

**“A DR. STRANGELOVE SITUATION”:
NUCLEAR ANXIETY,
PRESIDENTIAL FALLIBILITY,
AND THE TWENTY-FIFTH AMENDMENT**

*Rebecca C. Lubot**

This Article is a revisionist history of the ratification of the Twenty-Fifth Amendment, which establishes procedures for remedying a vice presidential vacancy and for addressing presidential inability. During the Cold War, questions of presidential succession and the transfer of power in the case of inability were on the public’s mind and, in 1963, these questions became more urgent in the shadow of the Cuban Missile Crisis. Traditional legal histories of the Amendment argue that President John F. Kennedy’s assassination was both the proximate and prime factor in the development of the Amendment, but they do not account for the pervasive nuclear anxiety inherent in American politics and culture at the time. Oral interviews of key actors, such as former Senator Birch Bayh of Indiana, the Amendment’s architect, as well as examination of the Lyndon B. Johnson papers, the files of the Subcommittee on Constitutional Amendments, and other previously unexamined archives, offer new insight into the anxiety and thought processes of the President, Congress, and state legislators. With the ratification of the Twenty-Fifth Amendment on February 10, 1967, the nuclear anxiety of the era became ingrained in the Constitution itself. The framers of the Amendment adjusted America’s foundational document not as dictated by a momentary whim but by the exigencies of the times. With the goal of expanding the field of legal history by examining cultural and political factors, this Article argues that nuclear anxiety provides another important explanation for the incorporation of the Amendment.

* Lecturer, Federated Department of History, Rutgers University–Newark; PhD, U.S. History, Rutgers University–New Brunswick; M.S., Theory and History of International Relations, London School of Economics. I am grateful to John Feerick as well as the members of my PhD committee: David Greenberg, Richard McCormick, Jackson Lears, Paul Clemens, and Ross Baker. This Article, which was prepared for the symposium entitled *Continuity in the Presidency: Gaps and Solutions* held at Fordham University School of Law, is dedicated to the memory of my father, Dr. Eric S. Lubot. For an overview of the symposium, see Matthew Diller, *Foreword: Continuity in the Presidency: Gaps and Solution*, 86 FORDHAM L. REV. 911 (2017).

| | |
|--|------|
| INTRODUCTION..... | 1176 |
| I. NUCLEAR ANXIETY IN CONGRESS | 1180 |
| A. “ <i>This Is the Time to Do It</i> ”: <i>Legislative Precursors, 1958–1963</i> | 1180 |
| B. “ <i>He and He Alone Has the Authority to Push the Vital Button</i> ”: <i>Drafting and Passage Through Congress, 1963–1964</i> | 1182 |
| C. “ <i>The Nightmare of Nuclear Holocaust</i> ” and “ <i>the Potential of Paralysis</i> ” <i>Require Us “to Act—and To Act Now”</i> : <i>Passage Through Congress, 1965</i> | 1187 |
| II. NUCLEAR ANXIETY IN THE STATE LEGISLATURES, 1965–1967 | 1192 |
| A. “ <i>Let Us Not Rush Pell-Mell down the Road to Madness</i> ”: <i>Ratification in Pennsylvania</i> | 1192 |
| B. “ <i>The Possibility of a Simultaneous Death of All in the Line of Succession Is a Nuclear Age Reality</i> ”: <i>Ratification in Arkansas</i> | 1193 |
| C. <i>Nuclear Anxiety and Presidential Continuity “Are Not Unrelated in the Thoughts of the Public”</i> : <i>Ratification in Colorado</i> | 1194 |
| CONCLUSION | 1197 |

INTRODUCTION

“This is a true *Dr. Strangelove* kind of situation,”¹ Senator Birch Bayh, principal author of the Twenty-Fifth Amendment, said to his fellow Congressmen when assessing the outcome of the first invocations of the Amendment. The 1964 film, *Dr. Strangelove or: How I Learned to Stop Worrying and Love the Bomb*,² dramatized an inconceivable event, a nuclear catastrophe, with black humor.³ *Dr. Strangelove* depicted a scientist—an individual in a field Americans loved to trust—who had become “strange,” or gone insane. By invoking the popular film, Bayh pointed to Cold War anxieties about the collision of military and scientific power, as the film focused on the ability of the President who wielded that power. The Twenty-Fifth Amendment was designed to secure the line of presidential succession in cases of disaster such as a sudden strike and, at the same time, prevent a

1. *Examination of the First Implementation of Section Two of the Twenty-Fifth Amendment: Hearing on S.J. Res. 26 Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 94th Cong. 154 (1975) (statement of Sen. Birch Bayh, Chairman, Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary).

2. *DR. STRANGELOVE OR: HOW I LEARNED TO STOP WORRYING AND LOVE THE BOMB* (Columbia Pictures 1964).

3. The fact that *Dr. Strangelove* is listed on the National Film Registry of the Library of Congress underscores the plot’s enduring cultural significance. *Complete National Film Registry Listing*, LIBR. CONGRESS, <https://www.loc.gov/programs/national-film-preservation-board/film-registry/complete-national-film-registry-listing/> [https://perma.cc/365B-XBXW] (last visited Nov. 19, 2017).

President who had become crazy or mentally unstable from controlling the bomb.

From the nation's founding until the mid-1940s, questions of presidential succession tapped into deep-seated anxieties about the durability of democratic government, and specifically whether it could withstand the threats posed by disruptive, unplanned changes to the nation's highest office.⁴ Following the United States' use of atomic bombs against Japan at the end of World War II, those anxieties took on a new gravity. As the *Bulletin of the Atomic Scientists* stated, "Merely by existing," nuclear weapons "have already set off chain reactions throughout American society and within every one of its institutions."⁵ The *Bulletin* recognized that nuclear anxiety—defined here as the "fear of nuclear war and of its consequences"⁶—had become a staple of American popular and political culture but was also difficult to quantify. In response, the *Bulletin* designed the "Doomsday Clock" in 1947 as a gauge of how close mankind is to destroying itself, with midnight representing the apocalypse.⁷ The President had the Zeus-like power to destroy entire nations and snuff out millions of lives with the press of a button in an instant; all other powers were trivial by comparison.

At the same time that Congress granted this cosmic authority solely to the President with the 1946 Atomic Energy Act,⁸ Congress was debating what would become the Presidential Succession Act.⁹ Franklin D. Roosevelt's sudden death brought attention to succession and inability issues at the dawn of the nuclear age.¹⁰ The Presidential Succession Act of 1947 clarified the line of succession beyond the Vice President by amending an 1886 act—the last action on the succession issue—to make the Speaker of the House third, ahead of the President pro tempore.¹¹ Both the President and Congress deemed a congressional line of succession more democratic than the Cabinet line of succession—which was in place at the time—because the Speaker is elected by the people of his district and then chosen by his cohort.¹²

4. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 132–133, 141, 144 (2005).

5. PAUL BOYER, *BY THE BOMB'S EARLY LIGHT: AMERICAN THOUGHT AND CULTURE AT THE DAWN OF THE ATOMIC AGE* xvii (1994) (quoting Robert Karl Manoff, *The Media: Nuclear Security vs. Democracy*, BULL. ATOMIC SCIENTISTS, Jan. 1984, at 29).

6. Tom W. Smith, *Nuclear Anxiety*, 52 PUB. OPINION Q. 557, 557 (1988).

7. Kennette Benedict, *Doomsday Clockwork*, BULL. ATOMIC SCIENTISTS (Jan. 26, 2017), <http://thebulletin.org/doomsday-clockwork8052> [<https://perma.cc/4JP3-QWBN>].

8. Atomic Energy Act of 1946, Pub. L. No. 79-585, 60 Stat. 755 (codified as amended in scattered sections of 42 U.S.C.).

9. See H.R. REP. NO. 79-829, at 1–2 (1945).

10. *Succession to the Presidency: Hearings on S. Con. Res. 1, S. 139, S. 536, and S. 564 Before the S. Comm. on Rules & Admin.*, 80th Cong. 6 (1947) (statement of Sen. Theodore Francis Green, Member, S. Comm. on Rules & Admin.) (noting the "renewal of the discussion [of presidential succession] since the death of President Roosevelt").

11. 3 U.S.C. § 19 (2012).

12. In a June 19, 1945, statement to Congress, President Truman wrote, "[T]he office of the President should be filled by an elective officer. . . . I believe that the Speaker is the official in the Federal Government whose selection, next to that of the President and Vice President,

Truman's Presidential Succession Act became law in 1947¹³ and the Soviets exploded their first atom bomb just two years later.

