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50 Years After the 25th Amendment: How to Improve Presidential Succession

Second Fordham University School of Law Clinic on Presidential Succession

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50 Years After the 25th Amendment



How to Improve Presidential Succession

Recommendations of Fordham University School of Law's Second Clinic on Presidential Succession



FORDHAM UNIVERSITY

THE SCHOOL OF LAW

Fordham Law has a rich history with the 25th Amendment that begins with one graduate, John D. Feerick '61, who helped draft the amendment.

Amid the amendment's 50th anniversary in the 2016–2017 academic year, 14 Fordham Law students in the Presidential Succession Clinic carried on the School's legacy.

These clinic students developed a report in the *Fordham Law Review* that offers **seven key recommendations** to improve upon what Feerick started with a *Fordham Law Review* article in October 1963 that outlined the weakness in the succession system.

Why Presidential Succession Matters

Presidents are all-too mortal.

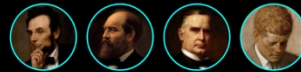
9 presidents did not finish their terms.
That's **20%** of all presidents.



4 deaths from illness



4 assassinations



1 resignation



History says so.

Six times the 25th Amendment has come in handy:



1973

Ford's nomination as vice president



1985

Reagan transfers power before surgery



1974

Ford's succession following Nixon's resignation



2002

Bush transfers power before colonoscopy



1974

Rockefeller's nomination as vice president



2007

Bush transfers power before colonoscopy

The Clinic's Recommendations

#1 – *The executive branch needs a contingency plan.*

The president should create a prospective declaration of inability allowing the vice president to initiate a transfer of power during an emergency when there is no time for the cabinet to weigh in under the 25th Amendment's Section 4.



While Reagan was in surgery following the 1981 assassination attempt, it was unclear who was in charge because the 25th Amendment was never invoked. On 9/11, Bush wasn't easily reachable when major decisions, such as authorizing the military to shoot down airliners, needed to be made.

#2 – *The president needs a clear head.*

A mental health professional should be part of the White House Medical Unit.

The infographic features a large fraction '1/4' in white. To its right is a stylized icon of a human head in profile with a brain inside, rendered in light blue. Below the fraction and icon, the text reads 'of the first 37 presidents may have suffered from mental illness while in office' in light blue. To the right of this text is a black and white portrait of Calvin Coolidge, a former U.S. president, wearing a dark suit and tie.

Source: Davidson et al., *Mental Illness in Presidents Between 1776 and 1974*, Journal of Nervous and Mental Disease, Feb. 2006

Following his son's death, Calvin Coolidge fell into a depression that may have severely affected his presidency. The impact, to varying degrees, of psychological and cognitive issues on other presidents is discussed in the clinic's report.

#3 – The line of succession needs a refresh.

Congress should remove legislators and some cabinet departments from the current line of succession and allow the president to nominate several “standing successors” to replace those officials.

Current Line of Succession

- | | |
|----------------------------------|---|
| 1 - Vice President | 11 - Secretary of Labor |
| 2 - Speaker of the House | 12 - Secretary of Health and Human Services |
| 3 - Senate President Pro Tempore | 13 - Secretary of House and Urban Development |
| 4 - Secretary of State | 14 - Secretary of Transportation |
| 5 - Secretary of the Treasury | 15 - Secretary of Energy |
| 6 - Secretary of Defense | 16 - Secretary of Education |
| 7 - Attorney General | 17 - Secretary of Veterans Affairs |
| 8 - Secretary of the Interior | 18 - Secretary of Homeland Security |
| 9 - Secretary of Agriculture | |
| 10 - Secretary of Commerce | |

The current inclusion of legislators might not be constitutional and could lead to a change in party control of the White House, and some Cabinet secretaries might not be prepared to serve as president.

Proposed Line of Succession

- 1 - Vice President
- 2 - Secretary of State
- 3 - Secretary of Defense
- 4 - Attorney General
- 5 - Secretary of the Treasury
- 6 - Secretary of Homeland Security
- 7 - Standing Successor
- 8 - Standing Successor
- 9 - Standing Successor
- 10 - Standing Successor

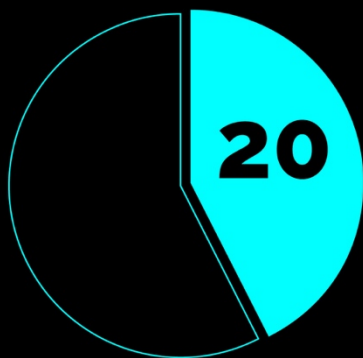
#4 – Gaps in the 25th Amendment need filling.

