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Preventing Presidential Disability Within the Existing Framework of the Twenty-Fifth Amendment

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PREVENTING PRESIDENTIAL DISABILITY WITHIN THE EXISTING
FRAMEWORK OF THE TWENTY-FIFTH AMENDMENT

*Ryan T. Harding**

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I. INTRODUCTION

Section 3 of the Twenty-Fifth Amendment allows for a President to voluntarily transfer the power of his office to the Vice President during periods of presidential inability.¹ Section 4 of the Twenty-Fifth Amendment allows for the Vice President and a majority of the cabinet to involuntarily remove the President if he is incapable or unwilling to acknowledge that he is unable to discharge the powers of his office.² With the recent election of President Donald J. Trump, there have been increased discussions about the protections of the Twenty-Fifth Amendment and how they could be used to check President Trump in the event that he becomes mentally unstable or otherwise becomes unable to manage the affairs of the executive branch.³ However, many of these discussions neglect to examine the inherent weaknesses of the Twenty-Fifth Amendment.⁴ Conversely, other commentators acknowledge the inherent weaknesses of the Twenty-Fifth Amendment but propose unrealistic or dangerous modifications to the existing legal framework.⁵

1. U.S. CONST. amend. XXV, § 3.

2. U.S. CONST. amend. XXV, § 4.

3. Ross Douthat, *The 25th Amendment Solution for Removing Trump*, N.Y. TIMES (May 16, 2017), <https://www.nytimes.com/2017/05/16/opinion/25th-amendment-trump.html>; Richard A. Friedman, *Is It Time to Call Trump Mentally Ill?*, N.Y. TIMES (Feb. 17, 2017), <https://www.nytimes.com/2017/02/17/opinion/is-it-time-to-call-trump-mentally-ill.html>; Heather Digby Parton, *Don't Look Now: It's President Pence! Donald Trump Can Be Deposed, Even Without Impeachment*, SALON (Jan. 25, 2017), <https://www.salon.com/2017/01/25/dont-look-now-its-president-pence-donald-trump-can-be-deposed-even-without-impeachment/>; Dean Falvy, *You're Fired: Four Ways Donald Trump's Presidency Might Not Last Four Years*, JUSTIA (Feb. 2, 2017), <https://verdict.justia.com/2017/02/02/youre-fired-four-ways-donald-trumps-presidency-might-not-last-four-years>.

4. For example, consider the following scenario: it is early September of 2020 and President Donald J. Trump, along with Vice President Mike Pence and the rest of the Cabinet, are in the midst of a scorched earth presidential campaign to win a second term in the White House. Further, during this tight reelection campaign and daily global turmoil, President Trump complains of numbness in his right arm and blurry vision during a private meeting with Vice President Pence, Secretary Ben Carson, and Ivanka Trump. Mr. Pence and Dr. Carson soon begin noticing that the President is having frequent difficulty expressing himself verbally, recalling recent events, and staying focused on simple tasks. They also begin noticing that Ivanka Trump is limiting their access to the President and is performing most of his official duties on his behalf. Vice President Pence and the rest of the cabinet now have a decision to make: do they reveal the underlying medical condition of the President and exercise the involuntary protections of the Twenty-Fifth Amendment against President Trump, or do they remain silent? Exercising the involuntary provisions of the Twenty-Fifth Amendment would almost certainly cause the President to lose his reelection bid. However, if President Trump continues to serve, he may put the country at grave risk due to his illness.

5. See, e.g., Earl Blumenauer, *The Fatal Flaw of the 25th Amendment*, OREGONIAN (Feb. 15, 2017), http://www.oregonlive.com/opinion/index.ssf/2017/02/the_fatal_flaw_of_the_25th_ame.html.

This article will therefore examine the shortcomings of the Twenty-Fifth Amendment and how to improve this amendment responsibly within the existing legal framework. Part II of this article will detail the legal framework of presidential disability law prior to the adoption of the Twenty-Fifth Amendment, the eventual passage of the Twenty-Fifth Amendment, and the actual legal framework of the Twenty-Fifth Amendment.⁶ Part III will critique the Twenty-Fifth Amendment and discuss possible solutions to modify and strengthen the Twenty-Fifth Amendment within the existing legal framework.⁷ This section will also consider and reject various proposals to replace the Twenty-Fifth Amendment. Part IV will offer various ways to strengthen the protections of the Twenty-Fifth Amendment within the existing constitutional framework.⁸ Part V will conclude that, although there is room for improvement, the Twenty-Fifth Amendment still offers the best way to prevent presidential disability.⁹

II. BACKGROUND

Although the Twenty-Fifth Amendment has recently come into vogue, the history of presidential inability and the legal frameworks seeking to remedy its effects is as old as the presidency itself.¹⁰ Part A will discuss the legal framework prior to the adoption of the Twenty-Fifth Amendment. Part B will discuss the passage of the Twenty-Fifth Amendment. Part C will examine the legal framework of the Twenty-Fifth Amendment.

A. The Prior Legal Framework

The legal framework managing presidential inability prior to the Twenty-Fifth Amendment consisted of Article II, Section 1 of the Constitution, various order of succession laws, and, to a lesser extent, the Twentieth Amendment. However, as discussed below, the Constitution was ambiguous about key provisions, and the order of succession has changed multiple times to reflect different policy goals.

6. *See infra* Part II.

7. *See infra* Part III.

8. *See infra* Part IV.

9. *See infra* Part V.

10. Charles Witt, *The Health and Controversial Death of George Washington*, 80 EAR, NOSE AND THROAT J. 102, 104 (2001) (detailing the medical issues plaguing President George Washington).

I. Article II, Section 1, Clause 6

The Founding Fathers originally provided for the possible death or incapacity of the President of the United States in Article II, Section 1 of the Constitution.¹¹ This provision states that:

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.¹²

a. Presidential inability

During the Constitutional Convention, Delaware delegate John Dickinson asked “what is the extent of the term ‘disability’ and who is to be the judge of it?”¹³ Unfortunately, Dickinson’s question would never be answered during the Convention or in the Constitution.¹⁴ Thus, it should come as no surprise that this clause has been subject to much debate concerning (1) what is inability and (2) who determines when inability exists.¹⁵ Nonetheless, the prevailing historical view of most presidential administrations and academics was that the Vice President determines the inability of the President.¹⁶

b. Death of a President: The Tyler precedent

Another ambiguity in Article II, Section 1, Clause 6 is whether the vice president, upon the death, incapacity, resignation, or impeachment of the President, assumes the presidency or merely serves as the acting President until the next election.¹⁷ The text of the provision only states that “[i]n Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same

11. U.S. CONST. ART. II, § 1, cl. 6.

12. *Id.*; see also Peter Frelinghuysen, Jr., *Presidential Disability*, 307 ANNALS AM. ACAD. 144, 144–46 (1956).

13. JAMES M. RONAN, *LIVING DANGEROUSLY: THE UNCERTAINTIES OF PRESIDENTIAL DISABILITY AND SUCCESSION I* (2015).

14. *See id.* at 1–3.

15. *Id.* at 1.

16. See John D. Feerick, *Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment*, 79 FORDHAM L. REV. 907, 912–13 (2010).

17. *Id.* at 918–19.

shall devolve on the Vice President.”¹⁸ However, any ambiguity was essentially put to rest by the decisive actions of Vice President John Tyler.¹⁹

President William Henry Harrison, the ninth President of the United States, died of pneumonia on the early morning of April 4, 1841.²⁰ Harrison was the first President to die in office, so the matter was not settled on whether the Vice President ascended to the presidency or merely served as acting President.²¹ Nonetheless, Vice President Tyler believed that Article II, Section I, combined with his taking of the presidential oath, entitled him to fully assume the presidency in his own right.²² Tyler acted out his belief by asserting his authority as President over the cabinet and his detractors.²³ Congress later passed a resolution recognizing John Tyler as the tenth President of the United States.²⁴ This resolution, coupled with Tyler’s strong actions, set precedent for the Vice President assuming the presidency following the death, resignation, or impeachment of the President rather than merely serving as acting President.²⁵

c. Death of the President and Vice President: Order of succession laws

Article II, Section 1, Clause 6 also provides for Congress to establish who, in the event that both the President and Vice President are impeached, resigned, or deceased, will serve as acting President.²⁶ The acting President, however, will only serve until “the Disability be removed” or until a new President is elected.²⁷ Fortunately, throughout the history of the United States, the succession laws have not been put to the test.²⁸

18. U.S. CONST. art. II, § 1, cl. 6.

19. Leonard Dinnerstein, *The Accession of John Tyler to the Presidency*, 70 VA. MAG. HIST. AND BIOGRAPHY 448, 449 (1962).

20. JOHN R. BUMGARDNER, THE HEALTH OF THE PRESIDENTS: THE 41 UNITED STATES PRESIDENTS THROUGH 1993 FROM A PHYSICIAN’S POINT OF VIEW 59, 62 (1994); see also EDWARD P. CRAPOL, JOHN TYLER: THE ACCIDENTAL PRESIDENT 7–10 (2006).

21. CRAPOL, *supra* note 20, at 7–10.

22. RONAN, *supra* note 13, at 12–13; Dinnerstein, *supra* note 19, at 449.

23. See RONAN, *supra* note 13, at 12–15.

24. *Id.* at 15.

25. *Id.*; see also Joel K. Goldstein, *History and Constitutional Interpretation: Some Lessons from the Vice Presidency*, 69 ARK. L. REV. 647, 689 (2016) (“Public servants often invoke prior practice to justify behavior. Seven Vice Presidents who succeeded to the presidency in the nineteenth and twentieth century relied on the Tyler Precedent to justify their claims. In fact, the practice quickly won such acceptance that no citation was needed.”).

26. U.S. CONST. art. II, § 1, cl. 6.

27. *Id.*

28. RONAN, *supra* note 13, at 7–9, 23–25, 34–35.

The first order of succession law was The Presidential Succession Act of 1792.²⁹ This law provided that, should both the Office of the President and Vice President be vacant due to death, resignation, or removal from office, the President Pro Tempore of the Senate would serve as Acting President of the United States.³⁰ If the office of the Senate Pro Tempore of the Senate were vacant, the Speaker of the House of Representatives would serve as Acting President of the United States.³¹ The law also required that a special election be held to elect a new President.³²

The second order of succession law was the Presidential Succession Act of 1886.³³ This law removed both the President Pro Tempore of the Senate and the Speaker of the House from the order of succession and replaced them with members of the cabinet.³⁴ The order of succession within the cabinet was based on seniority of when the cabinet department was created.³⁵ This law did not require a special election to elect a new President.³⁶

The modern law is the Presidential Succession Act of 1947.³⁷ This law, assuming the President and Vice President are deceased, resigned, or impeached, makes the Speaker of the House the first in the order of succession.³⁸ The President Pro Tempore of the Senate is next in the line of succession, followed by members of the cabinet based on seniority of when their departments were established.³⁹ Although this law has never been used, its constitutionality has been questioned.⁴⁰

2. *The Twentieth Amendment*

The Twentieth Amendment, which was ratified in 1933, moved the beginning of the presidential term from March 4th to January 20th.⁴¹ The Amendment also provided that if the President-Elect dies in-between election day and inauguration day, the Vice President-Elect is to be sworn in as

29. *Id.* at 7.

30. Act of Mar. 1, 1792, ch. 8, § 9, 1 Stat. 239, 240 (repealed 1886).

31. *Id.*

32. *Id.* § 10.

33. RONAN, *supra* note 13, at 23.

34. Charles S. Hamlin, *The Presidential Succession Act of 1886*, 18 HARV. L. REV. 182, 182–83 (1905).

35. *Id.*

36. *Id.*

37. 3 U.S.C. § 19 (2006); *see* RONAN, *supra* note 13, at 34.

38. 3 U.S.C. § 19(a)(1).

39. *Id.* § 19(b), (d).

40. *See, e.g.*, Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 113–16 (1995).

41. U.S. CONST. amend. XX, § 1.

President.⁴² The Amendment also provides for additional guidelines to be written by Congress if necessary.⁴³

B. The Passage of the Twenty-Fifth Amendment

Although there had been attempts at reform in the past following various periods of presidential inability, the periods of inability suffered by President Eisenhower and President Johnson and the death of President Kennedy would serve as the necessary catalyst for the passage of the Twenty-Fifth Amendment.⁴⁴ On September 24, 1955, President Dwight E. Eisenhower suffered a heart attack during the middle of the night during a trip in Denver, Colorado.⁴⁵ Although the condition was originally downplayed by the administration, Eisenhower insisted that the public be made fully aware of his medical condition.⁴⁶ Eisenhower was expected to fully recover from his heart attack but required complete rest for a month.⁴⁷ During this rest, the Cabinet carried out the status quo of government.⁴⁸ Moreover, Governor Sherman Adams of Colorado would serve as the official spokesman of the President rather than Vice President Nixon.⁴⁹ During this time, the executive branch was dysfunctional, and it was often unclear whether a bedridden President Eisenhower, Vice President Nixon, or Governor Adams was in charge of the federal government.⁵⁰

Another shortcoming of the current legal system was highlighted on June 8, 1956 when President Eisenhower was taken to the hospital for the removal of an obstruction in his small intestine.⁵¹ While in surgery, which lasted two hours, the President was unconscious.⁵² It was unclear during those two hours who, if anyone, would have legal authority to act if an emergency arose during that time.⁵³

42. *Id.* § 3; see also Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution's Succession Gap*, 48 ARK. L. REV. 215, 216 (1995).

43. See RONAN, *supra* note 13, at 31–32.

44. *Id.* at 71–72; see Herbert Brownell, Jr., *Presidential Disability: The Need for a Constitutional Amendment*, 68 YALE L. J. 189, 210–211 (1958); see also Ruth C. Silva, *Presidential Succession and Disability*, 21 L. AND CONTEMP. PROBS. 646, 660–62 (1956).

45. JOHN D. FEERICK, *FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION* 213–14 (1965).

46. *Id.* at 214–16.

47. *Id.* at 215.

