need to know as they begin their tenure in the White House.

The Transition Project scholars recognized the need for this service to a new administration because the Presidential Records Act of 1978 requires that an outgoing administration remove all records from the White House upon its departure and send them to the National Archives.⁸ Consequently, incoming White House staff members enter offices that are completely empty—totally devoid of any records—with very few exceptions. One of those very rare exceptions happens to be a file containing documents with instructions on how the Twenty-fifth Amendment works.⁹

One of the first acts a president-elect and his (and one day, her) spouse undertake is an extremely candid conversation with the White House Counsel, along with the Vice President-elect and his (or her) spouse, about the incoming President's wishes, should any unexpected health issues arise that would affect his ability to carry out the duties of the office.¹⁰

Thus, even before a new President takes office, he needs to plan for any eventualities that might stand in the way of his continuation in that office. Being forced to think about unpleasant circumstances that might lead you to lose your job prematurely may be an unpleasant task for any President to start work as the nation's highest elected officer. But, a President is responsible for the continuity of government: the nation has placed its trust in this person to guarantee that there will always be constitutionally authorized officials in place to run the country. Thus, it is imperative that, to the degree possible, advance plans are in place that reflect a President's choices, should such unpredictable circumstances arise.

Fred Fielding, who served as White House Counsel to three Presidents, is an invaluable resource because he has actually guided presidents and executive branch officials in determining when to use the Twenty-fifth Amendment.¹¹ His White House service began with a short stint at the end of the Nixon Administration, then serving for five years in the Reagan Administration at the time of the assassination attempt on Reagan, and then, returning to the Counsel's office for the last two years of the George W. Bush presidency. His first-hand recollections of the

8. 44 U.S.C. §§ 2201–2207.

9. Borrelli, *supra* note 1, at 6-7.

10. *Id.* at 25-26.

11. *Id.* at 14.

emotionally fraught and chaotic moments immediately following the March 30, 1981 assassination attempt on Reagan are especially illuminating.¹²

As Fielding describes it, upon hearing of the assassination attempt, the Cabinet and White House staff assembled in the Situation Room to follow the news from the hospital of the President's condition.¹³ When he explained the provisions of the Twenty-fifth Amendment to the people in that room, "their eyes glazed over."¹⁴ Most of them had no idea of what it was or how it worked. There was the infamous episode of Secretary of State Alexander Haig, running breathlessly into the White House Press Briefing Room, proclaiming he was "in control at the White House, pending the return of the Vice President."¹⁵ Haig continued, "Constitutionally, you have the President, the Vice President, and the Secretary of State, in that order."¹⁶ Secretary of Defense Weinberger challenged him, and claimed, instead, that the Secretary of Defense had command authority, thus, putting *him* in control.¹⁷

Fielding explained that the current line of succession ran from the Vice President to the Speaker of the House, not the Cabinet, and that Weinberger was correct that, as they were in the Situation Room, which was a military command post, then, yes, military command authority *does* pass from the President directly to the Secretary of Defense, and, yes, Weinberger was in charge of the military while Reagan was unconscious at the hospital.¹⁸

The file on the Twenty-fifth Amendment that is stored in the Counsel's office for each new administration was compiled by Fielding as one of his first tasks in 1981 when he was Counsel for Reagan. He called it an "emergency manual that detailed every possible scenario that we could think of for presidential inability." It had not been completed by the time of the assassination attempt, but the letters for Sections 3 and 4 had been finished, and Fielding had those letters in his hand when he walked into the Situation Room on March 30 immediately following the shooting. The file has been in the Counsel's office ever since.¹⁹

12. *Id.* at 25-26.

13. Fred F. Fielding, *An Eyewitness Account of Executive "Inability,"* 79 *FORDHAM L. REV.* 823, 827 (2010).

14. *Id.*

15. *Id.* at 828.

16. *Id.* at 826-28.

17. *Id.* at 828.

18. *Id.*

19. *Id.* at 828-29.

