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## The Twenty-Fifth Amendment: Incapacity and Ability to Discharge the Powers and Duties of Office?

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# THE TWENTY-FIFTH AMENDMENT: INCAPACITY AND ABILITY TO DISCHARGE THE POWERS AND DUTIES OF OFFICE?

LAWRENCE J. TRAUTMAN\*

## ABSTRACT

History provides many instances of U.S. presidential or vice presidential incapacity. It was the death of President John F. Kennedy that prompted the 25th Amendment to the Constitution to gain ratification in 1967, in part to establish a method to fill the vice presidency if it became vacant.

On Saturday morning September 22, 2018, readers of *The New York Times* awoke to read a page-one story about how the Deputy Attorney General, Rod J. Rosenstein had previously advocated the secret White House recording of President Trump, “to expose the chaos consuming the administration, and he discussed recruiting cabinet members to invoke the 25th Amendment to remove Mr. Trump from office for being unfit.” Given this recent controversy, it seems timely and opportune to take a fresh look at the Twenty-Fifth Amendment, its history and purpose, how it works, and potential application.

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Sometimes, no matter how great their dreams or magnanimous their aspirations, they are also reined in or thwarted by their own bodies, by family tragedy, or by their own worst tendencies. Yet in spite of these constraints they must strive to complete the goals they have set for themselves and the nation. Their structural restraints and impediments are difficult enough. When exacerbated by illness, loss, or weakness, the job frequently borders on the impossible, with the nation's course directly altered by what happens in their personal lives.

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 Presidential Historians<sup>1</sup>

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<sup>1</sup> See JEFFREY A. ENGEL & THOMAS J. KNOCK, WHEN LIFE STRIKES THE PRESIDENT: SCANDAL, DEATH, AND ILLNESS IN THE WHITE HOUSE 10 (Jeffrey A. Engel & Thomas J. Knock eds., 2017).

## I. OVERVIEW

The Twenty-Fifth Amendment to the United States Constitution provides a mechanism for the vice president's assumption of the presidency when it is determined that the president "is unable to discharge the powers and duties of office."<sup>2</sup> Over the history of the United States, there have been many instances of presidential or vice-presidential incapacity. Unbeknownst to the public—and much of the governmental leadership at the time—First Lady Edith Wilson, with the assistance of the president's physician and personal secretary, kept the true state of President Woodrow Wilson's disabling health conditions secret from the American people for seventeen months.<sup>3</sup> President Wilson abandoned his day-to-day duties and ill-equipped Edith largely oversaw these duties while also serving as the sole conduit between the President and the outside world.<sup>4</sup> But President Wilson was not alone. It is now clear that other past presidents have hidden their impaired physical and mental condition from the American public.<sup>5</sup> What would have happened if John F. Kennedy, or any of the other presidents who have died in office, lived for a prolonged period of time while unable to discharge the duties and responsibilities of the presidency? The assassination of President John F. Kennedy prompted the Twenty-Fifth Amendment to the Constitution to gain ratification in 1967, "in part to establish a method to fill the vice presidency if it became vacant."<sup>6</sup>

On Saturday morning, September 22, 2018, readers of *The New York Times* awoke to read a page-one story about how the deputy attorney general, Rod J. Rosenstein, had previously advocated the secret White House recording of President Trump, "to expose the chaos consuming the administration, and he discussed recruiting cabinet members to invoke the 25th Amendment to remove Mr. Trump from office for being unfit."<sup>7</sup> Given this recent controversy, it seems timely and opportune to take a fresh look at the Twenty-Fifth Amendment, its history and purpose, how it works, and potential application.<sup>8</sup>

This Article proceeds in eight sections. First, this Article discusses the language of the Twenty-Fifth Amendment, including: the Amendment's history and purpose;

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<sup>2</sup> U.S. CONST. amend. XXV.

<sup>3</sup> ENGEL & THOMAS, *supra* note 1, at 108.

<sup>4</sup> *Id.* at 109.

<sup>5</sup> *See generally id.*

<sup>6</sup> Peter Baker, *Talks of the 25th Amendment Underscores a Volatile Presidency*, N.Y. TIMES (Sept. 22, 2018), <https://www.nytimes.com/2018/09/22/us/politics/trump-25th-amendment.html>.

<sup>7</sup> Adam Goldman & Michael S. Schmidt, *Rosenstein Raised Idea of Recording Talks with Trump*, N.Y. TIMES, Sept. 22, 2018, at A1.

<sup>8</sup> *See generally* Katie Benner & Maggie Haberman, *White House Was Prepared to Put a Trump Loyalist in Rosenstein's Place*, N.Y. TIMES, Sept. 27, 2018, at A16; Katie Benner, *President Would Prefer Not to Fire Rosenstein*, N.Y. TIMES, Sept. 27, 2018, at A16; Katie Benner, *Rosenstein Still Has His Job, Trump Says*, N.Y. TIMES, Oct. 9, 2018, at A13; Andrew Buncombe, *Donald Trump and Rod Rosenstein to Meet Amid Reports Deputy Attorney General Expects to Be Fired*, N.Y. TIMES (Sept. 24, 2018), <https://www.independent.co.uk/news/world/americas/us-politics/rod-rosenstein-resignation-deputy-attorney-general-resign-trump-fired-sessions-a8552751.html>.

Constitutional meaning; congressional intent and hearings; mechanics of the Amendment; National Commission on Presidential Disability and the Twenty-Fifth Amendment; examples of presidential incapacity; role of the presidential physician; the President Succession Act of 1947; and the Continuity of Government Commission. Second, this Article presents Woodrow Wilson's prolonged and hidden inability to discharge the powers and duties of office. Third is a review of the circumstances surrounding President Eisenhower's heart attack at a time when Vice President Richard M. Nixon was experiencing ill health and taking potentially addictive medications. Fourth, this Article looks at the presidency of John F. Kennedy and considers his almost constant pain and heavy use of narcotics. Fifth, is a look at Lyndon Johnson. Sixth, this Article presents an examination of Richard Nixon's troubled presidential tenure. Seventh, a review of Ronald Reagan's presidency from a health perspective and his relationship with Vice President George H.W. Bush. Eighth, is a look at the presidency of Donald J. Trump and the numerous instances of serious concern from those at the highest levels of government about his competency and mental stability. And last, I conclude.

This Article makes an important contribution to our understanding of the history, development and importance of the Twenty-Fifth Amendment to the United States Constitution by recognizing the extent to which it has been seriously discussed recently among the highest levels of government and by conducting a scholarly assessment of arguments being made for contemporary application.

## II. THE TWENTY-FIFTH AMENDMENT

Many citizens would be astonished to discover that the Constitution does not provide adequate procedures for the exercise of the President's powers and duties in the event the President becomes temporarily disabled by illness. . . . It is incredible at this stage in our history that we have not yet provided clear procedures for determining in what manner the powers of the President shall be exercised during a period of incapacitating illness. . . . in this era of crisis, failure to take corrective action could have disastrous consequences.

Kenneth B. Keating  
U.S. Senator, New York  
June 11, 1963<sup>9</sup>

In this section, I present the language of the Twenty-Fifth Amendment and discuss: its history and purpose; congressional hearings and intent; National Commission on Presidential Disability and the Twenty-Fifth Amendment; set the stage for a discussion about examples of presidential incapacity; describe the mechanics of the Amendment; and the President Succession Act. The need for the Twenty-Fifth Amendment arises from the ambiguity of Article II, Section I, Clause 6, which states:

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

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<sup>9</sup> *Hearings Before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary United States Senate 88th Cong. First Session on S.J. Res. 28, S.J. Res. 35 and S.J. Res. 84 Relating to the Problem of Presidential Inability*, 88th Cong. 10 (1963) [hereinafter *Hearing on Presidential Inability*] (statement of Sen. Kenneth B. Keating).