48. JOHN D. FEERICK *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* 19 (3rd ed. 2014).

49. *Id.*

50. See *id.*

51. *Id.*

52. *Id.*

53. See *id.*

Because of Eisenhower's health conditions and the continued legal uncertainty as to who is President during times of incapacity, Eisenhower began speaking with Vice President Nixon, the cabinet, and the Department of Justice to study the problem of presidential disability and succession.⁵⁴ The Attorney General could not reach a conclusion on what procedure should be followed if the President were unable to declare his own incapacity.⁵⁵ Eisenhower wanted the law changed so that a President could declare his own incapacity or, in the event that the President could not declare his own incapacity, a panel of medical experts and the Chief Justice of the Supreme Court could make that determination.⁵⁶ Several cabinet members, however, preferred that the Vice President make the determination of presidential incapacity, with checks and balances provided by the cabinet.⁵⁷ This latter idea was proposed by the Eisenhower administration to Congress as a constitutional amendment.⁵⁸ However, the amendment failed for partisan reasons because Democrats feared this was a way to install Nixon as President prior to the election.⁵⁹

Since the constitutional amendment failed, Eisenhower and Nixon entered into an informal agreement to manage presidential incapacity.⁶⁰ The agreement provided that the Vice President would serve as acting President if the President stated that he was incapacitated or would be incapacitated.⁶¹ In the event that the President could not declare his incapacity, the Vice President would make that determination after appropriate consultation.⁶² However, in either event, the President could determine at any time when his incapacity had ended and would then resume the full powers of his office.⁶³

This agreement represented the first significant step towards addressing the problem of presidential incapacity.⁶⁴ However, this agreement was purely voluntary and did not have the force of law. Moreover, a President who is clearly incapacitated from a legal standpoint may still retain the physical ability to declare that his incapacity has ended. Fortunately, despite Eisenhower's medical conditions, the agreement was never put to the test and Eisenhower continued his administration without further incident.⁶⁵ Future

54. FEERICK, *supra* note 48, at 23.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 24.

60. FREERICK, *supra* note 48, at 53.

61. *Id.*

62. *Id.*

63. *Id.* at 54.

64. *Id.*

65. *See id.*

administrations would borrow the agreement that Eisenhower and Nixon established.⁶⁶

On November 22, 1963 at approximately 12:30 p.m., President Kennedy was assassinated as his motorcade drove through Dallas, Texas.⁶⁷ President Kennedy was rushed to the hospital but was pronounced dead at 1:00 p.m.⁶⁸ Vice President Lyndon B. Johnson took the oath of office at 2:38 p.m. and assumed the presidency.⁶⁹

The line of presidential succession was especially vulnerable during this dangerous time in American history.⁷⁰ When Lyndon Johnson assumed the presidency at age 55, he already had known, serious medical issues, including heart complications.⁷¹ Additionally, Speaker of the House John McCormack was 71 years old and Senate Pro Tempore Carl Hayden was 86 years old.⁷² Finally, at this time in history, there was no way for the President to name a replacement Vice President.⁷³

Despite his relatively poor health, President Johnson had only minor periods of incapacity in the White House.⁷⁴ In October of 1965, President Johnson had his gall bladder removed.⁷⁵ Before going under anesthesia, President Johnson voluntarily transferred the powers of the presidency to Vice President Hubert Humphrey under the terms of their informal agreement, making Humphrey the acting President.⁷⁶ After recovering from the effects of the anesthesia, President Johnson resumed the powers of the presidency pursuant to their agreement.⁷⁷ Although the legality of this transfer could be questioned, as a matter of policy it was a wise decision and helped pave the way for the Twenty-Fifth Amendment.⁷⁸

66. FEERICK, *supra* note 48, at 54.

67. JOSIAH THOMPSON, *SIX SECONDS IN DALLAS: A MICRO-STUDY OF THE KENNEDY ASSASSINATION 196–213* (1967).

68. *November 22, 1963: Death of the President*, JOHN F. KENNEDY PRESIDENTIAL LIB. AND MUSEUM, <https://www.jfklibrary.org/JFK/JFK-in-History/November-22-1963-Death-of-the-President.aspx> (last visited Apr. 15, 2018).

69. *Id.*; see also Julia L. Ernst, *John F. Kennedy and Constitutional Aspects of Presidential Succession*, 76 U. PITT. L. REV. 63, 64 (2004).

70. See Ernst, *supra* note 69, at 64.

71. *How JFK's Assassination Led to a Constitutional Amendment*, NAT'L CONST. CTR. (Nov. 22, 2016), <http://blog.constitutioncenter.org/2016/11/how-jfks-assassination-led-to-a-constitutional-amendment/>.

72. *Id.*

73. *Id.*

74. James M. Young, M.D., *Presidential Illness and the Twenty-Fifth Amendment: A Former White House Physician's Perspective*, in *MANAGING CRISIS: PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT 74–75* (Robert E. Gilbert ed., 2000).

75. *Id.*

76. *Id.*

77. *Id.*

78. See *id.*

On January 6, 1965, in response to the death of President Kennedy and this recent history of presidential inability, Senator Birch Bayh of Indiana proposed S. J. Res. 1 in the Senate.⁷⁹ An identical resolution was introduced in the House by Congressman Emanuel Celler, who was the Chairman of the House Judiciary Committee.⁸⁰ The Senate passed Senator Bayh's resolution on February 19, 1965 and the House passed an amended version of S. J. Res. 1 on April 22, 1965.⁸¹ The differences between the House and Senate versions were relatively minor.⁸² A Conference Committee was appointed to resolve the differences between the House and Senate versions of the amendment.⁸³ The final version of the proposal, which would later become the Twenty-Fifth Amendment, was approved by the House on June 30, 1965 and then by the Senate on July 6, 1965.⁸⁴ This proposal was ratified by the necessary number of state legislatures on February 10, 1967, thereby becoming the Twenty-Fifth Amendment.⁸⁵

C. The Legal Framework of the Twenty-Fifth Amendment

The Twenty-Fifth Amendment has four sections.⁸⁶ The first codified the Tyler Precedent by stating that upon "the removal of the President by death or resignation, the Vice President shall become the President."⁸⁷ This provision made it explicitly clear as a matter of law that a Vice President who assumes the presidency because of the death or resignation of the President actually becomes the President rather than merely serving as an acting President.

The second section allows the President to nominate a Vice President whenever the vice presidency is vacant.⁸⁸ This nominee becomes the new Vice President upon confirmation by both the House and the Senate.⁸⁹ This is important for situations where the Vice President has been removed from office or has died, or when the Vice President has ascended to the presidency.

79. FEERICK, *supra* note 48, at 79.

80. *Id.* at 79–80.

81. *Id.* at 99–100.

82. *See id.* at 100–01.

83. *Id.* at 100.

84. *Id.* at 101–04; *see also* BIRCH BAYH, ONE HEARTBEAT AWAY: PRESIDENTIAL DISABILITY AND SUCCESSION 305–33 (1968).

85. FEERICK, *supra* note 48, at 105.

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

87. *Id.* § 1.

88. *Id.* § 2.

89. *Id.*

Section 3 allows for the President to transfer his power voluntarily to the Vice President when he is unable to fulfill his duties.⁹⁰ The President must inform the President Pro Tempore of the Senate and the Speaker of the House in writing that he is unable to fulfill the duties of his office.⁹¹ The Vice President then serves as acting President and has all the powers and duties of the President of the United States until the President informs the President Pro Tempore of the Senate and the Speaker of the House that he is able to resume his duties or until a new President is elected.⁹² This is similar to the informal agreement between President Eisenhower and Vice President Nixon, which was later adopted by President Kennedy and President Johnson.⁹³

Section 4 allows for the involuntary removal of the President when he is unable or unwilling to declare his inability.⁹⁴ If the Vice President and a majority of the cabinet, or such other body as Congress may by law provide, vote that the President is unable to discharge his duties, and they convey this in writing to the President Pro Tempore of the Senate and the Speaker of the House, then the Vice President immediately assumes the powers of the presidency and serves as Acting President of the United States.⁹⁵ The President, however, can revoke this by informing the Senate Pro Tempore of the Senate and the Speaker of the House in writing that no inability exists.⁹⁶ The President then regains all of his powers and duties, and the Vice President is no longer the acting President.⁹⁷

If the President states that no inability exists, the cabinet and the Vice President have two options. First, they can do nothing and allow the President to regain his powers.⁹⁸ Second, if within four days a majority of the cabinet, or such other body as Congress may by law provide, and the Vice President vote again that the President is still incapacitated, and they inform the President Pro Tempore and Speaker of the House that the President is still incapacitated, then the President does not regain the powers of his office and the Vice President continues to serve as Acting President of the United States.⁹⁹

90. *Id.* § 3.

91. *Id.*

92. U.S. CONST. amend. XXV, § 3.

93. FEERICK, *supra* note 48, at 53; Stephen W. Stathis, *Presidential Disability Agreements Prior to the 25th Amendment*, 12 PRESIDENTIAL STUD. Q. 208, 209–12 (1982).

94. U.S. CONST. amend. XXV, § 4; *see also* Akhil Reed Amar, *Applications and Implications of the Twenty Fifth Amendment*, 47 HOUS. L. REV. 1, 2 (2010).

95. U.S. CONST. amend. XXV, § 4.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

If this second option is used, Congress then must decide whether the President is incapacitated.¹⁰⁰ Once assembled, Congress must decide within twenty-one days whether the President is incapacitated.¹⁰¹ If both chambers determine by a two-thirds vote that the President is unable to discharge the powers and duties of his office, then the Vice President continues to serve as Acting President of the United States until the disability is removed or the next President is elected.¹⁰² However, if Congress fails to act within the requisite time period, or fails to reach the two-thirds requirement, the President resumes the powers and duties of his office.¹⁰³ Nonetheless, there is nothing forbidding the cabinet and the Vice President from implementing this process again.¹⁰⁴

III. ANALYSIS

Although the Twenty-Fifth Amendment was a major improvement in preventing presidential inability, it is uncertain whether the Twenty-Fifth Amendment offers adequate protection against an incapacitated President continuing to serve in his official capacity. Part A offers a historical critique of the Twenty-Fifth Amendment by concluding that if history serves as a guide, the protections of the Twenty-Fifth Amendment are inadequate.¹⁰⁵ Part B offers possible solutions to modify or replace the Twenty-Fifth Amendment and their respective shortcomings.¹⁰⁶ These solutions, broadly speaking, include passing a new constitutional amendment to replace the Twenty-Fifth Amendment or passing legislation within the existing constitutional framework. Finally, Part C examines methods of reform that can occur outside of the legal system.¹⁰⁷

A. The Historical Critique of the Twenty-Fifth Amendment

This nation has suffered serious difficulties with death, disability, and incapacity in the White House.¹⁰⁸ However, a few key historical trends have occurred that bear special importance for the purposes of the Twenty-Fifth Amendment. These trends are (1) that Presidents conceal their inabilities from the public, (2) that Presidents conceal their inabilities from their ad-

100. *Id.*

101. U.S. CONST. amend. XXV, § 4.

102. *Id.*

103. *Id.*

104. *Id.*

105. *See infra* Part III A.

106. *See infra* Part III B.

107. *See infra* Part III C.

108. *See generally* EDWARD B. MACMAHON, M.D. & LEONARD CURRY, *MEDICAL COVER-UPS IN THE WHITE HOUSE* (1987).

ministration, (3) that Vice Presidents and the cabinet are ineffective during periods of presidential inability, (4) that the press can be an ineffective watchdog during periods of presidential incapacity, and (5) that Presidents can be reluctant to transfer power under Section 3 of the Twenty-Fifth Amendment. These historical trends demonstrate that the protections of the Twenty-Fifth Amendment are insufficient.

1. *Presidents Conceal Their Inabilities from the Public*

The first trend is that Presidents conceal their illnesses and disabilities from the public. The first example of concealment occurred during the presidency of Grover Cleveland. President Cleveland, after being diagnosed with cancer in May of 1893, concealed his diagnosis from the public.¹⁰⁹ Making matters worse, Cleveland would undergo a secret surgery to remove the cancer while on aboard a private yacht.¹¹⁰ The President was strapped in a chair, given anesthesia, and the tumor was removed.¹¹¹ This initial surgery was extremely risky due to the conditions of the surgery and the President's poor health.¹¹²

The most egregious example is Woodrow Wilson's inability following his stroke.¹¹³ On October 2, 1919, Wilson suffered a massive stroke.¹¹⁴ He was first discovered by his wife, Edith Wilson, who immediately called for White House physician Dr. Grayson.¹¹⁵ Shortly thereafter, Dr. Dercum, a neurologist, diagnosed Wilson as suffering from a stroke and paralysis on the left side of his body.¹¹⁶

Shortly after the diagnosis, Dr. Grayson and Dr. Dercum discussed the matter with Edith Wilson.¹¹⁷ Edith demanded that the doctors keep Wilson's medical condition confidential because she believed that sharing this information, which could result in his removal from office, would be detrimental to his recovery.¹¹⁸ The doctors acquiesced to her request and would issue a series of misleading statements to the press.¹¹⁹ The press largely took these

109. FEERICK, *supra* note 48, at 12–15; Leonard Schlup, *The Case of Cleveland and Stevenson*, 9 PRES. STUDIES Q. 303, 304–05 (1979).

110. BUMGARNER, *supra* note 20, at 138.

111. *Id.*

112. FEERICK, *supra* note 48, at 12.

113. Arthur S. Link, *Woodrow Wilson: A Cautionary Tale*, 30 WAKE FOREST L. REV. 585, 588 (1995); JOHN MILTON COOPER, JR., WOODROW WILSON: A BIOGRAPHY 535 (2009).

114. Link, *supra* note 113, at 588.

115. MACMAHON, *supra* note 108, at 56.

116. JOHN C. RAND, CONSPIRACY IN THE WILSON WHITE HOUSE 67–68 (2015).

117. *Id.* at 68.

118. *Id.*

119. *See id.*

statements at face value and ran encouraging articles about the President's improving health.¹²⁰

Franklin Roosevelt also concealed his ailments from the public. President Roosevelt, in addition to downplaying his polio caused paralysis throughout his entire political career, concealed his rapidly declining health from the public during his final presidential election.¹²¹ After being elected for a fourth term, Roosevelt's condition continued to worsen; he was indecisive, lethargic, lost weight, and his blood pressure rose.¹²² However, Roosevelt, his doctors, and his advisors maintained to the public that he was in good health.¹²³

Kennedy also concealed multiple health issues from the public. At the age of 30 years old, Kennedy was diagnosed with Addison's disease: a disorder caused by an insufficient amount of hormones, which can be managed by medication.¹²⁴ Kennedy, who was a congressman at the time of his diagnosis, withheld this information from the public and blamed his symptoms on malaria.¹²⁵ Later on, Kennedy would have a secret and dangerous operation to relieve his chronic back pain while he was a senator.¹²⁶ This surgery was not known to the press or the general public until after his presidency had ended.¹²⁷ Despite protracted rumors of his Addison's disease during his presidential candidacy, Kennedy was able to put these rumors to rest by a series of misleading, although factually accurate, medical statements.¹²⁸

Despite overcoming the political consequences of his ailments, President Kennedy would never overcome their physical effects. During his presidency, Kennedy would take a variety of powerful medications such as steroids and cortisone for his Addison's disease, antibiotics for urinary tract infections, anti-spasmodics for his colitis, and an anti-psychotic for a temporary mood swing.¹²⁹ Kennedy would also receive testosterone on a daily

120. *See id.* at 71–73.

