

PRESIDENTIAL AND VICE PRESIDENTIAL ILLNESS AND THE PRESIDENTIAL SUCCESSION ACT OF 1947

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I wanted to discuss some real-world examples of incidents and hypotheticals where both the president and the vice president could be either killed or incapacitated in a way that causes this gap between the Twenty-Fifth Amendment¹ and the 1947 Act² to become a salient challenge. If a president died or became incapacitated, the vice president may or may not be able to take over. There may be other instances, hypothetical or real, when the vice president also becomes ill and incapacitated and cannot assume their role if the president dies or becomes disabled.

One recent example of this, although certainly not the only one, had to do with President Trump having COVID in the fall of 2020. The question arises as to what would've happened if Vice President Pence and others, including Speaker Pelosi or Senate President Pro Tempore Leahy, had also become infected. For me, the issue is not just illness in terms of whether or not these people would've died, but other forms of incapacitation. What happens if somebody isn't dead, but they're somehow incapacitated in a way that makes it difficult for them to make appropriate decisions, but not so incapacitated that the people around them are willing to invoke the fourth section of the Twenty-Fifth Amendment to try and take them out of power? I think the recent example with Trump having COVID is one example, but certainly not the only one, when someone like Vice President Mike Pence wouldn't want to look like he was trying to coerce or co-opt power away from Trump by saying the president needs to step down from power.

Obviously, Trump wasn't going to invoke the third section of the Twenty-Fifth Amendment and say, "I personally don't feel like I'm in good enough shape, even though I'm in the hospital, even though I have a high fever, even though I'm getting all this treatment, to really discharge the duties of my office sufficiently. So I'm going to pass it over to Pence temporarily,"

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1. U.S. CONST. amend. XXV.
2. Presidential Succession Act, 3 U.S.C. § 19.

as other presidents have done, most notably, when they're having colonoscopies and they're under anesthesia for a period of time, and they pass their powers over to the vice president. He wasn't willing to do it, but then you're in the situation when the fourth section requires somebody like a vice president, such as Vice President Pence or other members of the Cabinet, to say, "this person is not capable of being in charge."

There are iconic examples of this in the past as well, the most commonly referred to had to do with Woodrow Wilson after he had a major stroke in office in 1919. Members of his Cabinet questioned his capacity, and, in fact, he was truly incapacitated. He was completely paralyzed on half of his body.³ Secretary of State Robert Lansing decided to challenge whether or not he was capable of discharging the duties of his office.⁴ But Wilson's wife, Edith, his secretary, Joseph Tumulty, and his doctor, Cary Grayson, all got together and decided to pull the wool over the Cabinet's eyes.⁵

They brought Senators Albert B. Fall and Gilbert M. Hitchcock into the sick room where the paralyzed side of Wilson's body was on the opposite side of the room from the entrance. They closed the drapes so that no one could see how incapacitated he was. He could partly speak out of one side of his mouth. He appeared to look like he was still functioning, although, in fact, he was not.⁶ This was of course before the Twenty-Fifth Amendment, but the Cabinet wasn't able to pursue moving him out of office. When he recovered somewhat, the first thing Wilson did was to take Lansing out of office.⁷ There was some revenge and some payback for that.

Of course, there are other examples of presidents who were incapacitated, but not dead. We can think of presidents who were extremely ill. John Kennedy was extremely ill with Addison's disease.⁸ Franklin Roosevelt was extremely ill with end-stage cardiovascular disease; he was fine for four or five hours a day, but in the other hours really not able to function completely.⁹

Here, the issue is not just one of people being killed, but also issues of incapacitation short of death. Other speakers in this program have raised several examples of when this could happen as a mass event. One example is obviously the January 6 insurrection, and I think Greg Jacob raised this as

3. See Daniel M. Smith, *Robert Lansing and the Wilson Interregnum, 1919–1920*, 21 HISTORIAN 135, 135 (1959).

4. See *id.* at 139–40.

5. See generally *id.*

6. See LOUIS AUCHINCLOSS, WOODROW WILSON 117 (2000). The many historical accounts of this meeting differ. Cf., e.g., *Fall and Hitchcock Interview with the President on the Peace Treaty*, WOODROW WILSON PRESIDENTIAL LIBR. & MUSEUM, <http://presidentwilson.org/items/show/22364> [<https://perma.cc/U48Y-94VX>] (last visited Nov. 3, 2022).