After the developments of more powerful bombs by the United States and the Soviet Union and a method to deliver them with the Soviet launch of Sputnik in 1957, nuclear anxiety began to spur government officials in Congress and in the Eisenhower administration to solve the presidential inability problem, which had been elusive since the Constitution's ratification. Eisenhower and Nixon signed a letter agreement, which was released to the public on March 3, 1958, under the specter of the arms race.¹⁴ In the letter, the President and Vice President agreed that the Vice President would assume presidential powers in the event the President declared himself unable to perform his duties.¹⁵ If the President was not in a position to declare himself unable to perform his duties, the Vice President, after consulting with whomever he deemed appropriate, would make the determination of inability.¹⁶ In either case, the President would determine when the inability had ended and his powers would be immediately restored.¹⁷ No President or Vice President in U.S. history had come to such a public agreement before Eisenhower and Nixon.¹⁸ Their public acknowledgement of the possibility of an incapacitated President suggested that the conversation about the need for a clear chain of command had become urgent. President John F. Kennedy and Vice President Lyndon Johnson signed a similar letter on August 10, 1961,¹⁹ reflecting that even the youthful Kennedy must have been anxious about ensuring the orderly transfer of power in the nuclear age.

Heightened tensions between the superpowers during the Kennedy administration—in particular, during the Cuban Missile Crisis of October 1962—focused policymakers and the public on the possibility that the President might be forced to decide the fate of millions in a matter of mere minutes.²⁰ This created an urgency for a more permanent solution to presidential succession and inability issues. Even if total annihilation did not occur, a nuclear attack could suddenly destabilize the American government;

can be most accurately said to stem from the people themselves." H.R. REP. NO. 79-829, at 1-2.

13. Presidential Succession Act of 1947, Pub. L. No. 199, 61 Stat. 380 (codified as amended at 3 U.S.C. § 19).

14. Agreement Between the President and the Vice President as to Procedures in the Event of Presidential Disability, PUB. PAPERS 196 (Mar. 3, 1958).

15. *Id.*

16. *Id.*

17. *Id.*

18. RICHARD M. NIXON, SIX CRISES 178-79 (1962).

19. Press Release, Office of the White House Press Secretary (Aug. 10, 1961) (on file with the National Archives and Records Administration, U.S. Senate Committee on the Judiciary, Subcommittee on Constitutional Amendments).

20. See, e.g., *Presidential Inability and Vacancies in the Office of the Vice President: Hearing on S.J. Res. 1 et al. Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 89th Cong. 92 (1965) [hereinafter *1965 Senate Hearing*] (statement of Sen. Birch Bayh, Chairman, Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary) (discussing the possibility of "the Russians mov[ing] missiles into Cuba" after the President has become incapacitated).

structural and procedural safeguards were needed to guard against this possibility. Nuclear anxiety flourished even more intensely after Kennedy's assassination. The specter of a nation without firm leadership during a time of nuclear crisis ultimately provided the impetus to resolve these succession issues.

The nuclear issue made the sudden transition from Kennedy to Johnson different from other unexpected presidential successions. Although seven other Presidents had died while in office and sixteen Vice Presidents had also died before completing their tenure, Kennedy was the first President to die instantaneously—fatally wounded by an assassin's bullet.²¹ Kennedy's immediate death, coupled with Johnson's presence in the same motorcade where Kennedy was shot, highlighted the long-standing concern that the passage of power to the Vice President might not always be smooth.²² Kennedy's assassination resulted in a sudden transfer of power to a Vice President whose own health was subject to question.²³

For this reason, traditional legal histories, such as that of David Kyvig, have argued that the Twenty-Fifth Amendment, though a product of "long-standing concerns about presidential disability and succession," was most immediately "a reaction to the assassination of President John F. Kennedy."²⁴ Yet the assassination does not fully explain the Amendment's sinuous journey through Congress and its ratification almost four years after Kennedy's death. For a more complete account, the climate of nuclear anxiety evident in culture and politics from 1945 through 1967 must be factored into the gradual ratification of the Twenty-Fifth Amendment.

Bayh's determination to alter the Constitution to solve this issue reflected the widespread belief that the American public and its government could no longer tolerate a potential absence at the helm during this era of nuclear apprehension.²⁵ Because the President wielded the power of the bomb, he literally had the power of life and death and the continuity of mankind in his hands—something that never could have been imagined by the framers of the Constitution. In the midst of the growing nuclear anxiety, Eisenhower's brief illnesses and Kennedy's sudden death exposed the paradox that the President was at once powerful and mortal. Asked years later if tense international confrontations such as the Cuban Missile Crisis and nuclear anxiety were in the back of his mind as he began drafting what later became the Twenty-Fifth Amendment, Bayh replied: "I think it was impossible for it not to be on the *forefront*, not the back of [my] mind."²⁶ The Cuban Missile Crisis "was very

21. STEVEN M. GILLON, *THE KENNEDY ASSASSINATION—24 HOURS AFTER: LYNDON B. JOHNSON'S PIVOTAL FIRST DAY AS PRESIDENT* 56–57 (2009).

22. See DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995*, at 357 (1996). In *Explicit and Authentic Acts*, David Kyvig engages in the debate over whether the Constitution continues to serve as the "sovereign will of the people as to the terms of their governance" or whether it is unable to "check[] the momentary whims and excesses of transitory holders of power." *Id.* at xviii.

23. Johnson suffered a heart attack in 1955, the same year as Eisenhower. *Id.* at 358.

24. *Id.* at 349.

25. Telephone Interview with Birch Bayh, former U.S. Senator from Ind. (Nov. 11, 2014).

26. *Id.*

much a reason” for the Amendment, he said.²⁷ Bayh perceived that the framers had not anticipated the effects of nuclear weaponry on the presidency, and this, coupled with the fallibility of any individual President, most likely led him to conceive that the time was right for an Amendment to address presidential succession and inability.

From December 1963, when Bayh introduced his draft of the Amendment, through its ratification in February 1967, references to Kennedy’s assassination lessened during congressional debate,²⁸ but direct and indirect allusions to the nuclear anxiety that permeated American culture and politics continued.²⁹ It was this nuclear anxiety that contributed to each stage of the process. But while the urgency of concern about presidential stability amid the real possibility of instant nuclear destruction directly contributed to ratification, it also complicated the process of ratification in states such as Pennsylvania, Arkansas, and Colorado.³⁰ Despite contrary reactions to the prospect of nuclear destruction, after more than two decades at the forefront of America’s psyche, nuclear anxiety became part of the framework of American government.

I. NUCLEAR ANXIETY IN CONGRESS

This Part describes the legislative precursors to the Twenty-Fifth Amendment, its drafting, and its passage through Congress. Throughout the process that ultimately led to ratification, nuclear anxiety permeated the discussion and informed decision-making.

A. “*This Is the Time to Do It*”: *Legislative Precursors, 1958–1963*

A year after the Sputnik launch and shortly after Eisenhower and Nixon signed their letter agreement, Senator Estes Kefauver of Tennessee, Chairman of the Judiciary Committee’s Subcommittee on Constitutional Amendments, made it clear he believed the time had come to pass inability and succession legislation. In April 1958, Kefauver introduced a bill on presidential succession, which embodied the spirit of the letter agreements with few modifications.³¹ He reintroduced the bill in the 86th Congress.³² Both times, the Chairman was able to move the bill out of his subcommittee to the wider Judiciary Committee, but no further.³³ Congress adjourned in 1960 with the legislation still on the Committee’s agenda.

27. *Id.*

28. *See generally* 1965 Senate Hearing, *supra* note 20.

29. *See infra* Parts I.B–C, II.

30. *See infra* Part II.

31. *See* BIRCH BAYH, ONE HEARTBEAT AWAY: PRESIDENTIAL DISABILITY AND SUCCESSION 26 (1968) (noting that this “administration proposal” was similar to the March 1958 letter agreement, but it “contain[ed] modifications that were designed to allay congressional criticism”).

32. S.J. Res. 40, 86th Cong. (1959).

33. *See* BAYH, *supra* note 31, at 27.