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.<sup>10</sup>

Only one reference to the issue of disability is noted among the records of the Constitutional Convention, when delegate Mr. John Dickinson of Delaware asked on August 27, 1787, “[W]hat is the extent of the term ‘disability’ [and] who is to be the judge of it?”<sup>11</sup> The August 1964 Senate Report on Presidential Inability and Vacancies in the Office of the Vice President discloses that a review of records for the Constitutional Convention fail to find an answer to Mr. Dickinson’s question.<sup>12</sup> In addition:

It was not until 1841 that this clause of the Constitution was called into question by the occurrence of one of the listed contingencies. In that year President William Henry Harrison died, and Vice President John Tyler faced the determination as to whether, under this provision of the Constitution, he must serve as Acting President or whether he became the President of the United States. Vice President Tyler gave answer by taking the oath as President of the United States. . . .

This precedent of John Tyler has since been confirmed on seven occasions when Vice Presidents have succeeded to the Presidency of the United States by virtue of the death of the incumbent President. Vice Presidents Fillmore, Johnson, Arthur, Theodore Roosevelt, Coolidge, Truman, and Lyndon Johnson all have become President in this manner.<sup>13</sup>

Reflecting upon his experiences as Vice President to President Eisenhower, Richard M. Nixon observed:

Simply stated, this clause does not make clear: Who decides when the President is unable to discharge the powers and duties of his office? Just what devolves upon the Vice President, the “powers and duties” or the “office” itself? can the President resume office once he has given it up? who decides if the President is well enough to resume his office, if he can at all?<sup>14</sup>

Having gained ratification on February 10, 1967, the Twenty-Fifth Amendment to the United States Constitution states:

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

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<sup>10</sup> U.S. CONST. art. II, § 1, cl. 6.

<sup>11</sup> S. REP. NO. 89-66 (1965).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Hearing on Presidential Inability, supra* note 9, Exhibit No. 4 (citing RICHARD M. NIXON, SIX CRISES 178–180 (1962)).

Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department, or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.<sup>15</sup>

#### A. History and Purpose

Story lines in popular cinema often depict scenarios where circumstances render the president incapable of discharging the powers and duties of the office. Just a few examples include: *Dave* (1993) (president suffers a stroke and is impersonated by a look-alike);<sup>16</sup> *Air Force One* (1997) (presidential aircraft hijacked with president aboard);<sup>17</sup> *Olympus Has Fallen* (2013) (president kidnapped by terrorists);<sup>18</sup> and *White*

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<sup>15</sup> U.S. CONST. amend. XXV.

<sup>16</sup> *DAVE* (Warner Bros. 1993).

<sup>17</sup> *AIR FORCE ONE* (Columbia Pictures Corp. 1997).

<sup>18</sup> *OLYMPUS HAS FALLEN* (Millennium Films 2013).

*House Down* (2013) (terrorists take president hostage).<sup>19</sup> Historian Jonathan Zimmerman writes:

In the second season of the TV serial drama “24,” President David Palmer declines to order a military strike against several Middle Eastern countries after receiving a tape recording of their officials plotting with a terrorist to build a bomb. Palmer thinks the recording is a fake, and it turns out that he’s right.

But Palmer’s vice president and Cabinet are itching for war, and they decide he is acting “irrationally” by holding his fire. Invoking the 25th Amendment . . . they vote Palmer out. He is eventually returned to office, of course, but not before the United States bombs a few places on false pretenses.

OK, so it’s Hollywood. But it also warns us against the casual use of the 25th Amendment, which was designed to protect us against presidents who are disabled rather than against those whom we merely dislike.<sup>20</sup>

A detailed historical account of every occasion of U.S. presidential or vice-presidential incapacity is beyond the scope of this single law journal article. However, many instances have happened. Writing in 1988, *The Report of the Commission on Presidential Disability and The Twenty-Fifth Amendment* [hereinafter “The Commission”] states, “Eight of the 35 men who have occupied the White House have died in office, four of them victims of assassins. Several have had serious illnesses, some of which at the time were hidden from those who should have been told, as well as the public.”<sup>21</sup> Presidents who have died in office include: William Henry Harrison (died April 4, 1841);<sup>22</sup> Zachary Taylor (July 9, 1850);<sup>23</sup> Abraham Lincoln (April 15, 1865);<sup>24</sup> James Garfield (September 19, 1881);<sup>25</sup> William McKinley (September 14,

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<sup>19</sup> WHITE HOUSE DOWN (Columbia Pictures Corp. 2013).

<sup>20</sup> Jonathan Zimmerman, *Opinion, 25th Amendment Won’t Cut It to Remove Trump*, S.F. CHRON. (May 25, 2017), <https://www.sfchronicle.com/opinion/article/25th-Amendment-won-t-cut-it-to-remove-Trump-11175040.php>.

<sup>21</sup> See MILLER CENTER COMMISSION NO. 4, REPORT OF THE COMMISSION ON PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT, THE NATIONAL COMMISSION ON PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT (Jan. 20, 1988) [hereinafter COMMISSION ON PRESIDENTIAL DISABILITY], <https://millercenter.org/issues-policy/governance/the-national-commission-on-presidential-disability-and-the-twenty-fifth-amendment>.

<sup>22</sup> See WILLIAM A. DE GREGORIO, THE COMPLETE BOOK OF U.S. PRESIDENTS 137 (8th ed. 2013).

<sup>23</sup> *Id.* at 175.

<sup>24</sup> See GEORGE MCGOVERN, ABRAHAM LINCOLN (Henry Holt & Co., Arthur M. Schlesinger & Sean Wilentz eds., 2009); JAMES M. MCPHERSON, TRIED BY WAR: ABRAHAM LINCOLN AS COMMANDER IN CHIEF (2008).

<sup>25</sup> See DE GREGORIO, *supra* note 22, at 293.



1901);<sup>26</sup> Warren G. Harding (August 2, 1923);<sup>27</sup> Franklin Delano Roosevelt (April 12, 1945);<sup>28</sup> and John F. Kennedy (November 22, 1963).<sup>29</sup>

*B. Constitutional Meaning, Congressional Intent, and Hearings*

Volumes have been written about constitutional interpretation and congressional intent.<sup>30</sup> While a comprehensive discussion of constitutional construction far exceeds the scope of this Article, some basic thoughts follow.

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<sup>26</sup> *Id.* at 355.

<sup>27</sup> *Id.* at 431.

<sup>28</sup> See *FDR Dies*, HISTORY.COM (last visited Jan. 30, 2019), <https://www.history.com/this-day-in-history/fdr-dies>.

<sup>29</sup> See ROBERT DALLECK, *AN UNFINISHED LIFE: JOHN F. KENNEDY 1917–1963* (2003).