121. MATTHEW B. WILLS, *A DIMINISHED PRESIDENT: FDR IN 1944 35–50* (2003).

122. FEERICK, *supra* note 48, at 17–18.

123. *Id.* at 18.

124. *Id.* at 122; *see also* JOAN BLAIR AND CLAY BLAIR, JR., *THE SEARCH FOR JFK* 561–62 (1976); *Addison's Disease*, MAYO CLINIC (Nov. 10, 2015), <http://www.mayoclinic.org/diseases-conditions/addisons-disease/home/ovc-20155636>.

125. FEERICK, *supra* note 48, at 122.

126. *Id.* at 124–25; *see also* James A. Nicholas et al., *Management of Adrenocortical Insufficiency During Surgery*, 71 *AM. MED. ASS'N ARCHIVES OF SURGERY* 737, 737–42 (1955).

127. MACMAHON, *supra* note 108, at 125.

128. *Id.* at 126–30; Fletcher Knebel, *Kennedy Calls Gossip About Illness False*, *DES MOINES REG.*, June 14, 1959, at 1.

129. Robert Dallek, *The Medical Ordeals of JFK*, *ATLANTIC* (Dec. 2002), <https://www.theatlantic.com/magazine/archive/2002/12/the-medical-ordeals-of-jfk/305572/>.

basis during his entire presidency.¹³⁰ Kennedy was also given injections of painkillers and amphetamines into his back.¹³¹ This information did not come to light until years after his presidency had ended.¹³²

Thus, this history shows us that Presidents often put their own political interests ahead of being fully forthcoming with the public regarding their declining health. Moreover, as evidenced by the less than candid release of medical information by Hillary Clinton and Donald J. Trump during the most recent election cycle, we can expect for this trend of deception to continue.¹³³

2. *President's Conceal Their Illnesses and Disabilities from Their Administration*

Second, in addition to concealing their health issues from the public, many Presidents have concealed their health issues from their Vice President and cabinet. Once again, Wilson is the most extreme example: he kept his Vice President and a majority of his cabinet in the dark about the true extent of his disability.¹³⁴

However, Secretary of State Robert Lansing and a few members of the cabinet were informed confidentially about the full extent of Wilson's disability.¹³⁵ Because of his knowledge, Lansing suggested that the Vice President serve as acting President during this period of incapacity.¹³⁶ On October 6, 1919, Secretary of State Lansing called a cabinet meeting and argued that the Vice President should serve as acting President if Wilson was unable to discharge his duties.¹³⁷ However, White House physician Dr. Grayson refused to answer any questions and simply voiced Wilson's supposed displeasure that a cabinet meeting had been called without his authority.¹³⁸ This

130. Lee R. Mandel, *Endocrine and Autoimmune Aspects of the Health History of John F. Kennedy*, 151 *ANNALS INTERNAL MED.* 350, 352 (2009).

131. ROBERT DALLEK, *AN UNFINISHED LIFE: JOHN F. KENNEDY 1917-1963* 398 (2003).

132. *Id.*

133. See Vikram David Amar, *Can and Should States Mandate Tax Return Disclosure as a Condition for Presidential Candidates to Appear on the Ballot?*, JUSTIA (Dec. 30, 2016), <https://verdict.justia.com/2016/12/30/can-states-mandate-tax-return-disclosure-condition-presidential-candidates-appear-ballot> (discussing that state regulation of the ballots for federal election may be unconstitutional if they prescribe additional requirements for candidates not found in the Constitution. Likewise, state requirements for presidential candidates to disclose their complete health history or other requirements could be unconstitutional); see also *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995).

134. FEERICK, *supra* note 48, at 15.

135. *Id.*

136. *Id.*

137. *Id.* at 15–17.

138. *Id.*

ended Lansing's desire to have the cabinet label Wilson as incapacitated.¹³⁹ Wilson would later dismiss Lansing as Secretary of State in February of 1920 due to his perceived disloyalty.¹⁴⁰ As a result, for the next year and a half, the United States would be without a fully functioning chief executive.¹⁴¹

Likewise, President Cleveland did not reveal his cancer diagnosis or his plan to have a secret operation to his administration.¹⁴² Rather, only one member of the cabinet was aware of this plan.¹⁴³ Fortunately, Cleveland was largely unaffected by the operation.¹⁴⁴

Finally, President Franklin Roosevelt kept Vice President Harry Truman in the dark regarding his rapidly deteriorating health and did not involve him in any areas of foreign policy.¹⁴⁵ Truman was not even briefed on the development of atomic weapons.¹⁴⁶ In fact, Truman had only spoken to Roosevelt twice since the inauguration, and even then, only about legislative matters.¹⁴⁷ Despite the fact that Vice President Truman was not briefed on matters of foreign affairs and national security, he was still able to provide admirable leadership when he assumed the presidency.¹⁴⁸ However, the fact that a President in rapidly declining health kept his Vice President ignorant of key matters of national security is a cause for concern and must serve as a reminder for modern Presidents.

Due to the fact that Section 4 of the Twenty-Fifth Amendment is dependent upon aggressive action by the Vice President and the cabinet, it is particularly distressing to see this long history of Presidents concealing their failing health from their cabinet and their Vice President. Moreover, now that the Twenty-Fifth Amendment empowers the Vice President and the cabinet to remove the President involuntarily during periods of incapacity, the incentive for Presidents to hide this damaging information has only in-

139. *Id.*; see also Edwin A. Weinstein, *Woodrow Wilson's Neurological Illness*, 57 J. AM. HIST. 324, 349 (1970).

140. FEERICK, *supra* note 48, at 16.

141. Michael Alison Chandler, *A President's Illness Kept Under Wraps*, WASH. POST (Feb. 3, 2007), https://www.washingtonpost.com/archive/local/2007/02/03/a-presidents-illness-kept-under-wraps-span-classbankhead-woodrow-wilsons-deteriorating-health-detailed-in-doctors-correspondencespan/1e558dea-4492-4808-af43-91437470e8a3/?utm_term=.f76f43e19b1a.

142. *Id.*

143. *Id.*

144. See BUMGARNER, *supra* note 20, at 140.

145. FEERICK, *supra* note 48, at 19.

146. *Id.*; Barton J. Bernstein, *Roosevelt, Truman, and the Atomic Bomb, 1941-1945: A Reinterpretation*, 90 POL. SCI. Q. 23, 34-39 (1975).

147. Bernstein, *supra* note 146, at 34-39.

148. *Id.*

creased. Only time will tell if this American tradition of presidential deception will continue.

3. *Vice Presidents and the Cabinet Are Ineffective During Presidential Incapacity*

Third, Vice Presidents and cabinet members are often paralyzed by indecision during periods of moderate to severe presidential inability, such as when the President is alive but is unable to govern.¹⁴⁹ The first example was when President Garfield was incapacitated and Vice President Arthur refused to take any action to replace the mortally wounded leader.¹⁵⁰ On July 2nd, 1881, at 9:20 a.m., President Garfield was shot by a disgruntled supporter.¹⁵¹ Garfield would largely be incapacitated for 80 days until his death.¹⁵² As a result, foreign policy and the daily functioning of the executive branch essentially came to a halt.¹⁵³ Garfield would not die until September 19, 1881.¹⁵⁴ However, at no time during these 80 days of incapacity did Vice President Chester A. Arthur confer with the President or attempt to assume the duties of the presidency.¹⁵⁵ Arthur was concerned about the appearances of seizing power, especially since they were from different factions of the Republican Party.¹⁵⁶

Again, the most damning example occurred during the Wilson administration when Vice President Thomas Marshall refused to take steps to replace Wilson despite his protracted disability.¹⁵⁷ Despite calls to serve as acting President from Secretary Lansing, Vice President Marshall did not seek to become the acting President because he was afraid of angering Edith Wilson and appearing as a usurper of power.¹⁵⁸ Likewise, with the exception of Lansing, the cabinet was largely ineffective during this period in trying to determine Wilson's inability.¹⁵⁹

149. Jerrold M. Post and Robert S. Robins, *The Captive King and His Captive Court: The Psychopolitical Dynamics of the Disabled Leader and His Inner Circle*, 11 POL. PSYCHOL. 331, 348–49 (1990).

150. FEERICK, *supra* note 48, at 8–9.

151. JUSTUS D. DOENECKE, *THE PRESIDENCIES OF JAMES A. GARFIELD & CHESTER A. ARTHUR* 53 (1981).

152. FEERICK, *supra* note 48, at 8; *see also* BUMGARNER, *supra* note 20, at 125–28.

153. FEERICK, *supra* note 48, at 9.

154. *Id.*

155. *Id.*; BUMGARNER, *supra* note 20, at 128.

156. FEERICK, *supra* note 48, at 8–9.

157. *Id.* at 15–17; Joel K. Goldstein, *Review: He Almost Changed the World: The Life and Times of Thomas Riley*, 104 IND. MAG. HIST. 183, 184–85 (2008).

158. FEERICK, *supra* note 48, at 15–17.

159. *See id.*

As such, due to Marshall's timidity and Lansing's dismissal, Edith Wilson and Dr. Grayson essentially served as the de-facto President.¹⁶⁰ They controlled what matters, if any, reached Wilson's desk, and they controlled who would see the President.¹⁶¹ During this year-and-a-half period of disability, government vacancies went unfilled, twenty-eight bills became law because of presidential inaction, and America's entrance into the League of Nations was defeated in the Senate.¹⁶² This unauthorized use of power and executive weakness could have been prevented if Vice President Marshall would have assumed his constitutional duty to manage the executive branch during this period of presidential inability.

A surprising example of vice presidential timidity was Vice President Richard Nixon's deferential approach during Eisenhower's recovery.¹⁶³ On September 24, 1955, President Dwight E. Eisenhower suffered a heart attack while in Colorado.¹⁶⁴ While he was recovering, the cabinet carried out the status quo of government under an unofficial agreement.¹⁶⁵ Additionally, Governor Sherman Adams of Colorado, rather than Vice President Nixon, served as the official spokesman of the President while he was resting in Colorado.¹⁶⁶

Not surprisingly, this system caused great confusion as it was often unclear to both the cabinet and the press whether Vice President Nixon, Governor Adams, or an incapacitated Eisenhower was in charge of the federal government.¹⁶⁷ To that end, Nixon was highly deferential during this period and did not sit in the President's chair or office.¹⁶⁸ The cabinet also began to act outside of their designated authority and soon began to realize the shortcomings of the current system for dealing with presidential disability.¹⁶⁹ Nixon would eventually come to believe that this committee system only worked due to the fact that there was not a national emergency or pressing issue which occurred during Eisenhower's period of incapacity.¹⁷⁰ However,

160. Judith L. Weaver, *Edith Bolling Wilson as First Lady: A Study in the Power of Personality, 1919-1920*, 15 PRESIDENTIAL STUD. Q. 51, 51 (1985); Dr. Howard Markel, *When a Secret President Ran the Country*, PBS (Oct. 2, 2015), <http://www.pbs.org/newshour/updates/woodrow-wilson-stroke/>.

161. Weaver, *supra* note 160, at 51.

162. *Id.*; see also Lloyd E. Ambrosius, *Woodrow Wilson's Health and the Treaty Fight, 1919-1920*, 9 INT'L HIST. REV. 73, 81 (1987).

163. *Id.* at 20-22; Robert E. Gilbert, *The Impact of Presidential Illness on the Administration of Dwight D. Eisenhower*, 31 POL. AND LIFE SCI., 16, 21 (2012).

164. FEERICK, *supra* note 45, at 213-14.

165. FEERICK, *supra* note 48, at 19.

166. *Id.*

167. *Id.* at 21.

168. *Id.* at 22.

169. *Id.* at 21.

170. See FEERICK, *supra* note 48, at 22.

Nixon could have improved this situation by decisive executive leadership rather than letting the cabinet run amok and letting a state governor serve as the mouthpiece of the President of the United States.¹⁷¹ One should be concerned that if Vice President Nixon was afraid of being seen as a usurper of executive power, the same could be true for other Vice Presidents.

Admittedly, the above examples occurred prior to the Twenty-Fifth Amendment. Thus, one might argue that a modern Vice President and cabinet, who are strengthened by the constitutional provisions of the Twenty-Fifth Amendment, would be much more decisive in the modern era. However, that is not necessarily the case.

For example, after President Ronald Reagan underwent anesthesia and surgery following an assassination attempt, Vice President George H.W. Bush was reluctant in exercising authority.¹⁷² At the time of the attempted assassination, Vice President George H.W. Bush was in Texas, although he immediately returned to the White House upon learning of the attack.¹⁷³ Upon his return to Washington, Bush refused to take a Marine helicopter to the South Lawn of the White House because “[o]nly the [P]resident lands on the South Lawn.”¹⁷⁴ Bush further noted that landing on the South Lawn “might well have made for great TV, but I thought it would have sent the wrong message to the country and to the world” and that “I was also thinking about Nancy Reagan, and how she probably didn’t need that kind of distraction at that time.”¹⁷⁵

Once at the White House, Bush would continue his hands-off approach to leadership.¹⁷⁶ Bush would not use the Twenty-Fifth Amendment, either Section 3 or 4, during Reagan’s surgery or while he recovered from surgery.¹⁷⁷ Moreover, Bush did not assume any special powers or responsibilities during Reagan’s recovery from the surgery.¹⁷⁸ Rather, Bush would defer to or clear decisions with White House Chief of Staff James Baker, Counselor to the President Edwards Meese, and White House Deputy Chief of Staff Michael Deaver.¹⁷⁹ In fact, these three individuals effectively managed the

171. *See id.*

172. Feerick, *supra* note 16, at 926.

173. *Id.*

174. Alan Peppard, *Command and Control: Tested Under Fire*, DALL. MORNING NEWS (May 13, 2015), <http://res.dallasnews.com/interactives/reagan-bush/>.

175. *Id.*

176. HERBERT L. ABRAMS, *THE PRESIDENT HAS BEEN SHOT: CONFUSION, DISABILITY, AND THE 25TH AMENDMENT IN THE AFTERMATH OF THE ATTEMPTED ASSASSINATION OF RONALD REAGAN 188–89* (1992).