Then, in 1962, Kefauver announced that he would join Republican Senator Kenneth Keating of New York to cosponsor a bill, Senate Joint Resolution 35 (“S.J. Res. 35”), which was endorsed by the American Bar Association (ABA). The bill “simply authorize[d] Congress to pass laws on how to decide when a President is disabled,” or, in other words, enabled Congress to establish procedure.³⁴ The thrust of the release was that “[t]his is the time to do it—when we have a young, healthy President, when extensive hearings on this subject would not be embarrassing to anyone.”³⁵ A healthy President would not take succession planning as a slight; legislating a solution had become imperative.

On June 11 and 18, 1963, the Senate Subcommittee on Constitutional Amendments held hearings on presidential succession and inability bill S.J. Res. 35.³⁶ The bill was less detailed than many pieces of legislation pending in the Subcommittee; it was drawn up that way in the hope that Congress would be more inclined to pass a less complicated piece of legislation.³⁷ It had the tacit support of former Vice President Richard Nixon, who experienced firsthand the issues involving an incapacitated President when Eisenhower was ill.³⁸ Nixon wrote to Kefauver before the hearings began: “With the advent of the terrible and instant destructive power of atomic weapons, the nation cannot afford to have any period of time when there is doubt or legal quibbling as to where the ultimate power to use those weapons resides.”³⁹ Pointing to the “constitutional defect” in his opening statement, Senator Keating agreed with the former Vice President: failing to take action in this era could result in “paralysis” at the very time that quick and cogent decision-making was imperative.⁴⁰ With these fears in mind, the Subcommittee as a whole came to that conclusion as well and the bill was voted out of the Subcommittee to the full Judiciary Committee.⁴¹

On August 10, 1963, two weeks after his sixtieth birthday, Kefauver died of a heart attack⁴² and the hope of a more solid succession and inability plan almost died with him. Senator James O. Eastland, Chairman of the Senate Judiciary Committee, considered dissolving the panel.⁴³ Yet a memorandum written in round cursive handwriting on Senate letterhead in the last of

34. Press Release, Estes Kefauver, U.S. Senator from Tenn., Memo from Washington (Jan. 28, 1963) (on file with the National Archives and Records Administration, U.S. Senate Committee on the Judiciary, Subcommittee on Constitutional Amendments).

35. *Id.*

36. *Presidential Inability: Hearings on S.J. Res. 28, S.J. Res. 35, and S.J. Res. 84 Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 88th Cong. 1–117 (1963) [hereinafter *1963 Senate Hearings*].

37. BAYH, *supra* note 31, at 54–55.

38. See NIXON, *supra* note 18, at 131–81.

39. Letter from Richard Nixon, former Vice President, to Estes Kefauver, U.S. Senator from Tenn. (June 10, 1963) (on file with the National Archives and Records Administration, U.S. Senate Committee on the Judiciary, Subcommittee on Constitutional Amendments).

40. *1963 Senate Hearings*, *supra* note 36, at 11 (statement of Sen. Kenneth B. Keating, Member, Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary).

41. BAYH, *supra* note 31, at 346.

42. *Estes Kefauver Is Dead at 60 After Heart Attack*, N.Y. TIMES, Aug. 11, 1963, at 1.

43. KYVIG, *supra* note 22, at 358.

Kefauver's files noted, confidentially, that presidential disability had "prospects [at] this time."⁴⁴ Concomitantly, Senator Bayh and his staff were searching for their own opportunities to resolve the succession and inability issue, hoping to fill the void Kefauver's death created.⁴⁵ Bayh convinced Chairman Eastland to make him the new Chairman of the Subcommittee on Constitutional Amendments⁴⁶ and on September 30, 1963, the Judiciary Committee ratified his appointment.⁴⁷

B. "*He and He Alone Has the Authority to Push the Vital Button*":
Drafting and Passage Through Congress, 1963–1964

Kennedy's sudden death elicited calls for legislation to remedy the confusion surrounding presidential succession and inability; these calls were coupled with references to the tense cultural and political mood of the era and the potential for nuclear war. "Has the Congress prepared the Presidency adequately for the possibilities of a violent age?" James Reston, columnist for the *New York Times*, asked on December 5, 1963.⁴⁸ He continued, "Is the rule of Presidential succession satisfactory for these days of human madness and scientific destruction?"⁴⁹ Similarly, a *Washington Post* editorial insisted that the problem of presidential succession "need[ed] a fresh analysis" because "[i]n these days of hair-trigger defense few things would be more perilous than uncertainty as to where the powers of the Presidency would lie in case of disaster."⁵⁰ These articles motivated Senator Bayh.⁵¹

Senator Bayh had been thrust into a centuries-old constitutional conundrum. On December 4, 1963, after listening to debate in a Judiciary Committee meeting that focused mainly on other matters but included references to the succession bill that Kefauver and Keating had introduced earlier in the year, Senator Bayh decided to draft his own measure.⁵² During the second week of December, the Senator gathered his team and began the herculean undertaking. John D. Feerick, author of a paper entitled "The Problem of Presidential Inability—Will Congress Ever Solve It?," published in the *Fordham Law Review* in 1963,⁵³ was an integral member of this team. Feerick became the Chair of the American Bar Association's Junior Bar Conference Committee on Presidential Inability and Vice Presidential

44. Memorandum from Estes Kefauver, U.S. Senator from Tenn. (July 1963) (on file with the National Archives and Records Administration, U.S. Senate Committee on the Judiciary, Subcommittee on Constitutional Amendments).

45. See BAYH, *supra* note 31, at 28–29.

46. Telephone Interview with Robert Keefe, former Admin. Assistant to U.S. Senator Birch Bayh (Nov. 5, 2014).

47. BAYH, *supra* note 31, at 29.

48. James Reston, *The Problem of the Succession to the Presidency*, N.Y. TIMES, Dec. 5, 1963, at 34.

49. *Id.*

50. Editorial, *Presidential Succession*, WASH. POST, Dec. 2, 1963, at A20.

51. BAYH, *supra* note 31, at 10, 32.

52. *Id.* at 29, 31–32.

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

Vacancy in the spring of 1964.⁵⁴ He made it the Junior Bar Conference's mission to garner further support for a presidential succession and inability amendment.⁵⁵ Other members of the American Bar Association, including Dale Tooley and Michael Spence, were instrumental in conducting the campaign—in Congress, among state legislatures, and with the public—to get presidential succession and inability measures written into the Constitution.⁵⁶

In his book *One Heartbeat Away*, Bayh wrote that the vice presidential vacancy following Kennedy's assassination and President Johnson's assumption of the presidency created urgency for proposing succession and inability legislation.⁵⁷ But in his speech on December 12, 1963, on the floor of the Senate, Bayh made no mention of the assassination.⁵⁸ Significantly, Bayh referred to the increased pace of communications and technology (and therefore warfare) in the modern era of globalization and concluded that the tense international atmosphere called for immediate action: "The accelerated pace of international affairs, plus the overwhelming problems of modern military security, make it almost imperative that we change our system to provide for not only a President but a Vice President at all times."⁵⁹ The following month, Bayh highlighted the increased importance and responsibilities of the Vice President during the Cold War.⁶⁰ In later testimony, members of the public and Congress amplified Bayh's point: even if it had not been the case in the past, now, during the atomic age, having a successor at all times was vital to the nation's security.⁶¹

Nuclear anxiety was a key motivating factor driving the amendment forward from the outset. As Bayh got to work with his team to perfect his first draft, he reflected that, for the sixteenth time in U.S. history, the nation was without a Vice President but that "this was a different and dangerous age. The possible consequences of inaction were . . . terrifying . . ."⁶² Senator Bayh introduced Senate Joint Resolution 139 ("S.J. Res. 139") on December 12, 1963.⁶³

Concerns at this time emphasized a perceived weakness in the 1947 succession law: the potential for the presidency to switch parties suddenly during the nuclear age. In its statement on national policy entitled *Presidential Succession and Inability*, the Committee for Economic

54. J. William Cuncannan, *Our Younger Lawyers*, 50 A.B.A. J. 505, 573 (1964).

55. Interview with John D. Feerick, Dean Emeritus, Norris Professor of Law, Fordham Univ. Sch. of Law, in Larchmont, N.Y. (Feb. 28, 2016).

56. *See infra* Part II.C.

57. BAYH, *supra* note 31, at 34.

58. 109 CONG. REC. 24,420–21 (1963) (statement of Sen. Bayh).

59. *Id.* at 24,421.

60. *Presidential Inability and Vacancies in the Office of Vice President: Hearings on S.J. Res. 13 et al. Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 88th Cong. 1–2 (1964) [hereinafter *1964 Senate Hearings*] (statement of Sen. Birch Bayh, Chairman, Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary).