<sup>30</sup> See generally Lawrence Alexander & Frederick Schauer, *Rules of Recognition, Constitutional Controversies, and the Dizzying Dependence of Law on Acceptance*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* (2009); Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 *CONST. COMMENT.* 427 (2007); Randy E. Barnett, *Interpretation and Construction*, 34 *HARV. J. L. & PUB. POL'Y* 65 (2011); Randy E. Barnett, *Scalia's Infidelity: A Critique of Faint-Hearted Originalism*, 75 *U. CIN. L. REV.* 7 (2006); William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 *HARV. L. REV.* 1079 (2017); Mitchell N. Berman, *Originalism Is Bunk*, 84 *N.Y.U. L. REV.* 1 (2009); Curtis Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 *HARV. L. REV.* 411 (2012); Thomas Colby & Peter J. Smith, *Living Originalism*, 59 *DUKE L.J.* 239 (2009); Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 *STAN. L. REV.* 573 (2008–2009); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I*, 65 *STAN. L. REV.* 901 (2013); Jamal Greene, Stephen Ansolabehere & Nathaniel Persily, *Profiling Originalism*, 111 *COLUM. L. REV.* 356 (2011); Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 *S. CAL. L. REV.* 205 (2013); Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 *NW. U. L. REV.* 703 (2009); Jeremy Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 *U. CHI. L. REV.* 1819 (2016); John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 *WM. & MARY L. REV.* 1321 (2018); Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 *N.Y.U. L. REV.* 1784 (2008); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 *NW. U. L. REV.* 857 (2009); Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 *STAN. L. REV.* (2010); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 *HARV. L. REV.* 2085 (2002); Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 *STAN. L. REV.* 1005 (2011); James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 *VA. L. REV.* 1523 (2011); Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 *COLUM. L. REV.* 606 (2008); Suzanna Sherry, *The Four Pillars of Constitutional Doctrine*, 32 *CARDOZO L. REV.* 969 (2011); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 *CONST. COMMENT.* 95 (2010); Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM: ESSAYS IN CONSTITUTIONAL THEORY* (2011); Cass R. Sunstein, *Beyond Judicial Minimalism*, 43 *TULSA L. REV.* 825 (2013); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 *MICH. L. REV.* 885 (2003); Adrian Vermeule, *Three Strategies of Interpretation*, 42 *SAN DIEGO L. REV.* 607 (2005); Keith E. Whittington, *Originalism: A Critical Introduction*, 82 *FORDHAM L. REV.* 375 (2013).

### 1. The Meaning of the Constitution

Constitutional scholar Jack Balkin observes, “the principles employed in constitutional construction are not limited to those available at the time of adoption. New constitutional principles (e.g., structural principles) can emerge over time as constitutional constructions of the text.”<sup>31</sup> Professor Balkin teaches, “[d]octrine consists of a wide variety of different principles at different levels of generality and specificity. New constitutional constructions can be inconsistent with many prior constructions and with a wide variety of principles of varying levels in existing doctrine.”<sup>32</sup> As a foundational concept:

The term “original meaning” can be confusing because we use “meaning” to refer to at least five different things: (1) semantic content (e.g., “what is the meaning of this word in English?”); (2) practical applications (“what does this mean in practice?”); (3) purposes or functions (“the meaning of life”); (4) specific intentions (“I didn’t mean to hurt you,”) or (5) associations (“what does America mean to me?”).

Thus, when we ask about the “meaning” of the Equal Protection Clause, we could be asking: (1) What concepts the words in the clause point to; (2) how to apply the clause; (3) the purpose or function of the clause; (4) the specific intentions behind the clause, or (5) what the clause is associated with in our minds or, more generally, in our culture.

Fidelity to “original meaning” in constitutional interpretation refers only to the first of these types of meaning: the semantic content of the words in the clause.<sup>33</sup>

Regarding the concepts of living constitutionalism and democratic legitimacy, Professor Balkin writes, “[i]n sum, living constitutionalism is primarily a theory about the processes of constitutional development produced by the interaction of the courts with the political branches. It is a descriptive and normative theory of the processes of constitutional construction.”<sup>34</sup> In addition:

Constitutional development outside the amendment process is the work of constitutional construction. Constitutional construction involves both the political branches and the courts. Constitutional construction by courts, in turn, is largely responsive to larger changes in political culture, public opinion, and the work of the political branches. What we call “living” constitutionalism is really the product of constitutional construction and changes in constitutional construction over time. For this reason it is what Robert Post and Reva Siegel call a “democratic constitutionalism” because constitutional doctrine is responsive to the social and political

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<sup>31</sup> Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 Nw. U. L. REV. 549, 579 (2009).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 552, citing Lawrence B. Solum, *Semantic Originalism* (Illinois Pub. Law Research Paper No. 07-24, 2008), <https://ssrn.com/abstract=1120244>.

<sup>34</sup> See Balkin, *supra* note 31, at 549.

mobilizations and counter-mobilizations that promote popular ideas of the Constitution's values, and to the views of popularly elected national political elites. Change occurs (1) because of changes in constitutional culture—what ordinary citizens and legal and political elites believe the Constitution means and who they believe has authority to make claims on the Constitution; (2) because of changes in political institutions and statecraft, which courts normally make sense of and legitimate; and (3) because of changes in judicial personnel (and hence their views of the Constitution). The later changes are due to the judicial appointments process, which is controlled by elected officials—particularly the President and the Senate—who in turn respond to existing political pressures and incentives.<sup>35</sup>

Legal scholar Adam R.F. Gustafson observes:

Constitutional actors derive constitutional meaning in two ways. They discover it through interpretation, and—when interpretive meaning runs out—they develop it through construction. The traditional tools of interpretation—text, history, and structure—clarify some of the Twenty-Fifth Amendment's linguistic ambiguities, but residual vagueness requires the relevant political actors to construct meaning by applying underdeterminate standards to particular circumstances.<sup>36</sup>

## 2. Constitutional Meaning and the Courts

So, how does the more than 240-year-old U.S. Constitution remain relevant and applicable to dramatic changes in culture and the human condition? Professor Jack Balkin contends that it is likely “the most important role of federal courts in the system of constitutional construction is legitimating and rationalizing the work of the national political process and its constitutional constructions. Federal courts are part of the national political process, and they are players in the dominant national coalition of their time.”<sup>37</sup> For the courts, it “is a process of doctrinal construction that rationalizes and supplements constitutional constructions by the political branches and responds to changes in political and cultural values in the nation as a whole.”<sup>38</sup> Professor Balkin writes:

Courts engage in constitutional construction in several different ways. First, courts rationalize new constitutional constructions by the political branches through creating new doctrines . . . .

Second . . . federal courts cooperate with the dominant forces in national politics by policing and disciplining those who do not share the dominant coalition's values . . . courts apply vague clauses and fill in gaps and silences in the Constitution in response to long-term changes in social

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<sup>35</sup> *Id.* at 592.

<sup>36</sup> See Adam R.F. Gustafson, *Presidential Inability and Subjective Meaning*, 27 *YALE L. & POL'Y REV.* 459, 462 (2009).

<sup>37</sup> See Balkin, *supra* note 31, at 569.

<sup>38</sup> *Id.* at 569.

attitudes that have become reflected in national politics. During the sexual revolution, for example, the federal courts promoted liberal values by loosening legal restraints on pornography and by protecting the right of married couples and single persons to use contraceptives . . . .

Third, federal courts cooperate with the national political coalition by limiting or striking down laws that reflect an older coalition's values.

Fourth, federal courts cooperate with the national political coalition by taking responsibility—and thus the political heat—for decisions that members of the dominant coalition cannot agree on and that would potentially split the coalition.

Fifth, the Supreme Court often takes direction about how to construct doctrine from contemporaneous expressions of constitutional values by political majorities.<sup>39</sup>

### 3. What About Constitutional Evil?

Professor Jack Balkin questions whether unjust and seriously bad results are possible from his concept of living constitutionalism? Living constitutionalism, according to Professor Balkin, “may possess sociological legitimacy—because constitutional construction follows public opinion; and even procedural legitimacy—because constitutional construction is democratically responsive.”<sup>40</sup> However, he expresses concern that living constitutionalism “may lack moral legitimacy because constitutional constructions can be very unjust; they can oppress minority groups and individual citizens, and undermine or even destroy democratic values.”<sup>41</sup> We see this result often throughout American history, as “minorities have been badly treated and rights denied in ways that we would find completely unacceptable in a constitutional democracy today.”<sup>42</sup> Modernly, the concern as applied to the Trump Administration is whether, as in the case of:

The Bush Administration's claim—most often associated with Dick Cheney, David Addington and John Yoo, that when the President Acts in his capacity as Commander-in-Chief, he cannot be bound by Congressional enactments that seek to limit his powers . . . well-trained lawyers can make truly bad legal arguments that argue for very unjust things in perfectly legal sounding language. No one should be surprised by this fact. Today's lawyers make arguments defending the legality of torture and, indeed, claiming that laws that would prevent the President from torturing people are unconstitutional. In the past lawyers have used legal sounding arguments to defend the legality of slavery, Jim Crow, and compulsory sterilization.