177. *Id.*

178. *Id.*

179. *Id.* at 188; *see also* *The Presidential Troika*, N.Y. TIMES (Apr. 19, 1981), <http://www.nytimes.com/1981/04/19/magazine/the-presidential-troika.html?pagewanted=all> (“[I]n the morning, they are on hand, as usual, for their start-of-the day gathering with the

executive branch while the President recovered from his surgery for the next several weeks.¹⁸⁰ Although Bush desired to appear deferential, he ultimately surrendered executive authority to unelected advisors who were not even confirmed by the Senate.¹⁸¹

Likewise, the cabinet neglected its responsibility under Section 4 of the Twenty-Fifth Amendment during Reagan's period of incapacity. While Bush was returning to the White House, Attorney General William Smith and White House Counsel Fred Fielding brought the paperwork to invoke Section 4 of the Twenty-Fifth Amendment to the situation room and explained the operation of the amendment to the President's staff, advisors, and the cabinet.¹⁸² Richard Darman, an assistant to the President, argued that the subject matter was inappropriate and took away the documents and locked them away in his safe.¹⁸³ This ended any discussion of invoking the involuntary protections of the Twenty-Fifth Amendment, and the cabinet would not further consider its constitutional obligation to invoke the Twenty-Fifth Amendment.¹⁸⁴ It is particularly distressing that the cabinet let an assistant to the President sideline their constitutional obligation.

The reasons for this timidity in the executive branch are numerous. For one, Vice Presidents are afraid of being seen as usurpers of power during times of tragedy. Although a respectful gesture, this is not the strong leadership that the country needs during times of crisis. Rather, when in doubt, it would be preferable for the Vice President to err on the side of decisiveness during times of potential inability. If a power vacuum occurs in the executive branch, it is preferable that this vacuum is filled by the Vice President, who was elected by the people of the United States and has a constitutional responsibility to them, rather than having unelected cabinet members, presidential advisors, or even family members filling the leadership void.

President in his hospital room. 'Boy, Mike, we sure screwed up the schedule,' Mr. Reagan jokes to Deaver. The swift-moving events at George Washington University Hospital were merely the most dramatic example of the influence and authority of President Reagan's troika - Meese, Baker and Deaver. In the first months of the Reagan Administration, the headlines, the limelight and the cover stories have focused on the President, Secretary of State Haig and David Stockman, the Administration's budget director. But behind the scenes, Meese, Baker and Deaver have been the nerve center of the new Administration, orchestrating the Reagan Presidency, guiding the new Cabinet and the entire Reagan entourage, screening all key appointments, subtly influencing politics and policies, helping the President set the tone in the vital formative weeks of his stewardship and *then enabling Vice President Bush to carry on business as usual when the President was gunned down.*") (emphasis added).

180. ABRAMS, *supra* note 176, at 188-89.

181. *See id.*

182. *Id.* at 180.

183. *Id.*

184. *Id.*

A related reason that Vice Presidents often justify their hands-off approach is out of respect for the first lady. This was evidenced during Wilson's disability and by Vice President George H.W. Bush.¹⁸⁵ From a matter of public policy and constitutional law, this justification, or perhaps an excuse, has absolutely no merit.

Lastly, vice presidential candidates are often selected by a presidential candidate for political reasons, such as the electability of the presidential ticket or to unite various factions of their political party, rather than seeking a true partner in managing the nation.¹⁸⁶ As such, once the President is elected, Vice Presidents are often relegated to a quasi-ceremonial position who have little actual power.¹⁸⁷ Thus, Vice Presidents may often lack the political strength within the executive branch, the experience, or the independent authority to assert control persuasively during periods of incapacity. For this reason, presidential candidates should pick a vice presidential candidate with a demonstrated record of strong executive leadership or an individual accustomed to making difficult choices under stressful situations rather than a candidate who merely balances the ticket or unites the party.

Likewise, cabinet officials are often picked for political reasons rather than for their independent strength. Moreover, as evidenced by Secretary of State Lansing during the Wilson administration, cabinet members can be dismissed by the President for any reason.¹⁸⁸ The fear of being fired could lead cabinet members to be especially timid during periods of presidential inability.

4. *The Press Is an Ineffective Watchdog for Presidential Inability*

Fourth, the press is often an ineffective watchdog for presidential inability. During President Cleveland's secret surgery, for example, the press was unable to persuasively determine what actually occurred until years after the surgery.¹⁸⁹ During Wilson's inability, the press largely believed the administration's narrative that Wilson was not disabled.¹⁹⁰ The press acquiesced in downplaying FDR's physical limitations due to his polio caused paralysis and did not discover his failing health during an election year.¹⁹¹

185. Peppard, *supra* note 174.

186. Katy J. Harriger, *Who Should Decide? Constitutional and Political Issues Regarding Section 4 of the Twenty-Fifth Amendment*, 30 WAKE FOREST L. REV. 563, 576–578 (1995).

187. *Id.*

188. See FEERICK, *supra* note 48, at 15–17.

189. FEERICK, *supra* note 48, at 11–12.

190. *Id.* at 14–16.

191. HUGH GREGORY GALLAGHER, *FDR'S SPLENDID DECEPTION: THE MOVING STORY OF ROOSEVELT'S MASSIVE DISABILITY-AND THE INTENSE EFFORTS TO CONCEAL IT FROM THE PUBLIC* 93–105 (1999); Arthur Schlesinger Jr. et al., *FDR's Wheelchair*, 29 WILSON Q. 7, 8 (2005).

Finally, the press was unable to discover Kennedy's Addison's diagnosis, his concoction of powerful medications, or his secret back surgery until well after his death.¹⁹²

However, it is worth noting that the press was aggressive in determining who was in control during President Reagan's emergency operation.¹⁹³ Further, in the modern age of cable news and the internet, one may believe that situations like Wilson could not occur again. Likewise, due to the antagonistic relationship between the press and President Trump, it is unlikely that any legitimate disability in the Trump administration could be hidden.¹⁹⁴ Although these arguments have merit, we must remember that the press is not infallible and that most journalists lack any sort of medical training. Moreover, in contrast to President Trump, future administrations may have very friendly relationships with the press. Thus, the possibility that the press will serve as an ineffective watchdog for presidential inability remains to this day.

5. *Presidents Can Be Reluctant to Transfer Power Under Section 3 of the Twenty-Fifth Amendment*

Finally, President Reagan was hesitant to invoke Section 3 of the Twenty-Fifth Amendment on several occasions. While the President was being taken to the hospital during his assassination attempt, Reagan did not invoke Section 3 prior to taking anesthesia, which would have voluntarily transferred power to Vice President George H.W. Bush until the President recovered.¹⁹⁵ Although this was an emergency situation, the President still had the time and the mental capacity to invoke this section.¹⁹⁶ His aides at the hospital, under the belief that the President's condition was stable, decided not to invoke Section 3 of the Twenty-Fifth Amendment.¹⁹⁷

Additionally, on July 12, 1985, President Reagan had surgery to remove a polyp from his colon.¹⁹⁸ Before anesthesia was used, President Reagan signed a letter to the President Pro Tempore of the Senate and the Speaker of the House transferring power to Vice President Bush, making

192. MACMAHON, *supra* note 108, at 125–27.

193. ABRAMS, *supra* note 176, at 109–111.

194. See generally RonNell Andersen Jones and Lisa Grow Sun, *Making an Enemy of the Press*, 2017 U. ILL. L. REV. ONLINE (Apr. 29, 2017), <https://illinoislawreview.org/symposium/first-100-days/making-an-enemy-of-the-press/>; see also David Jackson, *Trump Again Calls Media 'Enemy of the People'*, USA TODAY (Feb. 24, 2017), <http://www.usatoday.com/story/news/politics/2017/02/24/donald-trump-cpac-media-enemy-of-the-people/98347970/>.

195. *Id.* at 179; U.S. CONST. amend. XXV, § 3.

196. See ABRAMS, *supra* note 176, at 62.

197. *Id.* at 180–81.

198. Feerick, *supra* note 16, at 929.

him the Acting President of the United States.¹⁹⁹ However, the letter explicitly disclaimed using the Twenty-Fifth Amendment.²⁰⁰ Upon recovering from the surgery, the President sent another letter to the Speaker and President Pro Tempore explaining that he had resumed the powers of his office.²⁰¹

This episode is particularly perplexing considering that the President complied with the formalities of Section 3 of the Twenty-Fifth Amendment while expressly denying the use of the Twenty-Fifth Amendment.²⁰² Since the Amendment was not explicitly used, it is unclear whether Vice President Bush had any legal authority as acting President.²⁰³ Reagan's transfer of power, as a matter of policy, was at least a step in the right direction and marked an improvement to his prior surgery.

President George W. Bush did utilize Section 3 of the Twenty-Fifth Amendment several times during surgery, making Vice President Dick Cheney the Acting President of the United States.²⁰⁴ This is an encouraging sign that Section 3 may be utilized more often in the future.

Based on these historical trends, the protections afforded in Section 3 and 4 of the Twenty-Fifth Amendment can be inadequate. Presidents often conceal their medical issues and their inability from the public.²⁰⁵ They also conceal these issues from the Vice President and the cabinet: the very individuals entrusted under the Twenty-Fifth Amendment to implement the involuntary procedures of Section 4 of the Twenty-Fifth Amendment.²⁰⁶ Even worse, when Vice Presidents and the cabinet have learned of presidential incapacity, they often neglected their responsibility to temporarily replace the President, even in the modern era under the Twenty-Fifth Amendment.²⁰⁷ Additionally, the press is often unable to determine when presidential inability actually exists. Finally, Presidents may be reluctant to invoke Section 3 of the Twenty-Fifth Amendment.

B. Possible Modifications to the Law

Due to the current shortcomings of the Twenty-Fifth Amendment, many commentators and academics have called for various proposals to

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 929–30.

204. See Feerick, *supra* note 16, at 931–32; Sheryl Gay Stolberg, *Cheney Pens Letter While Acting as POTUS*, N.Y. TIMES: CAUCUS (Jul. 30, 2007, 5:20 PM), <https://thecaucus.blogs.nytimes.com/2007/07/30/cheney-pens-letter-while-acting-as-potus/>.

205. See, e.g., FEERICK, *supra* note 48, at 14–17.

206. *Id.*

207. ABRAMS, *supra* note 176, at 188–89.

either repeal and replace the amendment or substantially alter the substance of the Twenty-Fifth Amendment under the existing legal framework.²⁰⁸ These proposals, broadly speaking, include constitutional amendments that replace the Twenty-Fifth Amendment or legislation that modifies the Twenty-Fifth Amendment. However, as seen below, these proposals have their own drawbacks or are unlikely to be implemented.

1. *Constitutional Amendments*

The most direct way to cure the deficiencies of the Twenty-Fifth Amendment would be to repeal and replace the amendment.²⁰⁹ For the purposes of this analysis, it is helpful to consider a few alternatives to the Twenty-Fifth Amendment that were not enacted into law. One alternative to the Twenty-Fifth Amendment was having the Supreme Court, with the assistance of medical experts, determine presidential disability.²¹⁰ As stated above, this method was favored by President Eisenhower.²¹¹ This process would have begun when Congress, by a concurrent resolution approved by two-thirds of each chamber, suggested that the President was unable to discharge the powers of his office.²¹² If this threshold were met, the Supreme Court would then determine whether or not the President was able to discharge the powers of his office.²¹³ If the Court held that the President was unable to discharge his duties, the Vice President would become the acting President until the next President was elected or until the Supreme Court found that the President was able to discharge his duties.²¹⁴

As compared to the Twenty-Fifth Amendment, this proposal had the advantage of not being dependent upon those close to the President being responsible for initiating involuntary removal proceedings against their

208. See generally Robert E. Gilbert, *Coping with Presidential Disability: The Proposal for a Standing Medical Commission*, 22 POL. AND LIFE SCI. 1 (2003); Marie D. Natoli, *The Twenty-Fifth Amendment: Opening a Pandora's Box*, 6 PRESIDENTIAL STUD. Q. 48, 48–50 (1976).

209. See Samuel H. Hofstadter and Jacob M. Dinnes, *Presidential Inability: A Constitutional Amendment Is Needed Now*, 50 A.B.A. J. 59, 62 (1964) (a request to enact the current Twenty-Fifth Amendment because the existing legal protections were inadequate); John D. Feerick, *Presidential Inability: The Problem and a Solution* 50 A.B.A. J. 321, 323–24 (1964); see Thomas F. Schaller, *Democracy at Rest: Strategic Ratification of the Twenty-First Amendment*, 28 PUBLIUS 81, 96–67 (1998) (discussing the replacement of the prohibition amendment).

210. *Presidential Inability: Hearing Before the Special Subcomm. on Study of Presidential Inability of the House Comm. on the Judiciary*, 85th Cong., 1st sess. 1–2, at Sec. 3 (1957) [hereinafter *Presidential Inability*].

211. FEERICK, *supra* note 48, at 23.

212. *Id.*

213. *Id.*

214. *Id.*

leader. Additionally, the Supreme Court would presumably serve as a fairly neutral and unbiased arbitrator of whether the President was able to discharge his duties. However, this proposal was ultimately rejected because of a perceived lack of accountability and for violating the separation of powers doctrine.²¹⁵

In addition to concerns about lack of accountability and separation of powers issues, this proposal is also weak in the sense that members of Congress and the Supreme Court do not have daily interactions with the President. As such, they may not know whether the President is beginning to lose his ability to run the country. This is in stark contrast to the Vice President and the cabinet who have daily interactions with the President.²¹⁶ Additionally, because Congress has the ability to initiate this disability proceeding under this proposal, there is the risk that this proposal could turn into a tool of partisan politics rather than a sacrosanct responsibility. Finally, due to the increased partisanship of the Supreme Court, it is debatable how impartial the Supreme Court would be if it were required to make a finding of presidential disability.²¹⁷ As such, this alternative should not be seen as a viable alternative to the Twenty-Fifth Amendment.

A second alternative was the Presidential Inability Commission.²¹⁸ The commission would have been composed of the Vice President of the United States, the Chief Justice of the Supreme Court, the senior Associate Justice of the Supreme Court, The Speaker of the House, the minority leader in the House, the majority leader in the Senate, the minority leader in the Senate, the Secretary of State, the Secretary of the Treasury, and the Attorney General.²¹⁹ The Vice President would not have voting privileges but would serve as the leader of this commission.²²⁰

The commission would be convened if the President stated he was unable to discharge his duties or if three members of the commission believed

215. Harriger, *supra* note 186, at 575–76.

216. See generally Sarah Westwood, *Trump Packs Schedule with Cabinet-Level Meetings*, WASH. EXAMINER (Mar. 6, 2017), <http://www.washingtonexaminer.com/trump-packs-schedule-with-cabinet-level-meetings/article/2616558>.

217. See Gregory Dickinson, *One Justice, Two Justice, Red Justice, Blue Justice: Dissecting the Role of Political Ideology in Supreme Court Nominations*, 2017 U. ILL. L. REV. 345, 356–58 (2017) (discussing the increased partisanship and ideological divisions on the Supreme Court); see also Lucas Rodriguez, *The Troubling Partisanship of the Supreme Court*, STAN. POL. (Jan. 7, 2016), <https://stanfordpolitics.com/the-troubling-partisanship-of-the-supreme-court-da9fd5a900ac#.janfersaq>.