7. See Smith, *supra* note 3, at 158.

8. See David Brown, *JFK's Addison's Disease*, WASH. POST (Oct. 6, 1992), <https://www.washingtonpost.com/archive/lifestyle/wellness/1992/10/06/jfks-addisons-disease/aceb473c-a5dc-4199-9453-d3fcd3b18312/> [<https://perma.cc/F2FN-GTRE>].

9. See generally Michael S. Rosenwald, *FDR Had A Secret as He Sought A Fourth Term in 1944: He Was Dying*, WASH. POST (Oct. 5, 2020, 7:00 AM), <https://www.washingtonpost.com/history/2020/10/04/fdr-reelection-illness-trump-covid-19/> [<https://perma.cc/7TEP-QDSD>].

an issue.¹⁰ What would've happened if, during the insurrection, those who breached the Capitol had actually been more organized and had machine guns and had managed to actually kill a majority of Congress? How would we have thought about what would've happened?

Then there's the issue, raised also by Norm Ornstein, about a nuclear attack.¹¹ It might not just be a suitcase bomb. In the wake of attacks in Ukraine we can imagine other forms of nuclear attack, not just coming from Russia, but from North Korea or from China if we were to engage in a more extensive war over Taiwan, and so on.

I hadn't thought about Havana syndrome, which Dr. Fins raised, where large numbers of the Cabinet as well as Congress could be taken out in a single event.¹² You can imagine chemical weapons doing the same thing in a circumstance when there wasn't necessarily a designated survivor.

These mass-casualty events, particularly when incapacitation is involved, challenge this gap between the Twenty-Fifth Amendment and the 1947 Act. You have this third section of the Twenty-Fifth Amendment that requires the president to say he is impaired, but most presidents are unwilling to do so except for very short periods of time where he doesn't actually look impaired: "Oh, I'm going under anesthesia. It's not that I'm actually not capable of discharging the duties of my office."

Then you have the fourth section which requires that others remove him, but those others may also be severely impaired themselves, whether it's with a biological disease like COVID, a chemical attack, a nuclear attack, or killed in a mass event. Those who remain may be unwilling to take on the political challenge of trying to remove a president who's incapacitated, who's unwilling to say that they're incapacitated. You're in this situation under the 1947 Act where the vice president could be impaired or dead, and then what happens if others down the line of succession are impaired as well, like with a pandemic, or with a very serious mass-casualty event involving chemical or nuclear weapons?

These are not entirely hypotheticals because, in fact, things similar to this have happened in the past and have come very close to happening, particularly with the recent events regarding COVID and President Trump, where, in fact, he was much more ill, based on the treatments he received, than was reported to the public.¹³ You can imagine with the super-spreader events that they had, for example, around Justice Amy Coney Barrett's nomination to the Supreme Court, that many, many members of Congress

10. See Greg Jacob, *The 1947 Act and the Judiciary: Would the Courts Decide Who Is President?*, 91 FORDHAM L. REV. ONLINE 41, 42 (2022).

11. See Norm J. Ornstein, *Problems with the Legislative Succession Provisions of the Presidential Succession Act of 1947*, 91 FORDHAM L. REV. ONLINE 19, 21 (2022).

12. See Joseph J. Fins, *Carl Albert, Bipartisanship, and Presidential Succession: Lessons from Watergate*, 91 FORDHAM L. REV. ONLINE 59, 63–64 (2022).

13. See Noah Weiland, Maggie Haberman, Mark Mazzetti & Annie Karni, *Trump Was Sicker Than Acknowledged with Covid-19*, N.Y. TIMES (Feb. 28, 2021), <https://www.nytimes.com/2021/02/11/us/politics/trump-coronavirus.html> [<https://perma.cc/B45P-FK5L>].

could have been impaired at the same time as the Cabinet, in ways that would've left us in a true constitutional limbo.