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<sup>39</sup> *Id.*

<sup>40</sup> *See id.* at 611.

<sup>41</sup> *Id.* at 612.

<sup>42</sup> *Id.*

Elsewhere I have asserted that the Cheney/Addington/Yoo theory of presidential power, taken to its logical conclusions, allows Presidents to rule by decree (or indeed without decree) and is in this sense tantamount to presidential dictatorship. Such a theory has little basis in the original understanding of the Founding period, which feared the rise of a new Caesar or Cromwell; it is a product of the modern era. . . . A few more Supreme Court appointments who saw things the President's way, and we might be well on our way to a conception of presidential power that would have been unimaginable only ten years before . . . courts have made many bad and unwise decisions in our nation's history. Nobody should underestimate what lawyers in high places can do armed with legal language . . . .

The question is whether the system of living constitutionalism we have generated through years of construction is a worthy successor to the Framers' idea of separation of powers and checks and balances—a system that moderates, tests and checks; and one that makes politics both possible and accountable to prudence and reason. This is a question of both reason and faith; of both practical knowledge and of moral commitment to preserving just institutions and working for better ones.<sup>43</sup>

#### 4. Congressional Hearings and Intent

On June 11, 1963, Tennessee Senator Estes Kefauver, Chairman of the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary stated, “[o]n several occasions, this country has been reminded that a dangerous constitutional flaw exists in our presidential system.”<sup>44</sup> Over fifty-five years ago, Senator Kefauver warned, “[a]t least three Presidents have become so seriously ill while they were in office that for a considerable period of time they were incapable of exercising the powers and duties of the Presidency.”<sup>45</sup> Unfortunately, no clear authorization exists within the Constitution providing for “the Vice President, or any other officer, to discharge the presidential powers and duties while the President is unable to do so himself.”<sup>46</sup> Senator Kefauver provides us with the following historical account:

In 1958, this subcommittee conducted an exhaustive series of hearings into the constitutional problem of presidential inability. The three serious illnesses of President Eisenhower were then fresh in the public's memory, and six proposed constitutional amendments concerning presidential inability had been introduced in the Senate. The hearings proved that there was a deep concern among governmental leaders and constitutional scholars about this problem, but that there were equally deep differences of opinion as to what should be done to remedy the problem.

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<sup>43</sup> See *id.* at 612.

<sup>44</sup> *Hearing on Presidential Inability*, *supra* note 9 (statement of Estes Kefauver, Chairman of the S. Comm. on Const. Amendments).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1.

Since the 1958 hearings, the various interested parties have persisted in their efforts to work out a satisfactory constitutional solution to this problem.<sup>47</sup>

It was the death of President John F. Kennedy that prompted the Twenty-Fifth Amendment to the Constitution to gain ratification in 1967, “in part to establish a method to fill the vice presidency if it became vacant.”<sup>48</sup> Subsequent hearings of the Constitutional Amendments Subcommittee of the Committee on the Judiciary reveal:

Serious doubts have also been raised as to whether the “necessary and proper” authority of article I, section 8, clause 18, gives the Congress the power to legislate in this situation. The Constitution does not vest any department or office with the power to determine inability, or to decide the term during which the Vice President shall act, or to determine whether and at what time the President may later regain his prerogatives upon recovery. Thus it is difficult to argue that article I, section 8, clause 18 gives the Congress the authority to make all laws which shall be necessary and proper for carrying out such powers.<sup>49</sup>

Thus, the Constitutional Amendments Subcommittee of the Committee on the Judiciary recognized in 1973:

The death of President Kennedy and the accession of President Johnson has pointed up once again the abyss which exists in the executive when there is no incumbent Vice President. Sixteen times the United States of America has been without a Vice President, totaling 37 years during our history.

As has been pointed out, the Constitutional Convention in its wisdom foresaw the need to have a qualified and able occupant of the Vice President’s office should the President die. They did not, however, provide the mechanics whereby a Vice Presidential vacancy could be filled.<sup>50</sup>

It was not until ratification of the Twenty-Fifth Amendment that “the president, when he believed he was unable to discharge the duties of his office, [became] authorized to make a temporary transfer of his powers and duties to the vice president.”<sup>51</sup>

### *C. Mechanics of the Twenty-Fifth Amendment*

Since the Twenty-Fifth Amendment is divided into four sections, our discussion of how the Amendment works will proceed to look at the mechanics of each section.

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<sup>47</sup> *Id.*

<sup>48</sup> Peter Baker, *Talk of 25th Amendment Underscores a Volatile Presidency*, N.Y. TIMES, Sept. 23, 2018, at A23.

<sup>49</sup> S. REP. NO. 88-1382, at 7 (1964).

<sup>50</sup> *Id.* at 9.

<sup>51</sup> See COMMISSION ON PRESIDENTIAL DISABILITY, *supra* note 21.

### 1. Section 1

Derived from Article II, Section 1, Clause 6, this section provides that in the instance 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 Vice President shall become President.”<sup>52</sup> Because the conditions of “death” or “resignation” are such straight-forward events, Section 1 has not proven problematic historically. As described more fully later, with the death of President William Henry Harrison, and by Vice President John Tyler who “simply took the prescribed oath and proclaimed himself to be president, not acting president . . . . This precedent has since been followed in seven cases and has effectively answered the early constitutional question of whether the new occupant should be acting president or president.”<sup>53</sup>

### 2. Section 2

Like Section 1, this Section relates to Article II, Section 1, Clause 5, and answers the question about what happens when there is no sitting vice president.<sup>54</sup> Section 2 has now been employed twice: first, when President Nixon appointed Representative Gerald Ford to be Vice President on October 12, 1973, after the resignation of Spiro T. Agnew;<sup>55</sup> and, when President Ford nominated Nelson A. Rockefeller, a former New York Governor to serve as Vice President.<sup>56</sup> In cases where both the president and vice president are no longer living, the Presidential Succession Act of 1947 provides a schematic for succession.<sup>57</sup>

### 3. Section 3

The Commission on Presidential Disability and the Twenty-Fifth Amendment [hereinafter “The Commission”] states, “Section 3 creates a simple and relatively straightforward way for the president to provide for situations in which he suffers from a temporary inability to carry out the duties of office.”<sup>58</sup> Mechanically, this procedure requires “the president determining that he will be temporarily unable to perform his duties, communicating this decision to the Speaker of the House and the president pro tempore of the Senate, and subsequently communicating that his inability has ended.”<sup>59</sup> Furthermore, in those instances “where the president knows in advance that he will enter into a period of inability, this mechanism permits a smooth transition of power under the president’s ultimate control.”<sup>60</sup>

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<sup>52</sup> U.S. CONST. art. II, § 1, cl. 6.

<sup>53</sup> See COMMISSION ON PRESIDENTIAL DISABILITY, *supra* note 21.

<sup>54</sup> U.S. CONST. amend. XXV, § 2.

<sup>55</sup> See Joel K. Goldstein, Note, *Adequacy of Current Succession Law in Light of the Constitution and Policy Consideration: Taking from the Twenty-Fifth Amendment: Lessons in Enduring Presidential Continuity*, 79 FORDHAM L. REV. 959, 970 (2010).

<sup>56</sup> *Id.*

<sup>57</sup> 3 U.S.C. § 19(a)(1), (b) (2012).