Boyden Gray, Counsel to George H.W. Bush, described the file as a “big decision tree”—that is, “what happens if X, then go to Y; if Z, then go back to A.”²⁰ Lawyers in Fielding’s office who had been charged with thinking up different scenarios described their work as “making it up as we went along.”²¹ Fielding noted that once the book had been completed, he always carried one copy with him and left one copy back in the safe in the Counsel’s office at the White House. When he returned to the Counsel’s office years later in the Bush Administration, he was pleased to see that not only was the file still in the office, but it was in every emergency facility and also permanently on Air Force One and Air Force Two.²²

In turning to a fuller description of the role of the Counsel in the implementation of the Twenty-fifth Amendment as part of his or her official duties, it is necessary to understand that the Counsel needs to balance dual and, not infrequently, *dueling* (or, at least, conflicting) considerations: as the lawyer for the institution of the presidency, the Counsel’s primary responsibility is to insure that actions taken by a President are consistent with the Constitution and the laws. As a member of the White House staff, the Counsel must also be sensitive to the political needs of the chief executive for whom he or she serves. Consequently, the Counsel is likely to confront circumstances where *political* needs may conflict with *legal* or *constitutional* requirements. Thus, navigating a route that respects both may prove uncertain and challenging.²³

In interpreting and advising the President on implementation of Section 3 of the Twenty-fifth Amendment, it is inevitable that this classic and uncomfortable clash between politics and law will arise for the Counsel. No occasion can be more sobering than determining adherence to *constitutional* prescriptions during an unexpected and alarming event in the life of a President as well as assurance of a President’s continued *political* viability and continuity of service in the office.²⁴ The Counsel is squarely in the middle of that dilemma, and it is his or her judgment that sets the tone for the activity that will unfold in its wake.

And it *is* this dilemma—this clash of politics and law—that has produced the “paradox” of the Twenty-fifth Amendment. It is paradoxical because after taking more than a decade of work in the 1960s to finally

20. Borrelli, *supra* note 1, at 25..

21. *Id.*; Kassop, *supra* note 3, at 156.

22. Fielding, *supra* note 13, at 828-29.

23. Borrelli, *supra* note 1, at 28.

24. *Id.* at 63.

secure the amendment to provide for an orderly, temporary transfer of power when a chief executive's state of health renders him incapable of governing, Presidents have often been resistant to using it at the very times when it is most needed. Two examples from Reagan will illustrate some of that reticence.

Despite Fielding's best efforts to educate Reagan officials about the Twenty-fifth Amendment in the immediate aftermath of the assassination attempt, it was never invoked at that time. The President's staff and Cabinet members believed that executing a formal transfer of power, even if temporary, would signal a "perception problem" for Reagan.²⁵ It could be viewed as a sign of weakness or loss of stature for the President. Attorney General Ed Meese went so far as to ask the Office of Legal Counsel in the Justice Department to provide a legal opinion on whether a President can delegate his powers during a temporary disability when "it is not considered necessary or appropriate to invoke the provisions of the Twenty-fifth Amendment."²⁶

Thus, the Attorney General was looking for legal cover to justify a decision to *refrain* from using the amendment. Meese said that "the concern was that the press not get wind of any actions that would raise questions as to whether the President was capable of acting."²⁷

And, yet, a young associate counsel in Fielding's office, Christopher Hicks, recalled that the President was near death, and that it was a political decision to hide that from the nation. In Hicks's words, "Meese, Chief of Staff James Baker, Deputy Chief of Staff Michael Deaver, and First Lady Nancy Reagan controlled the information they chose to give to the other administration officials."²⁸

The day following surgery after the assassination attempt, Reagan's staff determined that it would be a good photo op to reassure the nation to show him sitting in his hospital room, signing a bill.²⁹ By that point, questions about invoking the Twenty-fifth Amendment were moot, and the issue was not raised again until four years later, when Reagan

25. Kassop, *supra* note 3, at 157.

26. *Id.* at 157-58. See Theodore B. Olson, *Presidential Succession and Delegation in Case of Disability*, 5 OPINIONS OF THE OFFICE OF LEGAL COUNSEL 91 (Apr. 3, 1981), also available at L. Simms, *Presidential Succession and Delegation in Case of Disability*, OFFICE OF LEGAL COUNSEL (Apr. 3, 1981) http://ir.lawnet.fordham.edu/twentyfifth_amendment_executive_materials/2 [https://perma.cc/6CTY-FC8Y].

27. Kassop, *supra* note 3, at 156 (quoting Herbert Abrams, *THE PRESIDENT HAS BEEN SHOT: CONFUSION, DISABILITY AND THE 25TH AMENDMENT IN THE AFTERMATH OF THE ATTEMPTED ASSASSINATION OF RONALD REAGAN* (W.W. Norton 1992)).

28. *Id.* at 156. Phone interview with Hicks on file with author (July 23, 2004).

29. Kassop, *supra* note 3, at 156.

underwent surgery for colon cancer.³⁰ Because there was advance notice, Section 3 was relevant. But here, too, Reagan chose not to invoke the amendment directly but, rather, to take an alternative route.