61. *See infra* notes 69–88 and accompanying text.

62. BAYH, *supra* note 31, at 34.

63. 109 CONG. REC. 24,420 (statement of Sen. Bayh).

Development (CED), a public policy think tank, suggested eliminating Congress from the line of succession to avoid a potential sudden switch in parties.⁶⁴ In the CED's proposal, the Secretary of the Treasury would be third in line behind the Vice President and Secretary of State, thus removing the Speaker of the House and Senate President pro tempore from the succession line, as put in place by the 1947 law.⁶⁵ Notably, the proposal pointed out the President's unique position in that he must keep his finger on the nation's nuclear trigger and provided, "As Constitutional commander in chief of the military services, the President controls both the nuclear trigger and the use of all other military force" and that "[t]he President's active leadership is so essential to the effective operation of the government that his death or serious illness . . . creates the risk of national disaster."⁶⁶ The proposal underscored the urgency of finding a solution to presidential succession and inability because of the power the President had at his fingertips.

Bayh invited star witnesses who understood the urgency firsthand to testify at the Subcommittee hearings that began on January 22, 1964.⁶⁷ Former President Eisenhower—whom Bayh believed was "the only person alive that could adequately describe the need for an inability amendment"⁶⁸—did not appear in person but agreed to submit a statement for the record.⁶⁹ In that statement, Eisenhower pointedly did not suggest that the letter agreements signed by himself and Nixon in 1958 would suffice to solve the succession and inability problem.⁷⁰ Instead, he said that the "bothersome" possibility of a disaster removing the President and Vice President simultaneously meant that changes should be made by constitutional amendment.⁷¹

Testimony from across the aisle was rife with similar remarks that nuclear war was a grim possibility, and, as such, the United States required an

64. COMM. FOR IMPROVEMENT OF MGMT. IN GOV'T, COMM. FOR ECON. DEV., PRESIDENTIAL SUCCESSION AND INABILITY 12, 18–19 (1964) [hereinafter PRESIDENTIAL SUCCESSION AND INABILITY].

65. *Id.* Columbia Professor Wallace S. Sayre, Chairman of the CED's Committee for Improvement of Management in Government, suggested that the Secretary of Defense should follow the Secretary of State in the presidential line of succession. *See* Letter from Robert F. Steadman, Dir., Comm. for Improvement of Mgmt. in Gov't, Comm. for Econ. Dev., to Members of the Comm. for Improvement of Mgmt. in Gov't and the Advisory Bd. (Aug. 13, 1964) (on file with the National Archives and Records Administration, U.S. Senate Committee on the Judiciary, Subcommittee on Constitutional Amendments) (enclosing proposal by William S. Sayre). In its final report, the CED recognized his suggestion. PRESIDENTIAL SUCCESSION AND INABILITY, *supra* note 64, at 17. Ultimately, however, it recommended the restoration of the 1886 succession law, *id.* at 19, wherein the Secretary of State would be second in line behind the Vice President, followed by the Secretary of the Treasury. *See* 3 U.S.C. §§ 21–22 (1886) (repealed 1947).

66. PRESIDENTIAL SUCCESSION AND INABILITY, *supra* note 64, at 9.

67. *See* 1964 Senate Hearings, *supra* note 60, at 1.

68. Telephone Interview with Birch Bayh, *supra* note 25.

69. Letter from Dwight D. Eisenhower, former President of the U.S., to Birch Bayh, Chairman, Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary (Mar. 2, 1964) (on file with the National Archives and Records Administration, U.S. Senate Committee on the Judiciary, Subcommittee on Constitutional Amendments).

70. *Id.*

71. *Id.*

immediate solution to the succession and inability problem. Republican Congressman Louis C. Wyman of New Hampshire stated that a “crippling inability is a daily possibility with any President” and concluded that Congress must act because “in this atomic era seconds can be crucial.”⁷² Republican Senator Jacob K. Javits of New York stated, “The split-second exigencies of this nuclear age do not permit the luxury of further incomplete solutions.”⁷³ And Senator James B. Pearson, Republican of Kansas, argued that “[i]n an era when defense of the entire free world, through the use of our nuclear deterrents,” relies on just one man, the President, “we cannot leave any doubt about the fact of succession or the capabilities of the President’s successor.”⁷⁴ The letter agreement between Kennedy and Johnson of August 10, 1961, was included in the testimony.⁷⁵ The agreement concluded that “[o]bviously,” not having a plan in place “is a risk which cannot be taken in these times.”⁷⁶ By early 1964, the voices calling for action were building.⁷⁷

One expert witness, Professor Ruth Miner of Wisconsin State College, was insistent that a solution was needed because of the tense public mood of the era. Due to her concern that an atomic attack would occur when all officials in the line of succession were in Washington, D.C., Miner suggested that the line after the Vice President include state Governors.⁷⁸ These Governors would be chosen in the order of their states’ population.⁷⁹ Yet the Governors who testified did not discuss Miner’s succession idea. Governor Edmund Brown of California said that it “would be tragic, in this day of nuclear weapons when foreign policy decision[s] literally can mean life or death, not to provide the machinery in all contingencies for a sure and smooth transition of executive power.”⁸⁰ Governor Nelson A. Rockefeller of New York

72. *1964 Senate Hearings*, *supra* note 60, at 211 (statement of Rep. Louis C. Wyman).

73. *Id.* at 51 (statement of Sen. Jacob K. Javits).

74. *Id.* at 261 (statement of Sen. James B. Pearson).

75. White House Statement and Text of Agreement Between the President and the Vice President on Procedures in the Event of Presidential Inability, PUB. PAPERS 561 (Aug. 10, 1961).

76. *Id.*

77. Discussions of presidential succession in the context of nuclear warfare were not confined to the floor of the Senate. In May 1964, the American Bar Association hosted a conference on presidential succession at which numerous members of Congress and President Eisenhower spoke. BAYH, *supra* note 31, at 111–12. LeRoy Collins, a former Governor of Florida who served as permanent chairman of the Democratic National Convention in 1960 and who moderated a panel discussion at the conference, reminded those present that “the responsibilities of the Presidency are far more awesome [sic] in this atomic age.” Governor LeRoy Collins, Remarks at the Conference on Presidential Inability and Vice-Presidential Vacancy (May 25, 1964) (on file with the National Archives and Records Administration, U.S. Senate Committee on the Judiciary, Subcommittee on Constitutional Amendments). Of the age itself, he said, “[W]e live on a thin line between the possibility of cataclysm on the one hand, and the greatest era of human progress of all time on the other. Any missing gap in our leadership thus contributes to the peril . . .” *Id.*

78. *1964 Senate Hearings*, *supra* note 60, at 267 (statement of Ruth Miner, Associate Professor, Wisconsin State College).

79. *Id.*

80. Letter from Edmund G. Brown, Governor, State of Cal., to Senator Birch Bayh, Chairman, Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary (Mar. 20, 1964) (on file with the National Archives and Records Administration, U.S. Senate Committee on the Judiciary, Subcommittee on Constitutional Amendments).

echoed Brown's sentiments and stated that the present arrangements did "not adequately cope with the nation's needs at a time of international crisis and tension when the 'hot line' to Moscow might have to be used on short notice by the nation's Chief Executive."⁸¹ Like the other witnesses, these Governors argued that the 1947 Act was inadequate in light of nuclear anxiety.

The only witness to eclipse Rockefeller's star power, former Vice President Richard Nixon, was even more adamant than in his earlier letter to Senator Kefauver that the existence of atomic weapons made it imperative to ratify an amendment. After stating that the President was the defender of the free world, Nixon continued: "The United States and the free world can't afford 17 months or 17 weeks or 17 minutes in which there is any doubt about whether there is a finger on the [nuclear] trigger . . ."⁸² Nixon also made the case in an essay for the *Saturday Evening Post*: "Fifty years ago the country could afford to 'muddle along' until the disabled President either got well or died."⁸³ He continued, "But today when only the President can make the decision to use atomic weapons in the defense of the Nation, there could be a critical period when 'no finger is on the trigger' because of the illness of the Chief Executive."⁸⁴ To Nixon, who had actually been in the presidential line of succession, the lack of planning for such a crisis was unacceptable.