<sup>58</sup> See COMMISSION ON PRESIDENTIAL DISABILITY, *supra* note 21.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

The Commission's report states the belief “that any president receiving anesthesia should use Section 3 . . . that this mechanism should be made part of a routine course of action so that its invocation carries no implications of instability or crisis . . . use rather than non-use will create the sense of routine.”<sup>61</sup> As discussed more fully later, President Reagan referenced Section 3 on July 13, 1985, when he signed a letter stating that he was “mindful of the provisions of Section 3.”<sup>62</sup> Logic for the use of Section 3 is presented by The Commission as follows:

One situation involves elective surgery where general anesthesia, narcotics, or other drugs that alter cerebral function will be used. A similar case involves a debilitating disease or physical malfunction. Because anyone under anesthesia is unable to function both during the period of unconsciousness and afterwards while disoriented, presidents should accept the inevitability of temporarily transferring power to the vice president beyond the immediate hours in the operating room, or even in the hospital—perhaps 24 or 48 hours. It would be wise for a president to state this publicly so that the nation and the world are reassured, and to settle White House officials’ fears of losing power.

In short, let the president wave from his window to show he is up and around but convalescing while the vice president, as acting president under Section 3, takes care of the day-to-day business. As Herbert Brownell has noted, there is a substantial difference between the president being able to wave to the crowd from a hospital window and being able to govern.<sup>63</sup>

#### 4. Section 4

Many of the most controversial and difficult contingency scenarios of presidential succession are addressed in Section 4, clearly the most complicated section of the Twenty-Fifth Amendment. As legal scholar Adam R.F. Gustafson writes, “Section 4 is only available when the President is so severely impaired that he is unable to make or communicate a rational decision to step down temporarily of his own accord . . . . Congress and the executive branch should clarify the distinct circumstances in which applications of each section are appropriate.”<sup>64</sup> Some congressional opponents to the Twenty-Fifth Amendment appear concerned about the possibility of a coup d’état because of too much power being transferred to the vice president and cabinet.<sup>65</sup> In addition:

The legislative record reveals that only severe disabilities—whether physical, mental, or as a result of capture—that render the President totally unable to communicate a rational decision comprised the expected applications of Section 4.

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*; see also *infra* Section VI.

<sup>63</sup> See COMMISSION ON PRESIDENTIAL DISABILITY, *supra* note 21.

<sup>64</sup> See Gustafson, *supra* note 36, at 462.

<sup>65</sup> *Id.* at 463 n.15 (2009) (expressing reservations from Rep. Henry B. González who stated that ‘a President might be wrongfully or mistakenly removed from office . . . .”).



Members of Congress restricted Section 4 to severe cases of inability, with increasing rigor and specificity leading up to the Amendment's adoption. On the day that S.J. Res. 1 passed the Senate and before it went to conference, Senator Bayh provided the following strict, if somewhat circular, definition of inability: "[T]he word 'inability' and the word 'unable as used in [Section 4] . . . mean that [the President] is unable either to make or communicate his decisions as to his own competency to execute the powers and duties of his office." This definition came as a "clarification" of Senator Bayh's earlier, more expansive statement that "the intention of this legislation is to deal with *any type of inability*, whether it is from traveling from one nation to another, a breakdown of communications, capture by the enemy, or *anything that is imaginable*." The earlier statement is true of Sections 3 and 4 considered together but misleading as applied to Section 4 alone. Senator Bayh's subsequent definition was suggested to him off the record by Senator Robert Kennedy, whose support Senator Bayh saw as critical for the Amendment's success. The definition suggests, as previously argued from constitutional structure, that Section 4 is available only where the application of Section 3 is impossible. . . .

One week before Congress passed the recommended Amendment in its final form, Senator Kennedy engaged Senator Bayh in a colloquy in which the latter agreed that the inability phrase in Section 4 means "*total* disability to perform the powers and duties of office. . . ." Members of Congress voted for the Twenty-Fifth Amendment with the understanding that Section 4 applied only to states of total inability in which the President would be unable to step down of his own volition.<sup>66</sup>

Interpretation of Section 4 presents several unique challenges. Writing about the broader topic of original meaning and constitutional construction, Professor Jack Balkin observes:

Because constitutional construction occurs in the same political space and time as the amendment process, the two processes can sometimes substitute for each other. Vague clauses can be built out through doctrine and institution building in ways that might also be achieved through amendment. (the same is also true with various silences and gaps in the original Constitution.) This is not a bug in our constitutional system; it is a feature. Nevertheless, the process of amendment and construction are not identical, and what each can achieve in practice does not always overlap.

Some kinds of changes—like the abolition of the Electoral College or altering the length of the President's term of office—cannot easily be achieved through construction; they require amendment. Constructions may be less durable than amendments: inter-branch understandings can be altered through practice, statutes can be repealed and doctrinal constructions overturned, distinguished, or made irrelevant. Conversely,

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<sup>66</sup> *Id.* at 482.

amendment may be an awkward and cumbersome way to respond to certain problems, revise previous doctrinal constructions, create new rules or promote wholesale changes in government. Constructing doctrine gradually through case law development and creating framework statutes and new institutions may be a more nimble and effective method.

Today people generally associate “living constitutionalism” with judicial decisions; but the political branches actually produce most living constitutionalism. Most of what courts do in constitutional development responds to these political constitutional constructions . . . .<sup>67</sup>

Commenting specifically about Section 4 interpretative issues, Professor Bryan H. Wildenthal writes:

The ratified text of Section 4, Clause 2 of the 25th Amendment . . . refers to “the principal officers of the executive department”—an obvious typographical or “scrivener’s” error, one of only two in the Constitution (the other is in Art. I, § 10, cl. 2). Clause 1 refers to “the principal officers of the executive departments,” an obvious reference to the secretaries of the various cabinet departments which was clearly intended and understood to be repeated verbatim in the second clause.

It is not entirely clear what “the executive department” in Clause 2 could refer to, even if the phrase were not, as it is, the obvious product of a simple mistake. Presumably, it could be read to refer to the executive branch as a whole, the “principal officers” of which might be the very same department secretaries referred to in Clause 1, thus rendering the error harmless. Some might argue that Clause 2 may properly be read as if corrected to remove the error in any event, though it is unclear how a justiciable case to resolve the point could ever be brought to the Supreme Court.<sup>68</sup>

#### 5. Inability Duration Considerations

Adam R.F. Gustafson concludes “that the framers generally expected Section 3 to apply most often to short-term disabilities, especially medical operations, while Section 4, on the other hand, generally contemplates longer periods of presidential inability.”<sup>69</sup> Believing that short term inabilities should rarely invoke Section 4 rather than Section 3, Senator Bayh states:

A President who was unconscious for 30 minutes when missiles were flying toward this country might only be disabled temporarily, but it would be of severe consequence when viewed in the light of the problems facing the country.

So at that time, even for that short duration, someone would have to make a decision. But a *disability which has persisted for only a short time would*

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<sup>67</sup> See Balkin, *supra* note 31, at 560.

<sup>68</sup> See Bryan H. Wildenthal, *U.S. Constitution* (Thomas Jefferson School of Law Research Paper No. 3188256, 2018), <https://ssrn.com/abstract=3188256>.

<sup>69</sup> See Gustafson, *supra* note 36, at 484.