218. *Presidential Inability: Hearings on S.J. Res. 28, S.J. Res 35, and S.J. Res. 84 Relating to the Problem of Presidential Inability Before the Subcomm. On Constitutional Amendments of the S. Comm. On the Judiciary*, 88th Cong. 3–4 (1957) [hereinafter *Presidential Inability Hearings*].

219. *Id.* at 43.

220. *Id.*

that the President was unable to fulfill his duties.²²¹ Once convened, the commission would seek medical advice on the condition of the President.²²² If a majority of the commission found that the President could not discharge his duties, the Vice President would become acting President until the next President was elected or until the commission found that the disability had been removed.²²³

This proposal had the advantage of a broad group of elected leaders, which would provide for some accountability to the people, justices who should serve as detached observers of inability, and insiders of the executive branch presumably loyal to the President.²²⁴ Moreover, because the Vice President could not vote, any vote by the commission would hopefully have the appearance of being a neutral finding of fact rather than a Machiavellian takeover.²²⁵ Additionally, because of the specific requirement that the commission consult medical experts, any finding of fact by the commission should be based, in part, on actual medical experts.²²⁶

However, some obvious drawbacks are that three members could easily convene this commission.²²⁷ When two of the members will be a senator and a congressman from the opposite party of the President, it is easy to imagine that political mischief could occur. Furthermore, the most serious drawback is that the President of the United States, who is the only elected official representing the entire country and who receives millions of votes nationwide, could have his power taken away by five votes of a Presidential Inability Commission. Thus, this proposed amendment should not be used as a model.

Finally, any proposed constitutional amendment, no matter the merits of the proposal, would face significant procedural, political, and enthusiasm barriers. On the procedural side, constitutional amendments are very difficult to enact because, absent a state convention, they require a two-thirds vote in both chambers of Congress and ratification by three-fourths of the state legislatures.²²⁸ By implication, any amendment seeking to modify or replace the Twenty-Fifth Amendment would face these procedural barriers.²²⁹ If reform were sought, Republicans would have a particular advantage

221. *Id.* at 42–44.

222. *Id.*

223. *Id.* at 42.

224. *See Presidential Inability Hearings, supra* note 218.

225. *Id.*

226. *Id.*

227. *Id.*

228. U.S. CONST. art. V.

229. *See id.*

because of their current strength at the state level and their majorities in both chambers of Congress.²³⁰

Moreover, any amendment would face significant political barriers. When reform was attempted in the past, both political parties were highly suspicious of the motivations of the other party, such as when Democrats rejected President Eisenhower's proposals out of fear that this was a ploy to make Nixon the President before an election.²³¹ Thus, in this highly partisan age, any constitutional amendment seeking to reform or replace the Twenty-Fifth Amendment would be viewed through the prism of presidential politics regardless of the merits of the proposal.²³² Any reform offered by Democrats would essentially be dead on arrival due to their potential motive to weaken President Trump and their current weakness at the state and federal level.²³³ Republicans, however, would have an easier time passing reform and lack an obvious political motivation for doing so.²³⁴

Finally, any amendment would face a significant enthusiasm gap. The Twenty-Fifth Amendment was only passed after President Kennedy was assassinated and the remaining line of succession was very vulnerable.²³⁵ Previous efforts at reform usually ended once a new President was elected and public memory of the prior President's disability faded.²³⁶ Although the election of Donald J. Trump has revised some interest in the Twenty-Fifth Amendment, this interest is still lacking nationwide consensus to sustain serious constitutional reforms. Likewise, due to the Democratic Party's weakness at the state level, and minority status in both chambers of Congress, any zeal by the Democratic Party is currently irrelevant barring an unforeseen development.²³⁷ If reform is to be had, it almost certainly will not take the form of a constitutional amendment and will require Republican support.

230. See generally Sean Trende & David Byler, *Republican Party the Strongest It's Been in 80 Years*, REAL CLEAR POL. (Nov. 17, 2016), http://www.realclearpolitics.com/articles/2016/11/17/republican_party_the_strongest_its_been_in_80_years.html.

231. FEERICK, *supra* note 48, at 24.

232. See, e.g., Adelle Nazarian, *Democrats Invoke 25th Amendment, Question Trump's Mental Health*, BREITBART (Feb. 20, 2017), <http://www.breitbart.com/big-government/2017/02/20/democrats-question-president-trumps-mental-health/>.

233. See Trende & Byler, *supra* note 230.

234. *Id.* However, this is assuming that they do not wish to see President Trump replaced by Vice President Pence.

235. RONAN, *supra* note 13, at 71–72.

236. *Id.*

237. Trende & Byler, *supra* note 230.

2. *Other Body as Congress by Law May Provide*

The Twenty-Fifth Amendment allows for the Vice President and “a majority of either the principal offices of the executive departments *or of such other body as Congress may by law provide*” to determine whether the President is unable to discharge his duties.²³⁸ Congress’ power to create another body is vast: “it can designate itself, expand or restrict the membership of the cabinet, combine the cabinet with other officials, and prescribe the rules and procedures to be followed by that body.”²³⁹ Due to the hardships in changing the Constitution, it is much more likely that any reform will be done via congressional legislation pursuant to the Twenty-Fifth Amendment rather than a new constitutional amendment.²⁴⁰ Below are some of the other bodies that Congress could create. This section will ultimately conclude that an advisory panel of medical experts is the most efficient and responsible way to improve the protections of the Twenty-Fifth Amendment.

a. Panel of congressional leaders to decide inability

Congress could use its powers enumerated in the Twenty-Fifth Amendment to create a panel of congressional leaders, in conjunction with the Vice President, to make the initial finding of presidential inability.²⁴¹ On the surface, this proposal has significant advantages. First, a panel of congressional leaders, who are elected by the people, would be independent of the President’s authority. These congressional leaders would therefore display more independence than cabinet officials who can be fired by the President without cause. As an example, consider when President Wilson fired Secretary of State Lansing for his perceived disloyalty by calling cabinet meetings while the President was disabled.²⁴² Additionally, because congressional leaders are elected by the American people and are responsible to them, this panel would be more responsible to and representative of the people’s wishes. This is in stark contrast to a panel of federal judges or a panel composed of medical experts deciding whether the President is disabled. Congress could also impose a two-thirds requirement for the panel to make

238. U.S. CONST. amend XXV, § 4 (emphasis added).

239. Harriger, *supra* note 186, at 567 (quoting JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND EARLIEST APPLICATIONS* 206 (1976)).

240. See Harriger, *supra* note 186, at 567.

241. U.S. Const. amend XXV, § 4; FEERICK, *supra* note 48, at 206 (noting that the legislative history of the Twenty-Fifth Amendment shows that “Congress’ power with respect to the creation of ‘another body’ is vast. It can designate itself, expand or restrict the membership of the Cabinet, combine the Cabinet with other officials, require a unanimous vote of the body established by law, and prescribe the rules and procedures to be followed by that body.”); see also Harriger, *supra* note 186, at 566–67.

242. FEERICK, *supra* note 48, at 15–17.

a finding of inability, which should prevent a slim majority of congressional leaders from illicitly harming the President.

There is also precedent for Congress to serve as the judge of a President's ability to serve. For example, the House of Representatives has the power of bringing impeachment proceedings by a majority vote against the President for treason, bribery, and other serious crimes and misdemeanors.²⁴³ The proceeding then moves to the Senate for trial.²⁴⁴ If the Senate votes by a two-thirds margin to convict, the President can be removed from office.²⁴⁵ Likewise, under the Twenty-Fifth Amendment, Congress serves as the final arbitrator of deciding if the President is fit to serve when the President contests a finding that he is unable to discharge the powers of his office.²⁴⁶ Because Congress may have to ultimately decide whether or not the President is disabled,²⁴⁷ having a panel of congressional leaders with the power to initiate proceedings under the Twenty-Fifth Amendment seems logical.

Despite this, Congress should not designate a panel of congressional leaders to make the initial determination of presidential inability. First, a member of Congress who is a member of the disability panel may use that position to threaten the President or may use that position as leverage during other negotiations. Second, there is a significant concern that during a divided government, when the President and the majorities of Congress are from differing political parties, a hostile Congress could use the commission for inappropriate reasons. This risk of politicized investigations during divided government was highlighted by Douglas Kriner and Liam Schwartz who found that:

Since the end of World War II, partisanship has played a key role (in driving congressional investigations). Under divided government, high-profile oversight activity grows more frequent and intense. In unified government, investigatory activity wanes, particularly when a cohesive congressional majority is in place to defend its partisan ally in the White House and the integrity of the shared party label.²⁴⁸

If Congress were given the power to initiate disability proceedings, partisanship would play a key role as it has in the past for similar proceedings.²⁴⁹ This would be especially true given the current visceral anger con-

243. U.S. CONST. art. I, § 2.

244. U.S. CONST. art. I, § 3.

245. *Id.*

246. U.S. CONST. amend XXV, § 4.

247. *Id.*

248. Douglas Kriner & Liam Schwartz, *Divided Government and Congressional Investigations*, 33 LEGIS. STUD. Q. 295, 314 (2008).

249. *See id.*

gressional Democrats have towards President Trump. Third, although Congress already has the impeachment power, they have not always used that power responsibly.²⁵⁰ For example, during the impeachment of President Bill Clinton, many academics and commentators believed that his impeachment was politically motivated rather than constitutionally justified.²⁵¹ As such, it is debatable whether we should entrust more quasi-judicial power to the legislative branch. Finally, from a practical standpoint, a panel of congressional leaders would lack daily contact with the President and therefore may not detect subtle changes in cognitive function or see isolated events of incapacity. This is in contrast to the cabinet that often works with the President on a daily basis. Thus, a panel of congressional leaders should not be entrusted to initiate disability proceedings against the President.

b. Panel of federal judges to determine presidential inability

Similar to the idea originally proposed by President Eisenhower, Congress could create a panel of federal judges to determine presidential inability.²⁵² This panel could be composed of various federal judges, from the district courts all the way to Supreme Court, selected at random for a set period of time. To avoid the appearances of partisanship, the panel should be divided evenly between judges selected by Republican Presidents and Democratic Presidents. Congress should require that any finding of inability be supported by a two-thirds majority and should also provide for medical experts to advise the panel. This panel could then schedule meetings with the President on a regular basis or when they suspect that the President is unable to discharge the duties of his office.

A panel of federal judges, who serve for life terms, would have the advantage of being completely independent from the President. As such, they would be much more independent than a panel of cabinet members who are subordinate to the President and can be fired without cause. Also, unlike congressional members, federal judges who are serving life terms should be less interested in using the panel for short-term political purposes. Federal judges, because of their job, would also be more qualified to listen to expert testimony, hear all of the factual evidence, and make a detached decision based on all the facts. Lastly, as compared to a panel of medical experts who determine presidential inability, federal judges are at least confirmed by the Senate, which provides for some oversight.

250. See Thomas R. Lee, *The Clinton Impeachment and the Constitution: Introduction to the Federalist Society Panel*, 1999 BYU L. REV. 1079, 1093–96 (1999).

251. *Id.*; see also Cass R. Sunstein, *Impeaching the President*, 147 U. PA. L. REV. 279, 314–15 (1998).

252. FEERICK, *supra* note 48, at 23.

Although a panel of federal judges determining inability would certainly be preferable to a panel of congressional leaders, this option still should not be used. First, although federal judges are selected by the President and confirmed by the Senate, they still lack direct accountability to the American people at large. As such, because the people would have no direct recourse against a panel of rogue judges, this option is particularly troubling. Second, although judges are certainly less political than congressional leaders, personal and political conflicts still arise between the executive and judicial branch, which is especially true during the current administration.²⁵³ Third, questions of presidential inability will almost always be mixed with issues of national security and political questions: two areas where courts are highly deferential.²⁵⁴ As such, a panel of federal judges would not be the best reform.

c. Panel of federal judges, congressional leaders, and cabinet officials

As noted above, an early alternative to the Twenty-Fifth Amendment was to have a disability commission composed of Justices of the Supreme Court, key congressional leaders, and cabinet officials to determine whether presidential inability existed.²⁵⁵ Likewise, Congress could create an “other body” similar to this early proposal.²⁵⁶ One advantage of this commission would be the mixture of individuals serving on the commission: federal judges, who should serve as detached observers; congressional leaders who represent the people; and cabinet officials who are presumably loyal to the President. Congress could impose a two-thirds majority requirement to prevent slim majorities or partisan interests from illicitly harming the President.

This balance of interests would be much more preferable to a panel composed entirely of congressional leaders. As mentioned earlier, because

253. Jason Mazzone, *President Trump and the Judiciary*, 2017 U. ILL. L. REV. ONLINE (Apr. 29, 2017), <https://illinoislawreview.org/symposium/first-100-days/president-trump-and-the-judiciary/>; see also Jeffrey Rosen, *Not Even Andrew Jackson Went as Far as Trump in Attacking the Courts*, ATLANTIC (Feb. 9, 2017), <https://www.theatlantic.com/politics/archive/2017/02/a-historical-precedent-for-trumps-attack-on-judges/516144/>.

254. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) (noting that “terrorism or other special circumstances” could warrant “heightened deference to the judgments of the political branches”); *Marbury v. Madison*, 5 U.S. 137, 170 (1803) (“The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”); see also J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 102 (1998).

255. *Presidential Inability*, *supra* note 209.

256. U.S. CONST. amend XXV, § 4.

the judges and congressional leaders are independent of the President, they would not fear reprisals from the President. At the same time, by having cabinet officials serve on the committee, the President's legitimate interests would be protected as well. However, because congressional leaders would be on the panel, politics would always be a factor.²⁵⁷ Likewise, due to the implicit partisanship of the Supreme Court, it is possible that politics could play a role as well even if Justices served on the commission.²⁵⁸ As such, although this commission merits serious attention, it does not represent the optimal method of reforming the Twenty-Fifth Amendment.

d. Panel of citizens to determine presidential inability

A previously unconsidered proposal in determining presidential inability would be for Congress to establish a panel of citizens, in conjunction with the Vice President, to determine whether presidential inability exists. This panel could be a representative cross-section of the nation. The panel could also be sworn to secrecy, similar to a grand jury, so that any proceedings before it are confidential. If this panel receives information that the President may be disabled, they could send a request to examine the President or invoke Section 4 of the Twenty-Fifth Amendment. Likewise, the Vice President could bring information before this panel to initiate Section 4 of the Twenty-Fifth Amendment. Congress could also impose supermajority requirements so that any finding of disability would require a two-thirds majority. Congress could also supply this panel with medical experts of various backgrounds to help them in their determination of presidential inability.

