

A WHITE HOUSE COUNSEL'S PERSPECTIVE ON PRESIDENTIAL HEALTH AND THE LINE OF SUCCESSION

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Let me talk a bit about the practical world of the White House in the context of presidential health and the Succession Act.¹ In the White House, there's a laser-like focus on protecting the president. That creates a strong bias, frankly, against dealing with health issues in a transparent and a process-oriented manner.

Many holding positions in the White House—including the one I held, White House counsel; the chief of staff; and the staff secretary—would say that, yes, they have an obligation to support and defend the Constitution of the United States. At the same time, part of their job also is to preserve the president's political capital, his reputation, and his power. The tension between those two threads can be manifested—and I can say this as a Reagan alumni, although I wasn't at the White House at the time—in the mistakes made in the context of John Hinckley's attempted assassination of President Reagan.

The one book I would recommend about the assassination attempt is *Rawhide Down*.² At the time of the assassination attempt, there was an all-star group of White House staffers, a number of whom are friends of mine, who've taught their successors how to run the White House. But they should have implemented the Twenty-Fifth Amendment and they didn't.³ It was probably the most clear-cut case in my lifetime. I came to Washington in 1973 to stay eighteen months, and I've been here ever since. That is the one case to be studied by every White House counsel.

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1. Presidential Succession Act, 3 U.S.C. § 19.

2. See generally DEL QUENTIN WILBER, *RAWHIDE DOWN: THE NEAR ASSASSINATION OF RONALD REAGAN* (2012).

3. See U.S. CONST. amend. XXV; see also Elaine Kamarck, *25th Amendment: How Do We Decide Whether the President Is Competent?*, BROOKINGS (Jan. 10, 2018), <https://www.brookings.edu/blog/fixgov/2018/01/10/25th-amendment-how-do-we-decide-whether-the-president-is-competent/> [<https://perma.cc/JU4T-END2>].

Conversely, in the White House, the media and the press corps are intensely interested in every aspect of the president's health. If you're on the White House staff, you're frequently faced with: "The president didn't look good today," or "the president had his regular checkup, what can you tell me?" I've been singled personally by those phenomena on two occasions.

In 1987, before Howard Baker and I went to the Reagan White House, we were briefed by a transition team. It was a long briefing at Howard's house the night before we started. One of the briefers had talked to the outgoing aides who were about to lose their jobs because they had worked for then-departed Chief of Staff Don Regan. They said one of the first things you're going to have to do is to assess whether or not you should implement the Twenty-Fifth Amendment due to the president being discouraged to the point of being incapacitated.

Howard Baker's immediate reaction was, "that's not the Ronald Reagan I saw the past few days. That's not the Ronald Reagan I negotiated with. Yes, we'll consider it because serious people have raised it, but I don't think that is a priority." He looked around at the three of us that were there and said, "if any of you think otherwise, let me know." We went on about our business. A year later, Jane Mayer and Doyle McManus wrote *Landslide*.⁴ They had access to that transition report, and it led to a three- or four-day firestorm. People said we were hiding important information from the American people, and/or that we were spying on the president.

Two decades later, Bill O'Reilly, in his book *Killing Reagan*, wrote the same story drawing on the same document.⁵ Again, I spent days refuting that there was a coup or a cover-up or anything sinister. We spent far more time on the aftermath than the ten minutes we spent being briefed about a potential Twenty-Fifth Amendment issue.

The point I am making is the president's health is the third rail for White House staff. It is the third rail and that frustrates a considered, organized, thoughtful process in some respects. Clearly, it did in the Hinckley assassination attempt. On the other hand, Reb Brownell has shared with me some materials that I hadn't seen in years from the Clinton Library of the precedents that had been assembled by the Reagan White House staff, as well as the staff for George H.W. Bush and Bill Clinton, on how to exercise the Twenty-Fifth Amendment.⁶ The White House staff knows how to use the Twenty-Fifth Amendment correctly. It's a considered and deliberate process. The White House physician is intimately involved. The central question, the harder part, is making the decision to use the amendment.