*ordinarily be excluded.* If a President were unable to make an Executive decision which might have severe consequences for the country, I think we would be better off under the conditions of the amendment.<sup>70</sup>

#### 6. What About Criminal or Impeachment Proceedings?

Taking place during the lifetime of many readers, the scandals surrounding Presidents Nixon and Clinton, scholars have suggested Sections 3 and 4 of the Twenty-Fifth Amendment as a potential mechanism whereby “an embattled President could temporarily step aside during impeachment proceedings.”<sup>71</sup> However, in both the case of Presidents Nixon and Clinton, “both situations resolved without even a rumor that the Vice President or cabinet considered declaring presidential inability under Section 4.”<sup>72</sup> However, as Adam R.F. Gustafson writes:

As Watergate evidence piled up against President Nixon and Vice President Agnew, former Secretary of Defense Clark Clifford suggested that public loss of confidence in Nixon rendered the executive branch ineffectual. After Agnew resigned and Vice President Ford had been confirmed, White House insiders prepared for Nixon to invoke Section 3 and temporarily relinquish power to Ford during the investigation. John Feerick, a lawyer instrumental in drafting the Amendment, notes that Section 3 “offered [Nixon] an opportunity to step aside temporarily during an impeachment inquiry. In fact, several members of Congress . . . suggested that he consider standing aside under the Twenty-Fifth Amendment on the ground that he was unable to discharge the duties of his office because of the constitutional controversies attending Watergate.” Nixon called this a “fatuous suggestion” and apparently never seriously considered invoking Section 3. During another presidential scandal, Akhil Amar suggested that invoking Section 3 during his impeachment trial would have offered President Clinton “recovery of his honor and a shot at redemption.” Although neither President accepted the invitation, these events revealed a consensus that Section 3 is broad enough to allow a President to cede power and dedicate himself to his own defense in an impeachment proceeding, or even to concede that the loss of his popular mandate rendered him ineffectual. Such a use would conform to the President’s broad, unreviewable discretion under Section 3 . . . .

[Since] Impeachment does not render a President totally unable to govern, as President Clinton demonstrated after he was impeached, so Section 4 has no application where an impeached President rationally decides to remain in office while defending against conviction.<sup>73</sup>

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<sup>70</sup> *Id.* at 485.

<sup>71</sup> *Id.* at 491.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

*D. National Commission on Presidential Disability and the Twenty-Fifth Amendment*

Approximately twenty years after ratification, the two principal authors of the Twenty-Fifth Amendment, former Eisenhower Attorney General Herbert Brownell and former U.S. Senator from Indiana Birch Bayh agreed to serve as co-chairmen of the University of Virginia's fourth Miller Center Commission.<sup>74</sup> A prominent group of individuals participated in The Commission on Presidential Disability and the Twenty-Fifth Amendment [hereinafter "The Commission"] representing important national U.S. organizations such as: the League of Women Voters, the American Bar Association, and the American Medical Association.<sup>75</sup>

The Commission concluded that it was preferable, "rather than amend the Constitution in an attempt to deal with such scenarios of presidential disability, political reality requires that the people of this nation make the most of what the Twenty-Fifth Amendment encompasses."<sup>76</sup> The Commission further recognized that the complexities of life may create "extremely complicated circumstances and could prove more difficult to implement."<sup>77</sup> The Commission attempted to define some of these scenarios and recommended creation of "a guide intended to assure prompt application in a manner faithful both to the spirit of the Constitution and to the intent of the framers of this Amendment."<sup>78</sup>

During the more than twenty years that had passed since ratification, The Commission noted several occasions where Sections 1 and 2 of the Amendment had "come into play with no resulting problems."<sup>79</sup> Accordingly, The Commission focused its report on Sections 3 and 4 and is, "designed to apply to complicated factual situations and are dependent to a great extent upon the circumstances which exist at the time of implementation."<sup>80</sup> These issues, recommendations and subsequent amendments to the Presidential Succession Act of 1947 are discussed in greater detail later in this Article.<sup>81</sup>

*E. Examples of Presidential Incapacity*

The human species is fragile and subject to invisible mental and physical health threats from many sources: bacteria, viruses, injuries from various sources, and genetic predisposition. The stresses of public office also tend to age many presidents faster than they might otherwise.<sup>82</sup> I have chosen the stories of several occupants of the White House during the past century to illustrate how vulnerable the American democracy is to human frailty. Non-historians may be alarmed to learn how often occupants of the White House have chosen to mislead the American public about the

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<sup>74</sup> See COMMISSION ON PRESIDENTIAL DISABILITY, *supra* note 21.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> See *infra* Section III(A).

<sup>82</sup> Evan Osnos, *How Trump Could Get Fired*, THE NEW YORKER, May 8, 2017, at 34–45.

health of the American president, a topic that seems to receive scant coverage (much like tax returns) during presidential elections.

In so many aspects of society, lawmakers and thoughtful employers have recognized that public safety demands the rigor of health examinations, and often drug usage tests, for such occupations as: a precondition to serve in any branch of the armed forces; airline pilots; operators of railroad engines; and professional athletes.<sup>83</sup> It defies logic to contemplate that the same information is not required of candidates seeking top elected office. Historians have contributed thousands of books and articles about various U.S. presidents and vice presidents.<sup>84</sup>

The various personal tragedies experienced by us all also impact presidential wellbeing and performance. The loss of family members has weighed heavily on many presidents: Andrew Jackson, death of his spouse Rachel;<sup>85</sup> Franklin Pierce, witnessing the violent death of his son just weeks before taking office;<sup>86</sup> and Calvin Coolidge's loss of his sixteen-year-old son.<sup>87</sup> Abraham Lincoln suffered from depression, death of a son, and added pressure of dealing with a mentally unbalanced wife.<sup>88</sup>

Two examples of the temporary inability provisions of Section 3 presidential incapacity are seen within recent years in uses where a president must undergo minor surgeries requiring anesthesia. On July 29, 2002 President George W. Bush took advantage of this provision for a total of “two hours and fifteen minutes during and after a twenty-minute colorectal screening.”<sup>89</sup> By fax to the Congressional leadership, President Bush invoked Section 3 using two separate letters—one serving to initiate the period of inability<sup>90</sup> and the second to terminate it.<sup>91</sup> Next, transfer of presidential power was made to Vice President Cheney by President George W. Bush on July 21, 2007, “for two hours and five minutes while having benign polyps removed from his

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<sup>83</sup> See generally 2 *Employment Screening Drug & Alcohol* § 12.01 (2018).

<sup>84</sup> See, e.g., Stefanie Cohen, *Fourscore and 16,000 Books*, WALL ST. J. (Oct. 12, 2012), <https://www.wsj.com/articles/SB10000872396390444024204578044403434070838>.

<sup>85</sup> See Daniel Feller, *A Crisis of His Own Contrivance: Andrew Jackson's Break with John C. Calhoun*, in *WHEN LIFE STRIKES THE PRESIDENT: SCANDAL, DEATH, AND ILLNESS IN THE WHITE HOUSE* 13 (Jeffrey A. Engel & Thomas J. Knock eds., 2017).

<sup>86</sup> See Michael F. Holt, *Personal Loss and Franklin Pierce's Presidency*, in *WHEN LIFE STRIKES THE PRESIDENT: SCANDAL, DEATH, AND ILLNESS IN THE WHITE HOUSE* 65 (Jeffrey A. Engel & Thomas J. Knock eds., 2017).

<sup>87</sup> See ENGEL & KNOCK, *supra* note 1.

<sup>88</sup> See Michael Burlingame, *Abraham Lincoln and the Death of His Son Willie*, in *WHEN LIFE STRIKES THE PRESIDENT: SCANDAL, DEATH, AND ILLNESS IN THE WHITE HOUSE* 10 (Jeffrey A. Engel & Thomas J. Knock eds., 2017).

<sup>89</sup> See Gustafson, *supra* note 36, at 459, citing Mike Allen, *Bush Resumes Power After Test—President's Routine Colon Exam Showed No Abnormalities*, WASH. POST, June 30, 2002, at A13.

<sup>90</sup> See Gustafson, *supra* note 36, at 488, citing Letter from President George W. Bush to the Speaker of the House of Representatives, 1 Pub. Papers 1083 (June 29, 2002).