This novel way of determining presidential inability has some unique merits. First, so long as the panel was representative of the nation at large, it would represent the people of the United States and could be seen as a truly democratic institution. This is in contrast to a panel of medical experts or Supreme Court Justices determining presidential inability.²⁵⁹ Likewise, because this would be a group of citizens rather than officials from other branches of the government, there would not be a separation of powers concern.²⁶⁰ Additionally, panels of citizens, like the grand jury, have historically

257. Kriner & Schwartz, *supra* note 248, at 313–14.

258. See Rodriguez, *supra* note 217; see also Kenneth W. Moffett et al., *Strategic Behavior and Variation in the Supreme Court's Caseload Over Time*, 37 JUST. SYS. J. 20 (2016) (arguing that Justices may be more hesitant to hear cases on certiorari if they are uncertain on how their colleagues may rule.).

259. See SUJA A. THOMAS, *THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES* 233–34 (2016).

260. *United States v. Williams*, 504 U.S. 36, 47 (1992) (quoting *United States v. Chanen*, 549 F.2d 1306, 1312 (9th Cir. 1977) (quoting *Nixon v. Sirica*, 487 F.2d 700, 712 n. 54 (1973)

been seen as a check against government misconduct.²⁶¹ As such, this panel could be seen as a check on government misconduct both from the standpoint of Presidents who conceal their disabilities and other government officials who would cover up those disabilities. Finally, juries are seen as valuable in deciding contested facts and legitimizing the outcomes of controversial subjects.²⁶² Thus, a panel of citizens could likewise be seen as a valuable way of determining presidential disability and offering legitimacy to that controversial decision.

However, this proposal would have serious drawbacks. First, there would always be the chance that a rogue panel of citizens is trying to investigate the President not because there is a serious allegation or evidence of presidential inability, but because they dislike the President (this would be especially true if the President was very unpopular).²⁶³ Second, although grand juries have historically been seen as a check on prosecutorial misconduct, this is largely not true today.²⁶⁴ It is questionable how effective this citizen panel would be in preventing government misconduct during presidential inability. Third, although a panel of citizens would have the benefit of being representative of the people, they would not have a significant understanding of the workings of the executive branch. Unlike the cabinet, they could not adequately weigh the political and policy consequences of their action. Finally, and most importantly, a panel of citizens could fall victim to a charismatic and Machiavellian Vice President who uses the panel as a way to remove a President purely for his own political gain.²⁶⁵ The cab-

(noting that the grand jury is not part of the executive branch nor the judicial branch but “a constitutional fixture in its own right.”)); see also Michael Daly Hawkins, *The Federal Grand Jury: Fish, Fowl, or Fair-Weather Game?*, 33 OKLA. CITY. U. L. REV. 823, 828–29 (2008).

261. *Branzburg v. Hayes*, 408 U.S. 665, 668–67 (1972); Michael F. Buchwald, *Of the People, by the People, for the People: The Role of Special Grand Juries in Investigating Wrongdoing by Public Officials*, 5 GEO. J.L. & PUB. POL’Y 79, 96–100 (2007); Barry Jeffrey Stern, *Revealing Misconduct By Public Officials Through Grand Jury Reports*, 136 U. PA. L. REV. 73, 74–76 (1986); see Rennee B. Lettow, *Reviving Federal Grand Jury Presentments*, 103 YALE L.J. 1333, 1335–1340 (1995).

262. See Jason Mazzone, *The Justice and the Jury*, 72 BROOK. L. REV. 35, 38–39 (2006).

263. See, e.g., Lydia Saad, *Bush Presidency Closes With 34% Approval, 61% Disapproval*, GALLUP.COM (Jan. 14, 2009), <http://www.gallup.com/poll/113770/bush-presidency-closes-34-approval-61-disapproval.aspx>.

264. Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 323 (1995).

265. Adam R.F. Gustafson, *Presidential Inability and Subjective Meaning*, 27 YALE L. & POL’Y REV. 459, 467–70 (2009) (noting that Congressional review may serve as an inadequate remedy when the Vice President and the cabinet improperly label the President as disabled under Section 4 of the Twenty-Fifth Amendment); see also Dr. Michael Cunningham, *House of Cards: Making Machiavelli Modern*, LEWIS U. FAC. F. (Feb. 18, 2014), <http://www.lewisu.edu/experts/wordpress/index.php/house-of-cards-making-machiavelli-modern/>.

inet, however, would presumably be more loyal to the President and more cautious. Although a novel idea, a panel of citizens to determine presidential inability should be rejected.

- e. Panel of former Presidents and Vice Presidents to determine presidential disability

An interesting suggestion by Congressman Earl Blumenauer would be for Congress to create an “other body” composed primarily of former Presidents and Vice Presidents to determine presidential disability.²⁶⁶ The congressman justifies his proposal with the understanding that this “group of people understands the pressures of the office and what’s necessary to discharge the responsibilities (of the presidency). Further, they all won national elections and were tested by actually discharging the responsibilities (of the office).”²⁶⁷

Congressman Blumenauer’s proposal has some significant strengths. First, former Presidents and Vice Presidents do understand the pressures of the office and the requisite strength required to meet them. As such, a panel of former Presidents and Vice Presidents would be the most qualified group of individuals to judge whether a current President is fit to serve. Second, the congressman is correct in saying that former Presidents, who were elected by the people, would have greater persuasive authority and more apparent legitimacy than a panel of unknown medical experts or relatively unknown political leaders. Third, because this panel would be composed of former members of the executive branch, there is not a separation of powers concern that arises when congressional leaders or judges determine whether the President is incapacitated.

However, this proposal has the inherent weakness that former Presidents may have personal and political grudges against the current President. For example, consider the living Presidents we currently have: Jimmy Carter, George H.W. Bush, Bill Clinton, George W. Bush, and Barack Obama.²⁶⁸ This group of individuals has significant conflicts with President Trump. Former President Bill Clinton could be very biased against President Trump because Trump just defeated his wife in a bitter presidential election.²⁶⁹ Likewise, former President Obama could be very biased considering

266. Blumenauer, *supra* note 5.

267. *Id.*

268. See, e.g., David A. Graham, *Here Are All 5 Living Presidents Together at the George W. Bush Library*, ATLANTIC (Apr. 25, 2013), <https://www.theatlantic.com/politics/archive/2013/04/here-are-all-5-living-presidents-together-at-the-george-w-bush-library/275296/>.

269. *Trump Wins Presidency, Defeats Clinton in Historic Election Upset*, FOX NEWS (Nov. 8, 2016), <http://www.foxnews.com/politics/2016/11/08/first-polls-close-in-2016-race->

the personal animosity between him and the current President and the fact that he was a strong supporter of the defeated Hillary Clinton.²⁷⁰ Additionally, both former President George H.W. Bush and George W. Bush could be biased against Trump because Trump routed Jeb Bush in the Republican Primary.²⁷¹ This would essentially leave Jimmy Carter, a Democrat who is 92 years old, as the only former President without a direct personal conflict with President Trump.²⁷² Under Congressman Blumenauer's proposal, however, these former Presidents with significant conflicts of interest would help determine whether President Donald J. Trump is fit for office, or they would have to recuse themselves. Additionally, although the most recent election was especially contentious and filled with dynastic implications, we should expect similar conflicts of interest to occur in the future. As such, there are significant concerns about having a panel of former Vice Presidents and former Presidents deciding whether the current President is able to discharge the powers of his office.

Despite the fact that political and personal disputes between the current President and former Presidents could often arise under this proposal, it is possible that these concerns could be manageable. For example, former

trump-projected-to-win-ind-ky-clinton-wins-vt.html; Ed O'Keefe, *With Electoral College Vote, Trump's Win Is Official*, WASH. POST (Dec. 19, 2016), https://www.washingtonpost.com/politics/the-electoral-college-is-poised-to-pick-trump-despite-push-to-dump-him/2016/12/19/75265c16-c58f-11e6-85b5-76616a33048d_story.html?utm_term=.ed1a48fd333a; Jenna Johnson, *At Florida Rally, Trump Resumes Attacking 'Crooked Hillary Clinton'*, WASH. POST (Sept. 27, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/09/27/at-florida-rally-trump-resumes-attacking-crooked-hillary-clinton/?utm_term=.fd6008f25e25; Ian Hanchett, *Trump: I'll Have Special Prosecutor For Clinton Email, 'You'd Be in Jail'*, BREITBART (Oct. 9, 2016), <http://www.breitbart.com/video/2016/10/09/trump-ill-have-special-prosecutor-for-clinton-email-you-d-be-in-jail/>.

270. See, e.g., Julie Hirschfeld Davis & Jonathan Martin, *Obama Endorses Hillary Clinton, and Urges Democrats to Unite*, N.Y. TIMES (June 9, 2016), <https://www.nytimes.com/2016/06/10/us/politics/obama-hillary-clinton-endorsement.html>; Ben Kew, *Watch: Obama, Seth Meyers Taunt Donald Trump in 2011 over Possible Presidential Run*, BREITBART (Nov. 9, 2016), <http://www.breitbart.com/big-hollywood/2016/11/09/watch-obama-seth-meyers-taunt-donald-trump-in-2011-over-possible-presidential-run/>.

271. See, e.g., Dr. Susan Berry, *Jeb Bush 'Savaged' by Donald Trump*, BREITBART (Feb. 1, 2016), <http://www.breitbart.com/big-government/2016/02/01/new-york-times-jeb-bush-savaged-by-donald-trump/>; Reena Flores, *Donald Trump, Jeb Bush Spar over Bush Family Legacy*, CBS (Feb. 13, 2016), <http://www.cbsnews.com/news/republican-debate-donald-trump-jeb-bush-spar-over-bush-family-legacy/>; Peter W. Stevenson, *The Remarkably Personal Feud Between Donald Trump and Jeb Bush, in 1 Video*, WASH. POST (Feb. 12, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/02/12/the-remarkably-personal-feud-between-donald-trump-and-jeb-bush-in-1-video/?utm_term=.c4525c210256; Matthew Yglesias, *"Low-Energy": Donald Trump's Favorite Diss on Jeb Bush, Explained*, VOX (Sept. 4, 2015), <http://www.vox.com/2015/9/4/9258037/low-energy-trump-bush>.

272. See, e.g., Andrew Blake, *Jimmy Carter Only Former President Confirmed to Attend Trump Inauguration*, WASH. TIMES (Dec. 24, 2016), <http://www.washingtontimes.com/news/2016/dec/24/jimmy-carter-only-former-president-confirmed-atten/>.

Presidents often transcend traditional politics and serve as elder statesmen of the nation rather than as advocates of their political party.²⁷³ As such, a panel of former Presidents could very well put aside partisan considerations when determining whether the current President is incapacitated. Likewise, former Presidents who had personal disputes with each other often become amicable once their tenure is over. Recent examples include the friendship between George W. Bush and former First Lady Michelle Obama, the friendship between Bill Clinton and George H.W. Bush, and the friendship between Jimmy Carter and Gerald Ford.²⁷⁴ As such, it is entirely possible that a panel of former chief executives would put aside any personal disputes and fairly examine the situation.

All things considered, Congressman Blumenauer's proposal has significant advantages and some potentially serious drawbacks. A panel of former Presidents would have unique insight on whether a current President has the ability to meet the demands of the office. However, there will always be a concern about political and personal disputes between former and current Presidents. Accordingly, although this proposal demands serious consideration, other solutions are preferable.

f. Panel of medical experts to determine presidential disability

Another alternative to the current system would be for Congress to create a panel of medical experts from various backgrounds and specialties to regularly meet with the President and determine with the Vice President, rather than the cabinet, if the President is suffering from any incapacitating conditions.²⁷⁵ An obvious advantage of this system is that these experts would be more likely to diagnose or recognize debilitating conditions than cabinet officials who usually lack specialized medical training.²⁷⁶ Moreover, because this would be an independent body created by Congress, this group of experts would be more aggressive than cabinet members who can be unilaterally fired by the President.²⁷⁷

273. See Kenneth T. Walsh, *Bush and Ex-Presidents Counsel President-Elect Obama*, U.S. NEWS (Jan. 8, 2009), <https://www.usnews.com/news/obama/articles/2009/01/08/bush-and-ex-presidents-counsel-president-elect-obama>.

274. Deena Zaru, *George W. Bush Explains His Fondness for Michelle Obama*, CNN (Mar. 3, 2017), <http://www.cnn.com/2017/03/02/politics/george-bush-michelle-obama-friends/>; Kevin Bahn, *George H.W. Bush on Bonding with Bill Clinton*, CNN (Mar. 5, 2013), <http://politicalticker.blogs.cnn.com/2013/03/05/george-h-w-bush-on-bonding-with-bill-clinton/>; *Ford and Carter: An Odd Couple?*, CBS (Feb. 18, 2000), <http://www.cbsnews.com/news/ford-and-carter-an-odd-couple/>.

275. See, e.g., Edwin M. Yoder Jr., *Determining Presidential Health Under the Twenty-Fifth Amendment*, 30 WAKE FOREST L. REV. 607, 613–14 (1995).

276. See *id.*

277. *Id.*

Nonetheless, there are major drawbacks to this alternative. First, a commission of medical experts lacks accountability to the American people at large, even if Congress appoints them. Moreover, the medical field is not representative of the people of the United States in general.²⁷⁸ This is in contrast to the President who is the only elected official who represents the entire United States and receives millions of votes nationwide.²⁷⁹ Thus, it is inappropriate for a small body of unelected, unrepresentative, and unaccountable experts to have the ability to sideline the President of the United States, even if they have better qualifications and are more independent than the cabinet.

Second, although a panel of medical experts would have more clinical training in recognizing signs of inability, it is unclear how often they would meet with the President.²⁸⁰ This is in contrast to the cabinet, which has frequent meetings and interactions with the President as a part of their daily routine. Thus, the cabinet is in a better position to see subtle changes or isolated incidents of incapacity than a panel of experts who infrequently meet with the President.

Finally, the decision on whether to invoke the involuntary protections of the Twenty-Fifth Amendment is not a purely medical decision because the decision cannot be separated from considerations of national security, international diplomacy, and other issues of significance.²⁸¹ Thus, the cabinet, with a large coalition of generalists from various areas of experience and expertise, would be in a better position to weigh these concerns than a panel of medical experts.²⁸² As such, the idea of a panel of medical experts determining presidential disability should be firmly rejected.

g. Advisory panel of medical experts

A proposal by Dr. Bert E. Park is to have a panel of physicians, specializing in various areas of medicine, be selected by the President prior to

278. See, e.g., Margot Sanger-Katz, *Your Surgeon Is Probably a Republican, Your Psychiatrist Probably a Democrat*, N.Y. TIMES (Oct. 6, 2016), https://www.nytimes.com/2016/10/07/upshot/your-surgeon-is-probably-a-republican-your-psychiatrist-probably-a-democrat.html?_r=0.