Perhaps nobody knew the flaws in the succession process as intimately as President Johnson himself. Johnson had not provided any support during the Subcommittee hearings and he forced Bayh to incorporate an earlier letter of Deputy Attorney General Nicholas deB. Katzenbach, dated June 18, 1963, into the record in hopes that critics of his succession and inability bill would not make note of the administration's silence.⁸⁵ Katzenbach had expressed support for the Kefauver-Keating succession legislation prior to Bayh's introduction of S.J. Res. 139.⁸⁶ Bayh knew that Katzenbach's main reason for supporting the earlier bill could also be applied to S.J. Res. 139.⁸⁷ "The primary purpose," the Deputy Attorney General said, "is to confer broad discretion on the Congress" when the President and Vice President disagree on inability "or an atomic attack or like holocaust prevents communication and agreement between the President and Vice President."⁸⁸ Despite fears of a chaotic transfer of presidential power in the nuclear age, Johnson recognized that some members of the House would not vote favorably for

81. Letter from Nelson A. Rockefeller, Governor, State of N.Y., to Senator Birch Bayh, Chairman, Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary (Feb. 25, 1964) (on file with the National Archives and Records Administration, U.S. Senate Committee on the Judiciary, Subcommittee on Constitutional Amendments).

82. Nixon testified on the final day of the hearings, Thursday, March 5, 1964. *1964 Senate Hearings*, *supra* note 60, at 242 (statement of Richard M. Nixon, former Vice President).

83. Richard M. Nixon, *We Need a Vice President Now*, SATURDAY EVENING POST, Jan. 1, 1964, reprinted in *1964 Senate Hearings*, *supra* note 60, at 237.

84. *Id.*

85. BAYH, *supra* note 31, at 78-79.

86. *Id.* at 78.

87. *Id.* at 78-79.

88. *1964 Senate Hearings*, *supra* note 60, at 202 (statement of Nicholas deB. Katzenbach, Deputy Att'y Gen.).

S.J. Res. 139 out of respect for House Speaker John McCormack, who was next in line due to the vice presidential vacancy created by Johnson's accession to the presidency.⁸⁹ Johnson relayed this inclination to Bayh in late March 1964 after the hearings were finished.⁹⁰

Two months later, on May 27, 1964, S.J. Res. 139 was reported out of the Subcommittee to the full Senate Judiciary Committee.⁹¹ The *Congressional Quarterly* noted that the Senate Subcommittee had approved a measure that “would provide a means of filling Vice Presidential vacancies, unsolved problems of paramount importance in a push-button-war age, in the opinion of some.”⁹² With Johnson's advice in mind, Senator Bayh was content to see the Judiciary Committee unanimously pass S.J. Res. 139 on August 4, 1964.⁹³ Weeks later, on September 29, 1964—about five weeks before the presidential election and only days before Congress adjourned for the campaign season on October 3—the Senate approved the bill by a roll call vote of 65 to 0.⁹⁴ Bayh now intended to “introduce the amendment at the beginning of the following session, pass it rapidly through the upper chamber, and bring [the] entire effort to bear upon the House of Representatives.”⁹⁵ Heightened nuclear anxiety would allow him to do just that.

C. “*The Nightmare of Nuclear Holocaust*” and “*the Potential of Paralysis*” Require Us “to Act—and To Act Now”:
Passage Through Congress, 1965

Bayh felt that the administration's support was crucial to passage. Because of lobbying by Bayh and the ABA, President Johnson dedicated eighteen words to the succession and inability issue in his State of the Union address on January 4, 1965: “I will propose laws to insure the necessary continuity of leadership should the President become disabled or die.”⁹⁶ On January 28, 1965, after additional lobbying, Johnson officially endorsed Bayh's amendment (Senate Joint Resolution 1 (“S.J. Res. 1”) and House Joint Resolution 1 (“H.J.R. 1”) in the new 89th Congress) by sending a message of support to Congress, which emphasized that a nuclear holocaust or other such catastrophe required planning in the form of an amendment.⁹⁷ Johnson contended that, thanks to providence, America had avoided a chaotic transfer

89. See BAYH, *supra* note 31, at 92–93.

90. See Telephone Interview with Birch Bayh, *supra* note 25.

91. See BAYH, *supra* note 31, at 346.

92. Letter from Congressional Quarterly Serv., Presidential Inability and Veep Vacancies, June 3, 1964 (on file with the National Archives and Records Administration, U.S. Senate Committee on the Judiciary, Subcommittee on Constitutional Amendments).

93. See BAYH, *supra* note 31, at 130–33.

94. 110 CONG. REC. 23,061 (1964); BAYH, *supra* note 31, at 159.

95. BAYH, *supra* note 31, at 98.

96. Lyndon B. Johnson, *Annual Message to the Congress on the State of the Union*, AMER. PRESIDENCY PROJECT (Jan. 4, 1965), <http://www.presidency.ucsb.edu/ws/?pid=26907> [<https://perma.cc/EY97-5BBD>].

97. 111 CONG. REC. 1547 (1965).

of presidential power.⁹⁸ But, he said, “[I]t is not necessary to conjure the nightmare of nuclear holocaust or other national catastrophe to identify these omissions as chasms of chaos into which normal human frailties might plunge us at any time.”⁹⁹ He continued, “The potential of paralysis implicit in these conditions constitutes an indefensible folly for our responsible society in these times. Commonsense impels, duty requires us to act—and to act now—without further delay.”¹⁰⁰ Highlighting the tense cultural and political mood, Johnson urged that “[a]ction on these measures now will allay future anxiety among our own people—and among the peoples of the world”¹⁰¹ With his finger not only on the trigger but on the pulse of the nation, the President was clearly prompting Congress to act before nuclear disaster struck. The President’s support proved effective when, on February 1, 1965, S.J. Res. 1 was reported favorably to the Senate Judiciary Committee by the Subcommittee on Constitutional Amendments and, three days later, the Judiciary Committee approved the resolution, sending it to the entire Senate.¹⁰²

The same week the Senate Judiciary Committee approved S.J. Res. 1, the House Judiciary Committee held its own hearings on February 9, 10, 16, and 17, 1965.¹⁰³ The testimony was replete with references to nuclear anxiety as the reason for moving forward with an amendment.¹⁰⁴ Convening the hearings, House Judiciary Chairman Emanuel Celler did not mention the tragic death of the late President in his opening statement. Instead he stated, “One would have to be blind not to see and acknowledge the dangers” the nation was gambling with by not having a solution to the important problem.¹⁰⁵ Celler listed the duties of the president and argued that the nation could not leave the office unfilled, even briefly, because of these responsibilities in the nuclear age.¹⁰⁶

Bayh was one of the experts who testified before the House Judiciary Committee and mentioned a nuclear nightmare. He began by discussing time limits, focusing on the number of days that might elapse between the nomination and confirmation of a Vice President.¹⁰⁷ Bayh shared the thoughts of the Senate Judiciary Committee and posed a nuclear holocaust scenario: “What if we were engaged in nuclear war and the seat of Government is destroyed? There would be a time element involved finding a place where the Congress could meet and convene despite rapid travel we take for granted.”¹⁰⁸ Nuclear war could cause numerous problems for presidential continuity—not the least of which was convening Congress to

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 1548.

102. *See* BAYH, *supra* note 31, at 346.

103. *See generally* 1965 Senate Hearing, *supra* note 20.

104. *Id.*

105. *Id.* at 2 (statement of Rep. Emanuel Celler, Chairman, H. Comm. on the Judiciary).

106. *Id.*

107. *Id.* at 40 (statement of Sen. Birch Bayh).

108. *Id.* at 67.

determine a President's inability if the President and Vice President disagreed—but predicting the hardships that would come in the aftermath of a nuclear attack was difficult.

When discussing the issue of time limits—a point of contention when ironing out the differences between the Senate and House versions of the bill—Congressmen made numerous references to the perils and anxiety of the nuclear age. Colorado Congressman Byron G. Rogers, a member of the House Judiciary Committee, raised the issue by referencing the earlier CED report of the need to include provisions for dual presidential and vice presidential incapacities. He stated that the CED “finds a need to change the present posture we are in because of the nuclear age” and that “it is conceivable, though remote, that some situation like [dual inability] might occur.”¹⁰⁹ Focused on the specter of nuclear war, Democratic Congressman Abraham J. Multer of New York reminded the committee about the unease surrounding President Eisenhower's illnesses, saying, “I need not document the circumstances of these occasions, for we can all recall the danger that can be sensed when a President is incapacitated, particularly in the nuclear age.”¹¹⁰ Howard W. Robison, another Representative from New York, suggested not only ratifying an amendment but including a statute to specify additional procedures in the event of disability. One of the provisions Robison stipulated was a commission with the responsibility to declare the President incapacitated. He said, “I feel the latter contingency is important in view of the perilous nuclear-threatened world in which we live.”¹¹¹ In another statement, California Congressman Edward R. Roybal, expressing his support for H.J. Res. 1, also tied the need for the amendment to the nuclear age: “I am sure that the members of this committee fully realize that we can no longer afford, in this nuclear-space age, to leave the fate of our Government to the whims of chance.”¹¹² Talk of time limits continued to pivot on the fact that Congress would be making the decision on inability in an age when minutes mattered.