<sup>91</sup> See Gustafson, *supra* note 36, at 488, citing Letter from President George W. Bush to President Pro Tempore of the Senate 1 Pub. Papers 1083 (June 29, 2002).

large intestine. The surgery itself lasted just thirty-one minutes.”<sup>92</sup> Again, two letters were employed, one to initiate, another to end the period of power transfer.<sup>93</sup>

A full treatment of presidential health and incapacity far exceeds the scope of this Article. However, for perspective, a brief discussion of some of the facts we now know about health risks that have previously had impact upon the function of government during the following presidencies is presented: Woodrow Wilson; Dwight Eisenhower; John F. Kennedy; Lyndon Johnson; Richard Nixon; Ronald Reagan; and George W. Bush. Standing alone, this brief treatment for each seems sufficient to establish the Twenty-Fifth Amendment’s critical importance.

#### *F. Role of Presidential Physician*

The Commission recognized the necessity for, “greater public recognition that presidents, like the rest of us, are subject to periodic illnesses and disabilities and that the Twenty-Fifth Amendment . . . offers excellent standard operating procedures for times of temporary presidential disability, a simple method to get through such contingencies without government disruption or public alarm.”<sup>94</sup> A copy of The Commission’s statement about the importance of the role of the president’s physician is included as Appendix B to this Article. In addition:

The Commission has been impressed by what it has learned of the advances and complexities of modern medicine, in part from our discussions with two former presidential physicians who cared for five presidents. It is now obvious that the presidential physician can, and must, play an increased role. We view it as a dual role: first, the physician must uphold his role in the traditional, confidential doctor-patient relationship; second, and equally important in the uniquely presidential case, the physician must act as a representative, in strictly non-political terms, of the interests of the nation which elected the president.<sup>95</sup>

#### *G. Presidential Succession Act of 1947, as Amended*

On July 18, 1947, President Harry Truman signed the Presidential Succession Act which provided a new schematic for presidential succession in the event of death or incapacity of both the president and vice president.<sup>96</sup> The provision for presidential line of succession has differed over the years, and the 1947 Act replaced provisions from 1886, which in turn had replaced the original act of 1792.<sup>97</sup> While significant turnover has taken place among cabinet members during the first two years of the

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<sup>92</sup> See Gustafson, *supra* note 36, at 489, citing Deb Riechmann, *5 Polyps Removed from Bush’s Colon*, ASSOCIATED PRESS (July 21, 2007).

<sup>93</sup> *Id.*

<sup>94</sup> See COMMISSION ON PRESIDENTIAL DISABILITY, *supra* note 21.

<sup>95</sup> *Id.*

<sup>96</sup> UNITED STATES SENATE, SENATE STORIES: PRESIDENTIAL SUCCESSION ACT, [https://www.senate.gov/artandhistory/history/minute/Presidential\\_Succession\\_Act.htm](https://www.senate.gov/artandhistory/history/minute/Presidential_Succession_Act.htm) (last visited March 5, 2019).

<sup>97</sup> *Id.*

Trump Administration, Exhibit 1 depicts the presidential order of succession as of the beginning of 2019, as follows:<sup>98</sup>

Exhibit 1  
Presidential Order of Succession  
As of January 3, 2019

	<b>Office</b>	<b>Current Office Holder</b>
1	Vice President	Michael R. Pence
2	Speaker of the House of Representatives	Nancy Pelosi
3	President Pro Tempore of the Senate	Charles Grassley
4	Secretary of State	Mike Pompeo
5	Secretary of the Treasury	Steven Mnuchin
6	Secretary of Defense	vacant
7	Attorney General	vacant
8	Secretary of the Interior	vacant
9	Secretary of Agriculture	Sony Perdue
10	Secretary of Commerce	Wilbur L. Ross, Jr.
11	Secretary of Labor	Alexander Acosta
12	Secretary of Health and Human Services	Alex Azar
13	Sec. of Housing & Urban Development	Benjamin S. Carson
14	Secretary of Transportation	Elaine L. Chao
15	Secretary of Energy	James Richard Perry
16	Secretary of Education	Elizabeth Prince DeVos
17	Secretary of Veterans Affairs	Robert Wilkie
18	Secretary of Homeland Security	Kirstjen Nielsen

*H. Continuity of Government Commission*

Following the attack on the World Trade Center and the Pentagon on September 11, 2001, many concerns were raised about ensuring future governmental continuity.<sup>99</sup> Funded privately by the Carnegie, Hewlett, Packard, and MacArthur Foundations, The Continuity of Government Commission was founded in the fall of 2002 by the American Enterprise Institute and Brookings “to consider how each of our three branches of government might reconstitute themselves after a catastrophic attack on Washington, D.C. and to make recommendations for statutory and constitutional changes that would improve the continuity of our basic institutions.”<sup>100</sup> The Continuity of Government Commission issued two reports. The first of these, issued in June 2003, provided a plan for temporary appointments to the U.S. Senate and House of Representatives until special elections could be held in the event of attacks resulting

<sup>98</sup> See Jason Silverstein, *Here’s the Presidential Order of Succession—Just in Case*, N.Y. DAILY NEWS (May 17, 2017), <http://www.nydailynews.com/news/politics/presidential-order-succession-case-article-1.2973129#>.

<sup>99</sup> THE BROOKINGS INSTITUTE, *THE CONTINUITY OF THE PRESIDENCY: THE SECOND REPORT OF THE CONTINUITY OF GOVERNMENT COMMISSION* (July 2, 2009), [https://www.brookings.edu/wp-content/uploads/2016/06/06\\_continuity\\_of\\_government.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/06_continuity_of_government.pdf).

<sup>100</sup> *Id.* at 5.

mass incapacitations or vacancies.<sup>101</sup> The second report, issued by The Continuity of Government Commission on July 2, 2009:

[A]ddresses our system of Presidential succession and how we would replace a president after a catastrophic terrorist attack to ensure the proper functioning of our government. Unlike the current provisions for congressional continuity which do not include any institutional protections in the case of an attack causing mass vacancies or mass incapacitations, there is a Presidential succession system in place. However, it is the finding of this commission that the current system would be inadequate in the face of a catastrophic attack that would kill or incapacitate multiple individuals in the line of succession . . . .

The current constitutional and legal provisions fail to take into account the possibility of a catastrophic attack on Washington, D.C. Since all individuals included in the Presidential line of succession are based in our nation's capital, a catastrophic attack on the city could potentially kill or incapacitate many if not all of those individuals and cause significant confusion about who can assume the powers of the presidency. With the inclusion of members of Congress and acting cabinet secretaries in the line of succession, all of whom must resign from their current positions before assuming the presidency and then can be "bumped" from the presidency by an individual ranking higher in the line of succession, it is possible to have no one remaining in the line of succession. Current procedures leave our nation especially vulnerable at presidential inaugurations and State of the Union Addresses.<sup>102</sup>

The Continuity of Government Commission recommended the following changes in the order of succession for the presidency:

1. Vice President
2. Secretary of State
3. Attorney General
4. Followed by four or five newly appointed individuals residing outside of Washington, D.C.<sup>103</sup>

Within five months of situations developing where both the presidency and vice presidency became vacant during the first twenty-four months of a presidential term, The Continuity of Government Commission recommended that a special election should be held.<sup>104</sup> The removal of Congressional leaders and cabinet secretaries is also recommended in the belief that their succession may be unconstitutional and that such a change may help to limit confusion as to exactly who can assume power.<sup>105</sup> In addition to numerous other suggestions, the Continuity of Government Commission

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 5, 68.

<sup>103</sup> *Id.* at 68.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*



also recommends that incoming presidential nominees be appointed prior to the inauguration to ensure individuals will remain in the line of succession.<sup>106</sup>

### III. WOODROW WILSON

[Edith Wilson was dedicated to] protecting [her] husband's health and political fortunes. Sometimes this has led to hiding presidential illnesses, the most obvious 20th century case being that of Edith Bolling Wilson during her husband's final years of semi-invalidism in the White House after suffering successive strokes. The presidential physician colluded with Mrs. Wilson to hide the truth from almost everyone.