279. See Carl M. Cannon & Emily Goodlin, *Trump to Disaffected Americans: "I Am Your Voice,"* REAL CLEAR POL. (July 22, 2016), http://www.realclearpolitics.com/articles/2016/07/22/trump_to_disaffected_americans_i_am_your_voice_131285.html.

280. Harriger, *supra* note 186, at 581–82.

281. *Id.* at 577–582; see also Joel K. Goldstein, *The Vice Presidency and the Twenty-Fifth Amendment: The Power of Reciprocal Relationships*, in *MANAGING CRISIS: PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT* 207 (Robert E. Gilbert ed., 2000).

282. See *id.*

the start of his administration.²⁸³ This panel, however, would be advisory only and could not invoke Section 4 of the Twenty-Fifth Amendment.²⁸⁴ Rather, they would only give advice to the Vice President and the cabinet pertaining to whether the President is able to discharge his duties based off their examination of him.²⁸⁵

An advisory medical panel would have significant advantages over a medical panel with the role of determining presidential inability. First, because they would lack the ability to actually remove the President, the concern of a small body of unelected doctors removing the President is eliminated. Second, because the cabinet would still be in charge of deciding whether the President is disabled, they would still be able to weigh the other policy ramifications of their decision as opposed to making a purely medical decision.

This proposal would also be preferable to a panel composed purely of congressional leaders.²⁸⁶ As noted earlier, a panel of congressional leaders would be subject to unnecessary political factors during periods of divided government. This would not be the case under an advisory panel of medical experts because the cabinet, which is loyal to the President, would still be responsible for making the preliminary finding of inability.

An advisory panel of medical experts, as a matter of practicality, is also more likely to be implemented as compared to a panel composed of federal judges, cabinet officials, and congressional leaders. This is because the latter panel would represent a fundamental shift in the use of the Twenty-Fifth Amendment, and therefore would face political, structural, and enthusiasm issues. These same concerns would also apply to a panel composed of former Presidents and Vice Presidents. The advisory panel of medical experts, by contrast, is simply tweaking the existing framework by giving the cabinet, which still decides whether inability exists, expert advice. This minor change of the current system would be less controversial, and therefore has a greater likelihood of success.

Finally, an advisory panel of medical experts would significantly improve the current system. First, with an advisory panel of experts, the cabinet and the Vice President would have expert analysis of medical and physiological issues when making any determination of presidential inability. Second, because the panel is empowered by Congress, the panel would be independent of the President and could encourage the cabinet to act when necessary. As such, Congress should establish an advisory panel of medical

283. Bert. E. Park, *Resuscitating the 25th Amendment: A Second Opinion Regarding Presidential Disability*, 16 POL. PSYCHOL. 821, 821 (1995).

284. *Id.*

285. *Id.*

286. *See supra* Part III(B)(2)a.

experts to assist the cabinet with their responsibilities under the Twenty-Fifth Amendment.

3. *Creation of a New Cabinet Position*

Under the existing legal framework of the Twenty-Fifth Amendment, the cabinet and the Vice President are entrusted to determine presidential inability.²⁸⁷ There is no requirement for the cabinet to consult with outside medical experts.²⁸⁸ However, Congress has the power to create new cabinet positions.²⁸⁹ For example, after the attacks on the World Trade Center on September 11th, 2001, Congress passed the Homeland Security Act, which created the cabinet position of the Secretary of Homeland Security.²⁹⁰ Therefore, Congress, with the consent of the President, could create a new cabinet position with the responsibility to detect presidential inability.²⁹¹ This new cabinet position could be a medical expert who could provide clinical advice to his or her fellow cabinet members.

- a. Elevation of the White House physician to a cabinet level position

A popular proposal is to make the White House physician a cabinet office.²⁹² Under this proposal, the President would select a physician to serve as his personal physician.²⁹³ This selection, however, would then be subject to congressional approval as it would be a cabinet level position.²⁹⁴ This approval process would ensure that the physician is qualified and that the physician is also aware of his or her dual role of detecting presidential inability.²⁹⁵ Moreover, if the Vice President and cabinet ever had to decide whether or not the President was unable to discharge his duties, the cabinet would have a medical expert who has personal knowledge of the President's health.

287. U.S. CONST. amend. XXV, § 4.

288. *Id.*

289. U.S. CONST. art. II, § 2

290. Jonathan Thessin, *Recent Development: Department of Homeland Security*, 40 HARV. J. LEGIS. 513, 513 (2003).

291. *See id.*

292. *See* Aaron Seth Kesselheim, *Privacy Versus the Public's Right to Know: Presidential Health and the White House Physician*, 23 J. LEGAL MED. 523, 543–44 (2002).

293. *Id.*

294. *Id.*

295. *Id.*

Nonetheless, a glaring shortcoming with this proposal is physician ethics and confidentiality laws.²⁹⁶ Simply put, it would be difficult for a physician to be treating the President as a doctor and then be expected to use or disclose that information in determination of whether the President is fit for service.²⁹⁷ Likewise, because of this potential dual role, it is likely that Presidents would seek outside medical care so as not to alert the cabinet of a potentially disqualifying medical diagnosis.²⁹⁸

Additionally, from a historical perspective, the White House physician was often complicit in the cover up of presidential inability because of personal loyalty to the President.²⁹⁹ It is uncertain whether entrusting the White House physician to implement Section 4 of the Twenty-Fifth Amendment is realistic. As a related concern, the President can always fire his cabinet officials with or without cause. Accordingly, the White House physician, like other members of the cabinet, may be hesitant to invoke Section 4 of the Twenty-Fifth Amendment out of fear of being fired. Because of these considerations, it is not advisable to elevate the White House physician to a cabinet level position. Rather, the White House physician and President should retain a more traditional doctor-patient relationship.

b. Creation of a new cabinet position to help determine presidential disability

A related approach would be for Congress to create a new cabinet position filled by someone with medical expertise with the responsibility to monitor the President's health.³⁰⁰ This position could offer medical expertise to his or her fellow cabinet members if issues of inability arose and could alert the cabinet or the Vice President if he or she suspected presidential inability. Because this position would be created with the responsibility to monitor the President's health, this should prevent this cabinet member from turning a blind eye to medical issues. Also, because this new position would only be one vote among many cabinet members, there wouldn't be the same concerns about medical experts having disproportionate influence over the executive branch.

296. See *Confidentiality, Patient/Physician*, AAFP (2013), <http://www.aafp.org/about/policies/all/patient-confidentiality.html>; see also Lawrence C. Mohr, *The White House Physician: Role, Responsibilities and Issues*, 16 POL. PSYCHOL. 777, 789–90 (1995); Jerrold M. Post, *The Health of Presidents and Presidential Candidates: Dilemmas and Controversies*, 16 POL. PSYCHOL. 757, 757–59 (1995).

297. Arthur S. Link, *Dr. Grayson's Predicament*, 138 PROCEEDINGS OF THE AM. PHIL. SOC'Y 487, 494 (1994); see also Kirath Raj, *The Presidents' Mental Health*, 31 AM. J.L. & MED. 509, 518–21 (2005).

298. Kesselheim, *supra* note 292, at 543–44.

299. See, e.g., RAND, *supra* note 116, at 67–68.

300. See *id.* at 543.

Nonetheless, an advisory panel of medical experts would still be preferable to a new cabinet position. First, as a matter of practicality, it would be much easier for Congress to exercise its power under the Twenty-Fifth Amendment to create an advisory panel of experts rather than create a new cabinet post for a medical expert. Second, an advisory panel of medical experts could be composed of a broad group of physicians with various medical expertise and backgrounds. This would be preferable to appointing one medical expert to a cabinet position who would have a more limited perspective overall. Finally, an advisory panel of medical experts created pursuant to the Twenty-Fifth Amendment could not be removed unilaterally by the President. This is in stark contrast to a cabinet member who can be fired without cause by the President. As such, an advisory panel of medical experts created under the Twenty-Fifth Amendment is a much better solution than creating a new cabinet position.

C. Reform Outside of the Legal System

Prolonged periods of presidential inability can also be prevented without changing existing law. Broadly speaking, this would include making presidential inability and the Twenty-Fifth Amendment an explicit part of presidential campaigns and senate confirmation hearings of prospective cabinet officials. Likewise, the executive branch could adopt voluntary agreements to supplement the Twenty-Fifth Amendment. These solutions are discussed below.

1. *Greater Emphasis on the Twenty-Fifth Amendment during Presidential Campaigns*

During the 2016 Presidential Campaign, the health of the major candidates was a frequent topic of discussion.³⁰¹ Due to their advanced ages, the press often discussed the health of Bernie Sanders, Hillary Clinton, and Donald Trump.³⁰² However, this discussion did not translate into more serious discussions about the Twenty-Fifth Amendment and presidential disability until Donald Trump was elected President. For example, despite Hilla-

301. See, e.g., Gregory Krieg, *Clinton's Health Is Fine, but What About Trump?*, CNN (Aug. 24, 2016), <http://www.cnn.com/2016/08/23/politics/Donald-trump-hillary-clinton-health/index.html>; see also Jeff Zeleny, *Sanders Releases Doctor's Note*, CNN (Jan. 29, 2016), <http://www.cnn.com/2016/01/28/politics/bernie-sanders-medical-records/>; Jenna Johnson, *Trump Discusses Health on 'Dr. Oz Show' After His campaign Said He Wouldn't*, WASH. POST (Sept. 14, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/09/14/donald-trump-will-no-longer-discuss-his-medical-history-on-dr-oz/?utm_term=.a2a6945b33d0.

302. See *supra* note 301.

ry Clinton's extensive medical history and advanced age, early criticisms of her health and fitness for office were dismissed as sexist.³⁰³ This narrative changed when she was diagnosed with pneumonia, a diagnosis that she initially concealed from the public, and then collapsed on camera, possibly losing consciousness, on September 11, 2016.³⁰⁴ Clinton was then taken to her daughter's apartment and examined by her doctor at her home in Chappaqua, New York, rather than visiting a hospital.³⁰⁵ Such actions on behalf of Clinton should have raised serious discussions on the Twenty-Fifth Amendment and parallels to the Wilson administration. Likewise, although questions about Trump's health were raised during the campaign, serious discussions about the ramifications and applications of the Twenty-Fifth Amendment were not raised until after he won the election, creating the appearance of partisanship.³⁰⁶

For example, during all three presidential debates, the Twenty-Fifth Amendment was never mentioned.³⁰⁷ Considering the health issues of both candidates, and their advanced ages, a perfectly acceptable question would have been to inquire about under what circumstances would a President Clinton or a President Trump invoke Section 3 of the Twenty-Fifth Amendment. Another legitimate question would be what, if any, instructions would a President Clinton or a President Trump give to their Vice President

303. Chris Cillizza, *Can We Just Stop Talking About Hillary Clinton's Health Now?*, WASH. POST (Sept. 6, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/09/06/the-questions-about-hillary-clintons-health-are-absurd/?utm_term=.cb8c239e4b91; Pam Key, *MSNBC's Joan Walsh: Trump Questioning Hillary's Health 'Is the Classic Definition of Sexism'*, BREITBART (Aug. 29, 2016), <http://www.breitbart.com/video/2016/08/29/msnbc-joan-walsh-trump-questioning-hillarys-health-is-the-classic-definition-of-sexism/>.

304. Chris Cillizza, *Hillary Clinton's Health Just Became a Real Issue in the Presidential Campaign*, WASH. POST (Sept. 11, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/09/11/hillary-clintons-health-just-became-a-real-issue-in-the-presidential-campaign/?utm_term=.be8de9eaf35e; Alex Seitz-wald et al., *Hillary Clinton's Health Scare: 9 Unanswered Questions*, NBC NEWS (Sept. 12, 2016), <http://www.nbcnews.com/politics/2016-election/hillary-clinton-s-health-scare-9-unanswered-questions-n646551>.

305. Alex Seitz-wald, *supra* note 304.

306. Compare Lawrence K. Altman, *A Doctor's Assessment of Whether Donald Trump's Health Is 'Excellent.'* N.Y. TIMES (Sept. 18, 2016), <https://www.nytimes.com/2016/09/19/us/politics/donald-trump-health.html?module=ArrowsNav&contentCollection=Politics&action=keypress®ion=FixedLeft&pgtype=article> with Cathernie Caruso, *Psychiatrists Debate Weighing in on Trump's Mental Health*, SCI. AM. (Feb. 15, 2017), <https://www.scientificamerican.com/article/psychiatrists-debate-weighing-in-on-trumps-mental-health/>.

307. *Presidential Debate at Hofstra University in Hempstead, New York*, AM. PRESIDENCY PROJECT (Sept. 26, 2016), <http://www.presidency.ucsb.edu/ws/index.php?pid=118971>; *Presidential Debate at Washington University in St. Louis, Missouri*, AM. PRESIDENCY PROJECT (Oct. 9, 2016), <http://www.presidency.ucsb.edu/ws/index.php?pid=119038>; *Presidential Debate at the University of Nevada in Las Vegas*, AM. PRESIDENCY PROJECT (Oct. 19, 2016), <http://www.presidency.ucsb.edu/ws/index.php?pid=119039>.

and cabinet regarding when, if ever, they should invoke Section 4 of the Twenty-Fifth Amendment against them.

Even more egregious, during the debate between vice presidential candidates Mike Pence and Tim Kaine, the Twenty-Fifth Amendment was never mentioned.³⁰⁸ This would have been an exceptional opportunity to ask both candidates about how they would deal with presidential incapacity, when and under what circumstances would they consider invoking Section 4 of the Twenty-Fifth Amendment, and would they be ready to assume the powers of Acting President of the United States if either Section 3 or Section 4 of the Twenty-Fifth Amendment were invoked. Lastly, and most importantly, the vice presidential candidates should have been asked about how they would handle the nightmare scenario where a majority of the cabinet and the Vice President believe the President is unable to discharge his or her duties but the President contests their view.

In sum, although the health of both candidates was discussed during the election cycle, there was not a serious discussion by the press with the candidates or their running mates about presidential disability and the Twenty-Fifth Amendment. The time for an objective inquiry into the Twenty-Fifth Amendment should occur during the election when concessions can be made from candidates and their running mates. The current calls to use or alter the Twenty-Fifth Amendment after Donald Trump won the election are largely partisan based rather than legitimately motivated by a desire for constitutional reform.³⁰⁹ This should serve as a lesson for future election cycles.

2. *Senate Confirmation Hearings*

Likewise, Senate confirmation hearings of the prospective cabinet officials serve as an excellent way to probe nominees about their thoughts on the Twenty-Fifth Amendment. This is especially important because the most

308. *Full Transcript: 2016 Vice Presidential Debate*, POLITICO (Oct. 5, 2016), <http://www.politico.com/story/2016/10/full-transcript-2016-vice-presidential-debate-229185>.