Congress should create procedures mirroring the 25th Amendment for declaring the vice president disabled and declaring a “dual inability” of the president and vice president. Without an able vice president, the 25th Amendment cannot be invoked to declare the president unable. In a dual inability scenario, there is no formal way to initiate succession to the next person in the line of succession.

7 vice presidents
have died in office



2 have resigned



20 of the **47** individuals
who have served as vice president
have suffered from apparent
incapacity or experienced
a 'near miss' that could have
resulted in their incapacity.

#5 – Congress needs dispute resolution plans.

Congress should plan for a scenario where Section 4 of the 25th Amendment requires it to resolve a disagreement over the president's capacity to serve in part by preparing to create a bipartisan committee with members from both houses to gather information.

2/3



The vote required in both houses of Congress for the president to remain without his power and duties

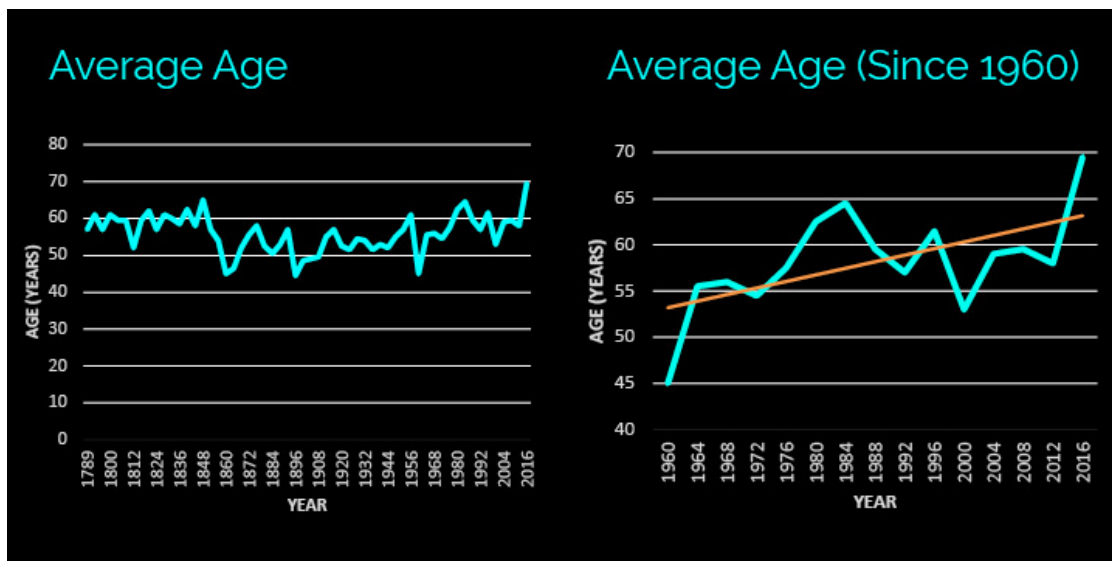
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number of days Congress has to “decide the issue”

#6 – Presidential candidates need to be transparent about their health.

A commission should create guidelines for what presidential candidates should reveal about their health.



The clinic's report details the many times candidate health has become a campaign issue. As the age of candidates increases, health may become an even more significant factor—as it did during the 2016 campaign when the candidates had the highest average age ever.

#7 – Political parties need better vacancy plans.

The political parties should make the vice presidential nominee the automatic successor to the presidential nomination if there is a vacancy right before an election and allow a special committee within the party to recommend a replacement nominee if a vacancy occurs earlier in the campaign. The parties should also create rules for removing medically incapacitated nominees.



During the 2016 campaign, some prominent Republicans called on Donald Trump to drop out after the release of the Access Hollywood tape. Democratic National Committee Chair Donna Brazile considered removing Hillary Clinton from the ticket after she collapsed at the 9/11 memorial. Both scenarios would have implicated the parties' replacement procedures.

Read the full report: *Fifty Years After the Twenty-Fifth Amendment: Recommendations for Improving the Presidential Succession System*, 86 Fordham L. Rev. 917 (2017), available at: <https://ir.lawnet.fordham.edu/flr/vol86/iss3/3/>

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For more information on the 25th Amendment and Presidential Succession, go to Fordham Law's online Twenty-Fifth Amendment Archive at:
https://ir.lawnet.fordham.edu/twentyfifth_amendment_archive/



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