On February 19, 1965, Bayh introduced S.J. Res. 1 on the floor of the Senate.¹¹³ In his speech on the Senate floor, Bayh listed the crises America was dealing with when Eisenhower had his heart attack in 1955 and then read a pertinent section of Nixon's *Six Crises* aloud.¹¹⁴ This underscored the fact that it was the President's job to react to these situations and that it was he who had his finger on the nuclear button. In the section Bayh read, Nixon had written: “The ever-present possibility of an attack on the United States was always hanging over us. Would the President be well enough to make the decision? If not, who had the authority to push the button?”¹¹⁵ The principal author of what would become the Twenty-Fifth Amendment not

109. *Id.* at 158 (statement of Rep. Byron G. Rogers, Member, H. Comm. on the Judiciary).

110. *Id.* at 182 (statement of Rep. Abraham J. Multer).

111. *Id.* at 260 (statement of Rep. Howard M. Robison).

112. *Id.* at 289 (statement of Rep. Edward R. Roybal).

113. 111 CONG. REC. 3250 (1965) (statement of Sen. Bayh).

114. *Id.* at 3251 (quoting NIXON, *supra* note 18, at 150).

115. *Id.*

only pointed numerous times to nuclear attack as the reason for urgent passage but was now highlighting the nuclear anxiety of the former Vice President, who was once first in the line of succession. The Senate passed S.J. Res. 1 by a vote of 72 to 0 on February 19, 1965.¹¹⁶

After the Senate delivered S.J. Res. 1 to the House, Congressman Celler again iterated the sentiment that, because the President's finger was on the nuclear trigger, Congress could not ignore the danger inherent in failing to enact Bayh's resolution. The Congressman said, "One would have to be blind not to see and acknowledge the danger and the risk we are faced with at this very moment . . ." ¹¹⁷ Celler's statement echoed that of Johnson's January 28 endorsement—while fate had been kind to America in that Kennedy had not lingered incapacitated, which perhaps would have caused a chaotic transfer of presidential power, Congress could not expect America's luck to hold out.¹¹⁸ Celler noted that the resolution had the support of the ABA and reread earlier testimony into the record.¹¹⁹ The House passed a modified version of S.J. Res. 1 by a vote of 368 to 29 on April 13 and returned the bill to the Senate on April 22.¹²⁰

When the House returned the bill to the Senate on April 22, moderate changes had been made to limit the time in which Congress had to decide the President's disability.¹²¹ Bayh used the nuclear issue to sway the decision-making. The House had added the provision that if Congress did not declare within ten days that the President was incapacitated, he would resume office.¹²² Bayh disagreed with this change and commented that, although he was not a doctor, time for diagnoses and discussion would be needed.¹²³ He would "bet there are some illnesses which can't even be diagnosed in ten days, let alone permitting enough time for congressional discussion."¹²⁴ After a ten-day period, Congress could still be weighing the evidence and "we might have a President who could be completely off his rocker reassuming his powers and duties, even if it meant he could blow us all to kingdom come in an hour's time."¹²⁵ Bayh had again invoked the nuclear specter as a main argument, this time for the Senate not to cave to the House.

One other time-related difference remained between the Senate and House versions. In the House version, Congress was required to convene within forty-eight hours to discuss the President's inability, and Bayh, yet again, brought up the possibility of nuclear attack.¹²⁶ Congress convening in that last instance would only occur if the President and Vice President had

116. See BAYH, *supra* note 31, at 346.

117. 111 CONG. REC. 7937 (1965) (statement of Rep. Celler).

118. See *supra* notes 97–101 and accompanying text.

119. 111 CONG. REC. 7936 (1965) (statement of Rep. Celler).

120. BAYH, *supra* note 31, at 346–47.

121. *Id.* at 279–80.

122. *Id.* at 282.

123. *Id.* at 285.

124. *Id.*

125. *Id.* at 283. Congress eventually agreed on twenty-one days. *Id.* at 286.

126. *Id.* at 283. Four days appears in the Amendment's final form. *Id.*

disagreed about the President being disabled.¹²⁷ On this point, Bayh stated, “If we’re hit by an atomic attack and the Capitol building is destroyed, it might take more than forty-eight hours for Congress to convene.”¹²⁸ The resolution moved forward in both chambers for the same reason—a strong belief that something needed to be done to provide for smooth transitions during the nuclear age—and the differences were hammered out successfully in conference committee.¹²⁹

Going into the final vote, Bayh was nervous that the amendment would not pass,¹³⁰ but leveraging the nuclear issue likely helped see the bill through. In his final floor speech, Bayh concluded that during other times in history, it may not have mattered if a competent President was at the helm in times of crisis, but due to the possibility of nuclear war, the succession and inability amendment had to be passed now. Juxtaposing the period before the bomb with the current era, Bayh stated, “[T]oday, with the awesome power at our disposal . . . when it is possible actually to destroy civilization in a matter of minutes, it is high time that we listened to history.”¹³¹ The amendment would ensure “a President of the United States at all times, a President who has complete control and will be able to perform all the powers and duties of his office.”¹³² After his speech that once again emphasized the dangers of the nuclear era, the amendment passed the Senate on July 6, 1965, by a roll call vote of 68 to 5.¹³³

In the end, nuclear-attack provisions were not written into the amendment submitted to the states for ratification,¹³⁴ but concerns about such an attack clearly affected the language and structure of the amendment as passed by Congress. The words of the framers of the amendment, Congressmen, and expert witnesses illustrate that this nuclear anxiety was an underlying cause precipitating passage. Because passage was urgent, some of the suggestions—such as provisions to deal with the fact that those in the line of succession were located in Washington, D.C.,¹³⁵ directions in the case of dual disability of the President and Vice President,¹³⁶ and the establishment of a commission to help determine what constitutes “inability”¹³⁷—were not addressed by the amendment. But Congress had recognized the need for an immediate solution in the nuclear age, and, by the summer, the proposed amendment went to the states for ratification.¹³⁸

127. *Id.*

128. *Id.*

129. *See id.* at 327–31, 347.

130. *Id.* at 319.

131. 111 CONG. REC. 15,595 (1965) (statement of Sen. Bayh).

132. *Id.*

133. BAYH, *supra* note 31, at 333, 347.

134. *See* U.S. CONST. amend. XXV.

135. *See supra* notes 78–79 and accompanying text.

136. *See supra* note 109 and accompanying text.

137. *See supra* note 111 and accompanying text.

138. *See* BAYH, *supra* note 31, at 333.

II. NUCLEAR ANXIETY IN THE STATE LEGISLATURES, 1965–1967

Ratification by three-fourths of the states was now all that remained for the amendment to become part of the Constitution, but the amendment's success was not guaranteed. Following passage in the Senate, Bayh and the ABA immediately launched a campaign to get the necessary thirty-eight states on board.¹³⁹ Eventually, thirteen states would ratify the amendment in 1965, eighteen in 1966, and the final seven states in January and February of 1967.¹⁴⁰ While some states ratified quickly and without issue, political and cultural tensions determined the amendment's success in others.¹⁴¹ The potential need for practical application of what had originally been an academic interest of Feerick's became obvious when President Kennedy's sudden death drew nationwide media attention. But that reason was not emphasized as the amendment made its way through the states. Instead, state legislators framed their opinions on the amendment based on the anxiety around nuclear attack.¹⁴²

This Part focuses on three states in which nuclear anxiety was particularly evident—Pennsylvania, Arkansas, and Colorado. On the floor of the Pennsylvania House of Representatives, the possibility of nuclear conflict was cited as the reason for immediate ratification and why partisan politics had to be overcome.¹⁴³ Conversely, in Arkansas, the amendment's lack of detail pertaining to a nuclear attack was criticized and briefly held up the amendment's progress.¹⁴⁴ In Colorado, previously unexamined correspondence between Colorado State Senator John R. Bermingham and members of the ABA reveal Bermingham's pleas that specific provisions be written into the amendment to deal with a nuclear crisis.¹⁴⁵

A. “Let Us Not Rush Pell-Mell down the Road to Madness”: Ratification in Pennsylvania

In Pennsylvania, the proposed amendment passed through both houses of the legislature and through two additional readings before it was met with delays due to concerns about the nuclear era. The cause of the amendment's pause was a lone representative, Philadelphia Democrat Eugene Gelfand, whose party controlled the statehouse.¹⁴⁶ Gelfand, perhaps unaware of the scrutiny and debate the amendment had undergone at the federal level, argued against ratifying Bayh's amendment too quickly without careful consideration.¹⁴⁷ But Gelfand's colleague, Republican Representative G.