Although Fielding knew of Reagan's preference, he drafted two sets of letters for the President, one that was a straightforward letter invoking Section 3, and a second letter that indicated that Reagan would abide by the procedures of the amendment without formally activating it.³¹ Think of this as "acting consistent with but not pursuant to" the amendment.³² This is the same tactic that Presidents use when reporting to Congress on the deployment of military troops, where Presidents will follow the statutory procedures of the War Powers Resolution but will not acknowledge that they have formally activated the statute. In this way, they cannot be bound by the law's restraints, and the President sets no precedent for official compliance with the War Powers Resolution. Similarly, Reagan chose this same parallel—but not official—route in his choice to abide by the procedures of the Twenty-fifth Amendment without formally invoking it.³³

In choosing the second of Fielding's two options, Reagan provided congressional leaders with letters notifying them that he would, in fact, transfer power temporarily to the Vice President while he was under anesthesia. However, he stated in his letter that "I am mindful of the provisions of Section 3 of the Twenty-fifth Amendment to the Constitution and of the uncertainties of its application to such brief and temporary periods of incapacity. I do not believe that the drafters of the Amendment intended its application to situations such as the instant one."³⁴ Vice President George H.W. Bush held power temporarily as Acting President for eight hours before Reagan notified Congress that he was now able to resume the duties of the office.

Fielding raised one other point about Reagan's use of the amendment for his cancer surgery. Reagan had made clear, as the amendment provided, that he alone would be the judge of when he was sufficiently conscious and capable of resuming his official duties.³⁵ Fielding, along with the chief of staff and the press secretary, went to see the surgeon after surgery had been completed and asked the surgeon how they could tell if

30. Fielding, *supra* note 13, at 829-30.

31. *Id.* at 830; Kassop, *supra* note 3, at 160.

32. Kassop, *supra* note 3, at 160-61.

33. *Id.* at 160.

34. *Id.*

35. Kassop, *supra* note 3, at 160.

the President was really ready to function again.³⁶ The surgeon could not give them an answer. So, the four of them discussed this dilemma, and came up with a plan.³⁷ They would ask Reagan to read the letter that he would send to Congress to resume his duties to see if he understood it. The doctor agreed that would be sufficient proof that the President was lucid enough to resume the duties of the office.³⁸

Fielding was questioned later as to whether this scheme inappropriately, and maybe even unconstitutionally, inserted him and the others into a decision that, constitutionally, was Reagan's alone to make.³⁹ He responded that, in practice, he did not know how it could be otherwise. His point was that Presidential advisers or doctors or spouses are inevitably going to be drawn into making judgments about a President's level of consciousness and whether he has his wits about him, aside from the President's own conclusions.⁴⁰ Thus, a presidential declaration of fitness to regain his powers will never, in Fielding's words, "stand alone," and "the role of any presidential adviser . . . is to evaluate the circumstances for the President and provide your judgment and your recommendation to the President."⁴¹

It then fell to George W. Bush to be the first President, arguably, who used the amendment exactly as it was intended when he twice underwent short colonoscopy procedures, first in 2002 and then again in 2007.⁴² Alberto Gonzales was White House Counsel in 2002, and Fielding was back in the Counsel's office for the 2007 procedure.⁴³ Vice President Cheney was Acting President for about 2 hours each time (just long enough for some people to worry about how much mischief Cheney could do while holding the reins of power!).⁴⁴

Even here, Bush qualified his use of the amendment by noting that he was using it "because we are at war." One wonders whether he would have refrained from using it for the same procedure if the nation had been at peace. Did the framers of the amendment intend that it should apply only during wartime, and not during peacetime?⁴⁵

36. *Id.* at 180-81.

37. *Id.*

38. Fielding, *supra* note 13, at 831.

39. *Id.*

40. *Id.*

41. Fielding, *supra* note 13, at 832.

42. Kassop, *supra* note 3, at 160.

43. *Id.* at 183.

44. *Id.* at 160.

45. *Id.* at 160-61.

What can we conclude, after fifty years of the amendment and of White House Counsels supervising its use? I offer some thoughts.

First of all, we have never experienced a Section 4 use of the amendment, when government officials determine that a President is unfit to carry out the duties of the office. All of the uses to date have been of Sections 1 and 2 on a vice presidential vacancy, or Section 3 on the issue of a President's own determination of his incapacity.