309. See Michael Russnow, *The 25th Amendment Could Rid America Of Trump*, HUFF. POST (Feb. 22, 2017), http://www.huffingtonpost.com/entry/25th-amendment-might-provide-solution-to-rid-america_us_58ad0598e4b0d818c4f0a397; Ryan Grim, *Nancy Pelosi Suggests Donald Trump Get His Mental Health Checked: People Are Starting to Study up on the 25th Amendment*, HUFF. POST (Feb. 2, 2017), http://www.huffingtonpost.com/entry/nancy-pelosi-suggests-donald-trump-get-his-mental-health-checked_us_5893aa48e4b0c1284f250e44; Leah Barkoukis, *Democratic Rep Floats Idea of Using 25th Amendment to Remove Trump From Office*, TOWNHALL (Feb. 21, 2017), <https://townhall.com/tipsheet/leahbarkoukis/2017/02/21/democratic-rep-floats-idea-of-using-25th-amendment-to-remove-trump-from-office-n2288591>; Alicia Powe, *Democrats Discuss Using 25th Amendment to Remove 'Unstable' Trump from Office*, WESTERN JOURNALISM (Feb. 21, 2017), <http://www.westernjournalism.com/democrats-discuss-using-25th-amendment-to-remove-unstable-trump-from-office/>.

important decision a cabinet member may ever make could be a decision to invoke Section 4 of the Twenty-Fifth Amendment. Cabinet nominees should be asked how they would respond to a situation where the President was displaying serious signs of inability, under what situations would they consider invoking Section 4 of the Twenty-Fifth Amendment, and how they would respond if a President, after being found unable to discharge his duty by the Vice President and a majority of the cabinet, contested their decision and tried to reclaim the powers of his office. Additionally, cabinet positions with special legal obligations, such as the Attorney General, or candidates with medical expertise should be asked additional questions regarding their unique responsibility regarding the Twenty-Fifth Amendment.

Nonetheless, during the confirmation hearing of Dr. Ben Carson, the issue of presidential disability or the Twenty-Fifth Amendment was never mentioned.³¹⁰ This is especially dismaying because Dr. Carson is a neurologist and a medical doctor and, due to this background, would be invaluable if Section 4 of the Twenty-Fifth Amendment were ever invoked, or needed to be invoked. Likewise, Jeff Sessions was never asked about the Twenty-Fifth Amendment despite the fact that, as Attorney General of the United States, he would have a unique responsibility in advising the President, the Vice President, the cabinet, and the rest of the administration about Section 3 and Section 4 of the Twenty-Fifth Amendment.³¹¹ This trend of not discussing presidential disability or the Twenty-Fifth Amendment continued for the rest of President Trump's cabinet nominees.³¹²

310. *Housing and Urban Development Secretary Confirmation Hearing*, C-SPAN (Jan. 12, 2017) <https://www.c-span.org/video/?421258-1/hud-secretary-nominee-ben-carson-testifies-confirmation-hearing>.

311. *Attorney General Confirmation Hearing, Day 1 Part 1*, C-SPAN (Jan. 10, 2017), <https://www.c-span.org/video/?420932-1/attorney-general-nominee-jeff-sessions-testifies-confirmation-hearing>; *Attorney General Confirmation Hearing, Day 1 Part 2*, C-SPAN (Jan. 10, 2017), <https://www.c-span.org/video/?420932-101/attorney-general-nominee-jeff-sessions-testifies-confirmation-hearing>.

312. *Education Secretary Confirmation Hearing*, C-SPAN (Jan. 17, 2017), <https://www.c-span.org/video/?421224-1/education-secretary-nominee-betsy-devos-testifies-confirmation-hearing>; *Secretary of State Confirmation Hearing, Part 1*, C-SPAN (Jan. 11, 2017), <https://www.c-span.org/video/?421335-1/secretary-state-nominee-rex-tillerson-testifies-confirmation-hearing>; *Secretary of State Confirmation Hearing, Part 2*, C-SPAN (Jan. 11, 2017), <https://www.c-span.org/video/?421335-3/secretary-state-confirmation-hearing-part-2>; *Treasury Secretary Confirmation Hearing*, C-SPAN (Jan. 11, 2017), <https://www.c-span.org/video/?421858-1/treasury-secretary-nominee-steven-mnuchin-testifies-confirmation-hearing>; *Defense Secretary Confirmation Hearing*, C-SPAN (Jan. 12, 2017), <https://www.c-span.org/video/?421347-1/defense-secretary-nominee-general-james-mattis-says-russia-trying-break-nato>; *Homeland Security Secretary Confirmation Hearing*, C-SPAN (Jan. 10, 2017), <https://www.c-span.org/video/?421234-1/homeland-security-nominee-general-john-kelly-testifies-confirmation-hearing>; *Energy Secretary Confirmation Hearing*, C-SPAN (Jan. 19, 2017), <https://www.c-span.org/video/?421782-1/energy-secretary-nominee-rick-perry-testifies-confirmation-hearing>; *Veterans Affairs Secretary Confirmation Hearings*,

As a practical concern, it may be difficult to get substantive answers from cabinet nominees about how they would handle presidential inability. For example, judicial nominees often demur on legal questions in Senate confirmation hearings because they believe that answering those questions will undercut their appearance of impartiality. Likewise, cabinet nominees may offer similar justifications for not answering how they would handle presidential inability. Despite this concern, the act of bringing up presidential inability and the Twenty-Fifth Amendment during Senate confirmation hearings would still impress upon cabinet nominees their constitutional responsibilities and remind them of their duty under the Twenty-Fifth Amendment. Senators should openly question cabinet nominees about their views of the Twenty-Fifth Amendment and presidential inability during confirmation hearings.

3. *Establishment of Guidelines and Agreements in the Executive Branch*

Lastly, Presidents and their administrations should create guidelines and agreements to supplement the Twenty-Fifth Amendment.³¹³ The President should discuss situations where he would wish to invoke Section 3 of the Twenty-Fifth Amendment, such as when he would undergo anesthesia, and those agreements should be prepared in advance so that they could be signed at a moment's notice during stressful situations.³¹⁴ This would be especially important in a situation where the President had been shot and

C-SPAN (Feb. 1, 2017), <https://www.c-span.org/video/?422806-1/veterans-affairs-secretary-nominee-david-shulkin-testifies-confirmation-hearing>; *Transportation Secretary Confirmation Hearing*, C-SPAN (Jan. 11, 2017), <https://www.c-span.org/video/?421230-1/transportation-secretary-nominee-elaine-chao-testifies-confirmation-hearing>; *Health and Human Services Secretary Confirmation Hearing*, C-SPAN (Jan. 18, 2017), <https://www.c-span.org/video/?421723-1/hhs-nominee-representative-tom-price-testifies-capitol-hill>; *Commerce Secretary Confirmation Hearing*, C-SPAN (Jan. 18, 2017), <https://www.c-span.org/video/?421257-1/commerce-secretary-nominee-wilbur-ross-testifies-confirmation-hearing>; *Interior Secretary Confirmation Hearing, Part 1*, C-SPAN (Jan. 17, 2017), <https://www.c-span.org/video/?421718-1/ryan-zinke-says-will-address-sexual-assault-allegations-interior>; *Interior Secretary Confirmation Hearing, Part 2*, C-SPAN (Jan. 17, 2017), <https://www.c-span.org/video/?421718-2/interior-secretary-confirmation-hearing-part-2>.

313. See, e.g., Calvin Bellamy, *Presidential Disability: The Twenty-Fifth Amendment Still an Untried Tool*, 9 B.U. PUB. INT. L.J. 373, 404 (2000); see also Kesselheim, *supra* note 292, at 544–45; see Herbert L. Abrams, *The Vulnerable President and the Twenty-Fifth Amendment, with Observations on Guidelines, a Health Commission, and the Role of the President's Physician*, 30 WAKE FOREST L. REV. 453, 473–78 (1995); Nancy Kassop, “The Law” when Law and Politics Collide: Presidents and the Use of the Twenty-Fifth Amendment, 35 PRESIDENTIAL STUD. Q., 147, 163 (2005).

314. See Herbert L. Abrams, *Shielding the President from the Constitution: Disability and the 25th Amendment*, 23 PRESIDENTIAL STUD. Q. 533, 533–36 (1993).

was quickly being transported to the hospital. Such a prepackaged agreement could then be quickly signed by the President before he undergoes anesthesia or otherwise becomes incapacitated.

Likewise, at the start of his administration, a President should discuss potential situations where he would wish that Section 4 of the Twenty-Fifth Amendment be invoked against him.³¹⁵ These situations could include typical situations, such as losing consciousness for a prolonged period of time or being diagnosed with a severe mental disease; to more complicated situations such as if the President has fallen into the hands of the enemy. Likewise, Presidents should decide on key terms, definitions, and the general intent of these instructions.

These contingency plans should then be signed by the President, the Vice President, the cabinet, and witnessed by detached observers. These instructions should then be made available for public viewing if the Twenty-Fifth Amendment were ever utilized. Although these agreements would not have the force of law, they would provide highly persuasive authority of what the cabinet and Vice President should do during periods of incapacity. Moreover, such voluntary agreements have yielded success in the past. These agreements would hopefully provide enough encouragement to avoid disasters like those in the past where the cabinet or the Vice President was complacent.

IV. RECOMMENDATIONS

The Twenty-Fifth Amendment can be improved within the existing legal framework with relatively minimal effort. These reforms include (1) the adoption of voluntary agreements within the executive branch to give meaning to the Twenty-Fifth Amendment, (2) the creation of an advisory panel of medical experts to advise the Vice President and the cabinet on whether presidential disability exists, and (3) greater emphasis on presidential incapacity throughout the political process.

A. Voluntary Agreements within the Executive Branch

The Trump administration, as well as future administrations, should adopt various voluntary agreements to give meaning and context to the Twenty-Fifth Amendment. President Trump and his advisors should consider specific situations where the President would want to transfer power voluntarily, such as when undergoing surgery, and have those agreements made

315. See Birch Bayh, *The Twenty-Fifth Amendment: Dealing With Presidential Disability*, 30 WAKE FOREST L. REV. 437, 449-450 (1995).

pursuant to the language of Section 3 of the Twenty-Fifth Amendment.³¹⁶ These agreements should then be kept close to the President at all times so they can be signed at a moment's notice in the event of an emergency.

More importantly, President Trump and future Presidents should decide under what situations they would want Section 4 of the Twenty-Fifth Amendment invoked against them.³¹⁷ These situations could include a broad range of situations such as the President being diagnosed with a degenerative mental illness or the President falling into the hands of the enemy.³¹⁸ The President, in conjunction with his physician and attorneys, should also consider drafting and defining key terms and the general intent of these instructions.³¹⁹ Such voluntary instructions, although they would not have the force of law, could help prevent prolonged periods of incapacity.

B. An Advisory Panel of Medical Experts

Pursuant to the Twenty-Fifth Amendment and existing law, Congress should establish an advisory panel of medical experts. This panel should be advisory only and should not be able to invoke Section 4 of the Twenty-Fifth Amendment.³²⁰ Rather, this panel should only be able to advise the Vice President and the cabinet on whether the President is incapacitated and give other medical advice.

This middle ground approach at reform is optimal because it does not place undue importance on medical experts, which would occur if Congress created a special commission of medical experts to decide whether presidential inability existed. This advisory panel also does not represent a significant separation of powers concern, which would occur if Congress created a panel composed of federal judges and congressional leaders, and the advisory panel has the advantage of being independent from the President. Finally, from a practicality standpoint, this reform is much more likely to gain the requisite support to be enacted into law as compared to other proposed reforms.

316. U.S. CONST. amend. XXV, § 3.

317. U.S. CONST. amend. XXV, § 4.

318. See Daniel J.T. Schuker, *Burden of Decision: Judging Presidential Disability Under the Twenty-Fifth Amendment*, 30 J.L. & POL. 97, 117–40 (2014).

319. See Bert E. Park, M.D., *Protecting the National Interest: A Strategy for Assessing Presidential Impairment Within the Context of the Twenty-Fifth Amendment*, 30 WAKE FOREST L. REV. 593, 593–96 (1995).

320. See Bert. E. Park, *supra* note 283, at 821–26.

C. Greater Political Scrutiny

Finally, more emphasis needs to be placed on presidential inability and the Twenty-Fifth Amendment throughout the political process. First, the press must always be alert to who is in control of the executive branch and whether the President is suffering from any legitimate, debilitating conditions. Second, during the election season, journalists need to question presidential candidates about when they would consider invoking Section 3 of the Twenty-Fifth Amendment and when they would wish that Section 4 of the Twenty-Fifth Amendment be invoked against them. Likewise, the press should ask vice presidential candidates under what situations they would invoke Section 4 of the Twenty-Fifth Amendment and how they would respond to a President who contested their finding that an inability existed. Finally, during senate confirmation hearings of cabinet nominees, the Senate must impress upon cabinet nominees of their duties under the Twenty-Fifth Amendment and ask them under what situations the nominee would consider invoking Section 4 of the Twenty-Fifth Amendment.

V. CONCLUSION

History shows that Vice Presidents and cabinet officials often lack the will or the ability to effectively check a President who has become incapacitated. Additionally, Presidents have historically held onto power despite the fact that they were incapacitated, in rapidly declining health, or disabled. This causes great concern because the current framework of the Twenty-Fifth Amendment is premised on the ability of the Vice President and members of the cabinet to remove an incapacitated President under Section 4 of the Twenty-Fifth Amendment or for the President to voluntarily transfer his power under Section 3 of the Twenty-Fifth Amendment to the Vice President before he becomes incapacitated.

However, despite the shortcomings of the Twenty-Fifth Amendment, it still represents the most effective way to manage presidential disability because the cabinet and the Vice President are in the best position to observe the President, these individuals know the responsibilities of the executive branch, and these individuals, collectively, are not predisposed to use the Twenty-Fifth Amendment for improper reasons.

Likewise, the Twenty-Fifth Amendment still allows for the possibility of reform. This reform should include (1) establishing an advisory panel of medical experts to assist the cabinet in determining whether the President is incapacitated and (2) establishing voluntary agreements within the executive branch to give meaning and context to the protections of the Twenty-Fifth Amendment. Furthermore, having legitimate discussions about presidential

inability throughout the political process will strengthen the protections of the Twenty-Fifth Amendment.

Taken together, these reforms within the existing constitutional framework will help prevent presidential disability, which is of paramount importance in the modern era. Further, these improvements are realistically achievable in the current political environment. Therefore, congressional leaders and the Trump administration should evaluate and adopt these proposed reforms.