139. *See id.* at 335–36.

140. *Id.* at 337–41.

141. *Id.*

142. *See generally infra* Parts II.A–C.

143. *See infra* Part II.A.

144. *See infra* Part II.B.

145. *See infra* Part II.C.

146. Notes of John D. Feerick from American Bar Association—Young Lawyers' Section, Committee on Presidential Inability and Vice Presidential Vacancy (Aug. 9, 1965) (on file with author).

147. *See* PA. H.R. LEGIS. JOURNAL, 149th Gen. Assemb., Reg. Sess. 1560–61 (Aug. 18, 1965) (statement of Rep. Gelfand).

Sieber Pancoast of Montgomery County, urged the Pennsylvania state legislature to back the amendment. During the floor debate, Pancoast argued that invoking the inability provisions—specifically the proposed section 4, which allowed the Vice President and a majority of the Cabinet to declare the President incapacitated—might lead to a power struggle within the executive branch, a struggle that was unacceptable for any “length of time in our atomic age.”¹⁴⁸ Gelfand, who spoke next, argued that though anxious times called for action, the house still should not vote in haste, stating, “I know the tenor of the times is to do something, but let us not rush pell-mell down the road to madness just for the sake of doing something, because it could mean disaster.”¹⁴⁹ The amendment was not brought to a vote.¹⁵⁰

The ABA believed that not ratifying the amendment would be a disaster and worked diligently to convince Pennsylvania legislators to move forward with ratification.¹⁵¹ It mobilized federal, state, and local bar associations, as well as other members of the Pennsylvania legislature, to put pressure on Gelfand to allow the process to move forward.¹⁵² Gelfand did not mention the ABA’s pressure, but in a matter of weeks, Pennsylvania became the fifth state to ratify on August 18, 1965.¹⁵³

B. “The Possibility of a Simultaneous Death of All in the Line of Succession Is a Nuclear Age Reality”: Ratification in Arkansas

In Arkansas, Bayh and the ABA also encountered a holdup. Bayh’s personal appearance at the National Governors’ Conference in July had helped bring Arkansas Governor Orval Faubus on board.¹⁵⁴ After the conference, Bayh and Faubus exchanged letters. In a letter dated August 5, 1965, Faubus stated that he had hoped that Congress would pass the amendment while Arkansas had been in special session, but now it did not seem likely that Arkansas would ratify before the Arkansas legislature convened next.¹⁵⁵ However, Representative Paul Van Dalsen disseminated a copy of an article by Professor George D. Haimbaugh that had appeared in the *South Carolina Law Review*, entitled “Vice Presidential Succession: A Criticism of the Bayh-Cellar [sic] Plan,” which criticized the amendment’s lack of specific provisions to deal with a nuclear attack.¹⁵⁶ In the article, Haimbaugh cited the possibility of a nuclear crisis and the effect it would have on succession, thus criticizing the amendment for not adequately

148. *Id.* at 1560 (statement of Rep. Pancoast).

149. *Id.* at 1563 (statement of Rep. Gelfand).

150. Notes of John D. Feerick, *supra* note 146 (noting that the legislation had been “held up” as of August 9, 1965, “by a lone objection from Representative Eugene Gelfand”).

151. *Id.*

152. *Id.*

153. BAYH, *supra* note 31, at 337.

154. See Letter from Orval E. Faubus, Governor, State of Ark., to Senator Birch Bayh, Chairman, Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary (Aug. 5, 1965) (on file with the National Archives and Records Administration, U.S. Senate Committee on the Judiciary, Subcommittee on Constitutional Amendments).

155. *Id.*

156. See BAYH, *supra* note 31, at 338.

addressing these issues.¹⁵⁷ Significantly, he wrote, “Arguments in favor of the Bayh-Celler plan for vice presidential succession also include a ritual reference to the dangers of the thermonuclear age.”¹⁵⁸ He continued, “The possibility of the simultaneous death of all in the line of succession is a nuclear age reality, but the Bayh-Celler plan does not meet this danger.”¹⁵⁹ Haimbaugh suggested that the amendment was not useful because it granted Congress powers it already had, including the power to designate successors to the presidency that would not be affected by a nuclear attack on Washington, D.C.¹⁶⁰ He argued that under Article II, Congress has “the power to extend the line of succession to include high ranking officials who work outside the Washington area.”¹⁶¹ Despite Haimburgh’s criticism, Arkansas ratified the proposed amendment on November 4, 1965.¹⁶²

*C. Nuclear Anxiety and Presidential Continuity
“Are Not Unrelated in the Thoughts of the Public”:
Ratification in Colorado*

The amendment began to pick up steam in the states; however, the ratification process in Colorado threatened the amendment’s overall success. In a letter to Feerick on July 21, 1965,¹⁶³ ABA member Dale Tooley included a letter he had written to the editor of *The Denver Post*, in which Tooley addressed an article from the day before, entitled “Twenty-Fifth Amendment Has Serious Defects.”¹⁶⁴ Tooley stated that although the paper originally supported the Colorado legislature’s passage of a memorial resolution and asked Congress in February 1965 to move forward on the amendment, the *Post* had reversed its earlier position and was now opposed to the amendment.¹⁶⁵ One notable point of the *Post*’s article was that the amendment did not deal directly with vice presidential inability.¹⁶⁶ What if both the President and Vice President were simultaneously unable to serve? The *Post* argued that this was a dangerous omission because a coherent Commander in Chief was needed when seconds mattered in the nuclear era: “In a nuclear age, the presidency must be occupied at all times by a man in full possession of his faculties.”¹⁶⁷ In Colorado, it looked like a lack of

157. George D. Haimbaugh, Jr., *Vice Presidential Succession: A Criticism of the Bayh-Celler [sic] Plan*, 17 S.C. L. REV. 315, 332 (1965).

158. *Id.* at 316.

159. *Id.* at 332.

160. *Id.* at 316.

161. *Id.*

162. BAYH, *supra* note 31, at 338.

163. Letter from R. Dale Tooley, Partner, Schmidt & Van Cise, to John D. Feerick, Skadden, Arps, Slate, Meagher & Flom (July 21, 1965) (on file with author).

164. Editorial, *Twenty-Fifth Amendment Has Serious Defects*, DENVER POST, July 20, 1965, at 20.

165. Letter from R. Dale Tooley to John D. Feerick, *supra* note 163. Tooley attached to his letter *The Denver Post*’s previous editorial position as of April 15, 1965, that “ratification will be forthcoming” and “it will come none too soon.” Editorial, *Congress Acts on Presidential Continuity*, DENVER POST, Apr. 15, 1965, at 28.

166. Editorial, *supra* note 165, at 28.

167. Editorial, *supra* note 164, at 20.

specifics around vice presidential inability during the nuclear age might prevent ratification.

Colorado State Senator John R. Bermingham also worried about the proposal's failure to contend with a nuclear catastrophe. Once a supporter and now opposed, Bermingham's concerns also made the Colorado newspapers.¹⁶⁸ In his first letter to the ABA dated August 10, 1965, Bermingham made clear that he wanted provisions explicitly written into the amendment in case of a nuclear crisis.¹⁶⁹ He questioned "why no provision was included in the proposed Amendment to cover the situation that would occur if an atomic bomb wiped out the entire city of Washington while all our high officials were present."¹⁷⁰ And he wondered, "How would the government get started again?"¹⁷¹ He would continue this focus on the lack of detail in the event of a nuclear attack for months.