4. See generally JANE MAYER & DOYLE MCMANUS, *LANDSLIDE: THE UNMAKING OF THE PRESIDENT, 1984-1988* (1988).

5. See generally BILL O'REILLY & MARTIN DUGARD, *KILLING REAGAN: THE VIOLENT ASSAULT THAT CHANGED A PRESIDENCY* (2015).

6. See generally OFF. OF WHITE HOUSE COUNS., *CONTINGENCY PLANS: DEATH OR DISABILITY OF THE PRESIDENT* (1993), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1009&context=twentyfifth_amendment_executive_materials [<https://perma.cc/Q84C-NMVF>].

The second time I was involved in a situation where the Twenty-Fifth Amendment was discussed was in July 1987, when Ronald Reagan was about to have surgery for a cancerous growth on his face. The physician did not know in advance whether the president needed to have anesthesia or not. President Reagan had no qualms about transferring power. We prepared the paperwork. As it turned out, he did not have to go under anesthesia. Nevertheless, the White House staff and the president's supporters were very wary of exercising the Twenty-Fifth Amendment.

What you find is that the transfers of power are rare. They are highly scripted and they're very brief. We've all seen photos of the White House chief of staff, right beside the president's bed waiting for the doctor to say that he's conscious so the president will sign the papers resuming power. Now, the one surgery I had, I'm not sure that just as soon as I awoke, I should have been exercising serious power or deciding succession.

I want to associate myself with John Rogan and others' comments about the mischievous impact—I think that's the best way to say it—of having the Speaker of the House and the Senate president pro tempore in the line of succession.⁷ Whether it's in the context of transfers of power for incapacity, or candor with the American people, I believe it is mischievous, and it's discouraging to good government.

I worked with John McCain on his vice presidential selection process. It'll probably be my epitaph: the guy who chose Sarah Palin. I didn't choose Sarah Palin, but that's what the press loves to write. Some of you may know or recall, we had very serious conversations with Senator Joe Lieberman, a member of the other party, about being the vice presidential nominee. He and I had a number of discussions about how he, if he became the president or the acting president, would be faithful to McCain policies. Would he fire all the Cabinet members? Would he stand behind pending nominations? That sort of thing. It just goes to show how awkward it is when you're sitting in the White House, looking at the Speaker, if he or she is from a different party, or looking at the president pro tempore, and wondering what's going to happen if we have to go there under the Succession Act.

I think regardless of the constitutionality—although I agree with those who think it's probably not constitutional—to have the Speaker and the president pro tempore in the line of succession is bad policy and it's mischievous. I like the notion that maybe you drop them down to the bottom of the succession tree⁸ because it goes to my last point, which is stability. It's fundamentally important to have stability and regular order in leadership.

I came back to the United States a year ago after serving as U.S. ambassador to Australia. When I arrived in Australia in 2019, Australia had

7. See, e.g., John Rogan, *The Relationship Between the Presidential Succession Act of 1947 and the Twenty-Fifth Amendment*, 91 FORDHAM L. REV. ONLINE 9, 12 (2022).

8. See Seth Barrett Tillman, *A Defense of the Legislative "Officer" Succession Provisions*, 91 FORDHAM L. REV. ONLINE 23, 27 (2022).

six prime ministers in twelve years,⁹ and it felt to me like the whole country was a bit loose in the sockets. The people were very concerned and a bit embarrassed. It was not the result of elections; the majority of changes were inter-party coups, caucus-room coups, and it did not serve Australia well. In response, the political parties of Australia adopted changes in party rules so that you can't have a coup on party whim, where the prime minister turns his or her back and there's suddenly a new prime minister, a new leader in Parliament who becomes the prime minister.¹⁰ I do think that leadership stability is so fundamentally important.

9. See PARLIAMENT OF AUSTRALIA, DEP'T OF PARLIAMENTARY SERVS., PARTY LEADERSHIP CHANGES AND CHALLENGES: A QUICK GUIDE 1, 3–8 (2019), https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1920/Quick_Guides/PartyLeadershipChangesChallenges [https://perma.cc/4CLC-GJLC].

10. See *id.*