Secondly, the pre-Amendment practice, started under Eisenhower, of informal agreements between a President and Vice President continued well after the amendment was ratified, at least through Clinton and Gore (and, possibly, George W. Bush and Obama continued that practice).⁴⁶ The purpose of these agreements was to add some clarity to the wishes of these Presidents and Vice Presidents, if they should be unconscious or incapable of acting on their own. The idea was that if basic principles could be agreed upon in advance by these leaders, with the knowledge and approval by their spouses and key White House staff members (the Counsel, the chief of staff and the White House physician), it would make application of those principles easier to accept at a difficult and critical time. This was wholly consistent with Senator Bayh's explanation for including Section 4 in the amendment and with his expectation for how the implementation of Section 4 should evolve.⁴⁷ Yet, many observers still note the need for even greater specificity as to the circumstances when Section 4 is likely to be needed.

Third, the amendment has had an uneven history, with Reagan's reluctance to embrace it fully, while George W. Bush followed it scrupulously and faithfully. As with just about any constitutional provision, how it is interpreted and implemented grows out of practices under it. Even at age fifty, the Twenty-fifth Amendment is still young and still experiencing growing pains. Fortunately for the country, we have not had many opportunities to give it room to grow. Thus, there is still much about how it might operate that remains open to question.

Fourth, I would reiterate the two points I made earlier: 1) the paradoxical way in which Presidents (Reagan, specifically) have approached Section 3 of the amendment, resisting it because of the perception of weakness it might portray to the public; and 2) Reagan's decision to follow the amendment's procedures in Section 3 but without formally invoking it ("acting consistent with but not pursuant to") is

46. *Id.* at 149-50.

47. *Id.* at 162.

Exhibit A for presidential reticence and reluctance to embrace the amendment.⁴⁸

On the other hand, George W. Bush made his decision to activate the amendment after talking with Fielding and asking about the Reagan experience. Perhaps, all that really tells us is that it is a highly personal decision that each President needs to make, if and when the circumstances arise.⁴⁹

These four simple conclusions reinforce why the advice and guidance of a White House Counsel is so critical to a President's—or another body's—decision-making in such sensitive times. The President (and one day, perhaps the Cabinet or even a congressionally appointed body as an alternative provided in Section 4) depends on the Counsel for interpreting and translating the Constitution and the laws. The Counsel is where the process of determining implementation of the Twenty-fifth Amendment begins, and that office is also the place that monitors and guides every step of the process for each section of the amendment. To reiterate, the Counsel has the ever-challenging task of reconciling constitutional requirements with political calculations. Fielding's early efforts in recognizing the amendment's relevance in 1981 and 1985 constituted a fitful start to the introduction of the amendment into political life, but it paved the way for stronger efforts by Counsels in subsequent administrations, as well as signaling that further deliberation was still needed to make the amendment effective.

As for any speculation about how President Trump might approach Section 3 of the amendment, should that need arise, one might assume that since he has shown no inclination to listen to his White House Counsel on many other matters so far, there seems little reason to think he would start here, and there is every reason to think that giving up power, even temporarily, is definitely not in Trump's DNA.

For that matter, media outlets reported in October 2017 that former Trump strategist Steve Bannon warned Trump that impeachment was not the greatest risk to his presidency, but rather, a larger threat to his continuance in office loomed from the possibility of the use by his Cabinet of the Twenty-fifth Amendment. Trump reportedly responded, "What's that?"⁵⁰

48. *Id.* at 160.

49. Fielding, *supra* note 13, at 833.

50. Gabriel Sherman, "I Hate Everyone in the White House!" Trump Seethes as Advisers fear the President is "Unraveling," VANITY FAIR, (Oct. 11, 2017), <https://www.vanityfair.com/news/2017/10/donald-trump-is-unraveling-white-house-advisers> [<https://perma.cc/JQ34-YKTL>].

Sections 3 and 4 of the Twenty-fifth Amendment are insurance policies for unpredictable and critical times. As with any insurance policy, one signs on to them as prudent and protective measures, while hoping they will never need to be used. The same is true for the nation and the assurance it gets from having constitutional provisions in place to guide it through a time of uncertainty. Let us keep in mind that constitutional provisions, such as those in the Twenty-fifth Amendment, provide a framework for action, but implementation of that framework depends wholly on government officials who carry out their duties in good faith. Perhaps, Fred Fielding offered the best view here when he said

We have to place a layer of trust in our elected leaders and their advisers . . . to mind that any procedural gaps in a continuity crisis will be dealt with integrity and with the nation's best interest at heart. . . . Even in the nation with the most able Constitution among all men, it will be no greater than the character and wisdom of the people [who] enforce it and are empowered to do so.⁵¹

51. Fielding, *supra* note 13, at 834.