Michael Spence, Tooley's assistant, responded to Bermingham ten days later and noted that Bermingham was not the only one to have raised questions about whether the succession and inability amendment addressed nuclear attack. Spence stated that although the drafting committee did consider that possibility, the amendment "could not cover every possible situation which might be imagined."¹⁷² The amendment was designed to deal only with problems "which history has indicated might be likely to reoccur."¹⁷³ He went further by stating that the amendment "does not deal with the subject of atomic holocaust specifically" but admitting that "[t]he occurrence of atomic destruction under any circumstance would be chaotic."¹⁷⁴ He concluded by saying that the proposed amendment would not cause problems during such events.¹⁷⁵

This was not the assurance that Bermingham wanted. He wrote again to Spence stating that the huge sums spent annually on defense against atomic attack were proof that the nuclear issue was an important one.¹⁷⁶ Bermingham concluded his letter by asking more pointedly why the amendment could not cover an atomic attack: "Do I interpret your remarks correctly in concluding that our laws make no provision whatsoever for

168. *GOP Senator Explains Vote on Amendment*, ROCKY MOUNTAIN NEWS, July 22, 1965, at 48.

169. Letter from John R. Bermingham, State Senator, State of Colo., to Am. Bar Ass'n (Aug. 10, 1965) (on file with the National Archives and Records Administration, U.S. Senate Committee on the Judiciary, Subcommittee on Constitutional Amendments).

170. *Id.*

171. *Id.*

172. Letter from H. Michael Spence, Am. Bar Ass'n, to the Honorable John R. Bermingham, State Senator, State of Colo. (Aug. 20, 1965) (on file with the National Archives and Records Administration, U.S. Senate Committee on the Judiciary, Subcommittee on Constitutional Amendments).

173. *Id.*

174. *Id.*

175. *Id.*

176. Letter from John R. Bermingham, State Senator, State of Colo., to H. Michael Spence, Am. Bar Ass'n (Aug. 26, 1965) (on file with the National Archives and Records Administration, U.S. Senate Committee on the Judiciary, Subcommittee on Constitutional Amendments).

continuity or succession in our government [in the event of an attack]?"¹⁷⁷ He continued: "Is there any reason why the succession law could not be amended to cover an atomic holocaust?"¹⁷⁸ Bermingham's salient points did not take into account the fact that if the amendment was redrafted to include any provisions for a nuclear attack, it would have to start again at the beginning in a congressional subcommittee.

In reply, Michael Spence said that Section I of Article 2 of the Constitution allows Congress to legislate on succession and that to provide for "contingencies such as the atomic holocaust you suggest[],"¹⁷⁹ succession law could be amended in the future; but this response did not fully satisfy Bermingham.¹⁸⁰ Spence—attempting to drive a wedge between the two issues that legislators at both the federal and state levels saw as intricately linked—added that the problem of an atomic holocaust was separate from the problems the amendment addressed.¹⁸¹ Bermingham, however, emphasized the importance of the nuclear issue to the public and that it was Congress's duty to legislate on both.¹⁸² Bermingham wrote, "Nevertheless, they are not unrelated in the thoughts of the public and it seems to me that Congress has as much duty to take action with respect to the one problem as the other."¹⁸³ At this point, Bermingham did not continue the battle to add language to cover a nuclear attack.

Bermingham could have stalled the amendment in Colorado, similar to what happened in Pennsylvania and Arkansas, but on January 27, 1966, the ABA sent cards to every member of the Colorado legislature asking that they support ratification.¹⁸⁴ In addition, Bayh's office dictated a defense of the amendment that was distributed by the ABA to each member the following week.¹⁸⁵ The ABA feared a domino effect; if the amendment was not ratified in Colorado because the language was deemed deficient in some way, other states might block ratification as well.¹⁸⁶ Yet after intense focus on the nuclear issue, Colorado ratified the amendment on February 3, 1966.¹⁸⁷

177. *Id.*

178. *Id.*

179. Letter from H. Michael Spence, Am. Bar Ass'n, to the Honorable John R. Bermingham, State Senator, State of Colo. (Sept. 2, 1965) (on file with the National Archives and Records Administration, U.S. Senate Committee on the Judiciary, Subcommittee on Constitutional Amendments).

180. *Id.*

181. *Id.*

182. Letter from John R. Bermingham, State Senator, State of Colo., to H. Michael Spence, Am. Bar Ass'n (Sept. 9, 1965) (on file with the National Archives and Records Administration, U.S. Senate Committee on the Judiciary, Subcommittee on Constitutional Amendments).

183. *Id.*

184. Letter from R. Dale Tooley, Partner, Schmidt, Van Cise, Freeman & Tooley, to Charles Gallagher, Cent. Bank & Tr. Co. (Jan. 27, 1966) (on file with the National Archives and Records Administration, U.S. Senate Committee on the Judiciary, Subcommittee on Constitutional Amendments).

185. BAYH, *supra* note 31, at 340.

186. Interview with John D. Feerick, *supra* note 55.

187. *Id.*

Additional states rapidly fell into line.¹⁸⁸ Whether these state legislators were for or against the addition of specific language in the amendment that would prepare the country for the possibility of a sudden presidential transition during a nuclear war, virtually every last one was in agreement that a permanent solution was needed to solve the succession and inability issue because of that possibility.¹⁸⁹

CONCLUSION

With the thirty-eighth state's ratification,¹⁹⁰ the Twenty-Fifth Amendment became part of the U.S. Constitution on February 10, 1967, three years, two months, and six days after Bayh drafted the legislation.¹⁹¹ Nuclear anxiety was ingrained in the Constitution itself even as the Constitution continued to take shape based on the needs of the era. Although the Amendment in its final form did not contain specific procedures in the event of nuclear attack, Congress attempted to strike a balance between including enough detail to provide a reassuring answer to the succession and inability problem and, at the same time, allowing flexibility should unforeseen events occur. As references to the sudden transition from Kennedy to Johnson faded into the background, nuclear anxiety remained at the forefront of political discourse at the federal and state levels.

Examining the legislative process through the lens of nuclear anxiety reveals new facets of the Amendment's path to ratification unavailable through more traditional accounts that omit the cultural and political mood or attribute the anxiety that helped propel the Amendment's ratification solely to President Kennedy's assassination. For a richer understanding of the reasons behind the Twenty-Fifth Amendment's ratification, nuclear anxiety must be taken into account.

We still live, as President John F. Kennedy said, "under a nuclear sword of Damocles . . . capable of being cut at any moment by accident or miscalculation or by madness."¹⁹² The historical patterns revealed by this study of the intersection of nuclear anxiety and presidential continuity indicate that as nuclear tensions rise, government activity around the search for solutions to succession and inability problems will intensify (though we are less likely to see the inability provisions—Sections 3 and 4 of the Twenty-Fifth Amendment—invoked in cases of "madness").¹⁹³ The continuity of the institution of the presidency is of greater importance than any one man, and,

188. The remaining states that ratified the Amendment did so without issue. *Id.* at 341.

189. *Id.*

190. Minnesota and Nevada ratified the Amendment on the same day, thus bringing the ratification count from thirty-six to thirty-eight states. *Id.*

191. *See supra* note 52 and accompanying text.

192. President John F. Kennedy, Address at the United Nations General Assembly (Sept. 25, 1961), <https://2009-2017.state.gov/p/io/potusunga/207241.htm> [<https://perma.cc/3W4B-UW7X>].

193. My doctoral dissertation also shows that while nuclear anxiety worked to produce the Amendment, it worked to suppress the Amendment in practice. *See* Rebecca C. Lubot, *The Passage of the Twenty-Fifth Amendment: Nuclear Anxiety and Presidential Continuity* (2017) (unpublished PhD dissertation, Rutgers University) (on file with author).

as a recent report of the Fordham University School of Law's Clinic on Presidential Succession points out, the remaining "gaps that persist . . . must be addressed because mass [nuclear] catastrophe, illness, or some other happenstance can occur at any time."¹⁹⁴ The Bulletin of Atomic Scientists reminds us: "the Clock ticks."¹⁹⁵

194. Fordham Univ. Sch. of Law's Clinic on Presidential Succession, Report, *Ensuring the Stability of Presidential Succession in the Modern Era*, 81 FORDHAM L. REV. 1, 25 (2012).

195. See SCI. & SEC. BD., BULLETIN OF THE ATOMIC SCIENTISTS, IT IS STILL 3 MINUTES TO MIDNIGHT: 2016 DOOMSDAY CLOCK STATEMENT 10 (John Mecklin ed., 2016), <http://thebulletin.org/sites/default/files/2016%20doomsday%20clock%20statement%20-%20final%5B5%5D.pdf> [https://perma.cc/66PF-NWN3].