The National Commission on  
Presidential Disability and the  
Twenty-Fifth Amendment  
January 20, 1988<sup>107</sup>

While almost a century ago, the presidency of Woodrow Wilson provides a vivid example of how, unbeknownst to the public and much of the governmental leadership at the time, disabling health conditions has rendered objectively vacant the office of the presidency, with day-to-day duties abandoned or overseen largely by an ill-equipped spouse.<sup>108</sup> Thomas Woodrow Wilson served as President of the United States from 1913 until the election of 1920 when Warren G. Harding won the presidency.<sup>109</sup> Historian Thomas J. Knock writes:

Woodrow Wilson . . . occupies a secure position within the exclusive pantheon of great presidents. The domestic legislation that he signed into law and the new directions he chartered in foreign policy during World War I shaped the politics and diplomacy of the United States throughout the twentieth century and beyond. . . . It included the creation of the Federal Reserve System and the Federal Trade Commission, tariff reform . . . and to restrict child labor . . . .

Yet few presidents, after accomplishing so much, experienced a reversal of fortunes as tragic as the one that happened to Wilson in his second term.<sup>110</sup>

A brief account follows detailing some of President Wilson's frequent and progressive illnesses. These accounts vividly illustrate risks to the American public from presidential incapacity.

Historian H.W. Brands states that "in 1896 he [Wilson] suffered a cerebral incident, probably a minor stroke, that cost him the use of his right hand

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<sup>106</sup> *Id.* at 49.

<sup>107</sup> See COMMISSION ON PRESIDENTIAL DISABILITY, *supra* note 21.

<sup>108</sup> Carl Anthony, *Edith Wilson: The First, First Lady President*, BIOGRAPHY (March 10, 2016), <https://www.biography.com/news/edith-wilson-first-president-biography-facts>.

<sup>109</sup> A. SCOTT BERG, WILSON 693 (2013).

<sup>110</sup> See Thomas J. Knock, *One Long Wilderness of Despair: Woodrow Wilson's Stroke and the League of Nations*, in WHEN LIFE STRIKES THE PRESIDENT: SCANDAL, DEATH, AND ILLNESS IN THE WHITE HOUSE 105 (Jeffrey A. Engel & Thomas J. Knock eds., 2017).

temporarily . . . . In 1906 another apparent stroke, again minor, prompted a long holiday in Bermuda.”<sup>111</sup> Also during 1906, “his hypertension burst a blood vessel in his left eye, rendering him briefly blind, and permanently visually impaired, on that side. In 1908 he again lost the use of his right hand, again temporarily.”<sup>112</sup> Professor Brands continues:

As president, he took care to pace himself, to get sufficient rest and exercise, and for several years his hypertension appeared to be under control. But his efforts at the peace conference and in the fight for the league exacted a price. In April 1919 he experienced another cerebral incident. His doctor, Cary Grayson, denied that it was a stroke, telling Lloyd George and others that the president had simply caught the flu that was going around (the world) and that this exacerbated a long-standing nervous condition that produced a twitching of the face. Yet a neurologist summoned to examine the president concluded that the patient had suffered a “stroke so destructive as that it had made of him a changeling with a very different personality and a markedly lessened ability.” Others noticed the change as well. Ike Hoover, a veteran White House usher, said the president “was never the same” after the attack.<sup>113</sup>

#### A. *Seventeen Months of Deception*

Then, in July 1919, President Woodrow Wilson “experienced another incident, probably a small stroke. And beginning in late September . . . he suffered an attack that culminated in a major and incapacitating stroke.”<sup>114</sup> At this point in time:

Wilson was, in fact, experiencing a mental decline, which was discernible to others. On several occasions in late July and early August, he responded to queries about the Treaty with incorrect information—instances of recent actions and events that he could not recall. His once photographic memory began to blur. On August 8, 1919, he delivered to a joint session of Congress a dull address full of run-on sentences about the high cost of living.<sup>115</sup>

Professor Thomas J. Knock observes of Woodrow Wilson, “The stroke that he suffered in October 1919 engendered a political crisis without precedent—the first, and arguably the worst, instance of presidential disability in U.S. history.”<sup>116</sup> Historian Knock continues, “[t]his was not only an illness literally of constitutional magnitude; it also occurred at a crucial moment in world history when the Great War had come to an end and ratification of the Treaty of Versailles and American membership in the League of Nations hung in the balance.”<sup>117</sup> Historian Richard Striner tells the story of

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<sup>111</sup> H.W. BRANDS, *WOODROW WILSON* 123 (2003).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 124.

<sup>115</sup> See BERG, *supra* note 109, at 616.

<sup>116</sup> See Knock, *supra* note 110, at 106.

<sup>117</sup> *Id.*

how Wilson's "behavior was erratic, and the man who kept trying to emphasize self-control began to snap at his colleagues and subordinates."<sup>118</sup> In addition:

Wilson had been diagnosed with arteriosclerosis as early as 1906. His first wife, Ellen, had lamented the fact that hardening of the arteries . . . is an awful thing—a dying by inches, and incurable. There is reason to suspect that this condition was impacting Wilson's judgment well before the stroke that he suffered in October 1919. In light of the many strange things that he would say and do in the course of the war, one cannot avoid wondering how much of the tragedy was grounded in pathologies of blood circulation and brain physiology . . . as we behold the misjudgments of Wilson—the avoidance and fantasy and arrogance—we are torn between anger at this man who was capable of so much better at his best and lamentation in regard to ways in which his condition was perhaps not fully his fault.<sup>119</sup>

Historian Brands states, "[b]ut on October 2 he collapsed on the floor of the bathroom, where Edith found him, bloody and unconscious . . . but when he regained consciousness . . . [he] discovered that his left side was paralyzed . . . [from] another stroke, this far more serious and debilitating than any of the previous ones."<sup>120</sup> And now we get to a resulting summary of President Wilson's impaired physical and mental condition, "[p]lacing personal loyalty above public interest, Grayson [Wilson's personal physician] and Tumulty [attorney and Wilson's private secretary] issued a series of statements from the president's office that ascribed to nervous exhaustion and neurasthenia his failure to appear in public and otherwise perform his duties . . ."<sup>121</sup> Bottom line; "[f]or seventeen months [wife] Edith, Grayson, and Tumulty kept the true state of Wilson's condition secret from the American people, and during most of that period Edith served as the sole conduit between the president and the rest of the world."<sup>122</sup>

As to wife Edith Wilson's stewardship during President Wilson's illnesses and lack of capacity, A. Scott Berg observes:

Edith would admit two decades later . . . [while President Woodrow Wilson had diminished capacity] she would determine not only what matters should come before the President but also when. More than a mere sentry, the second Mrs. Wilson took it upon herself to filter and analyze every issue that required Presidential action, executing those duties to the best of her ability. As she explained: "I studied every paper, sent from the different Secretaries or Senators, and tried to digest and present in tabloid form the things that, despite my vigilance, had to go to the President." In insisting that she never "made a single decision regarding the disposition of public affairs," Mrs. Wilson failed to acknowledge the commanding nature of her role, that in determining the daily agenda and formulating arguments

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<sup>118</sup> See RICHARD STRINER, *WOODROW WILSON AND WORLD WAR I: A BURDEN TOO GREAT TO BEAR* 100 (2014).

<sup>119</sup> *Id.*

<sup>120</sup> See BRANDS, *supra* note 111, at 125.

<sup>121</sup> *Id.* at 126.

<sup>122</sup> *Id.*

thereon, she executed the physical and most of the mental duties of the office.<sup>123</sup>

Historical accounts of President Wilson's diminished physical and mental capacity is widely documented in numerous biographical publications, including "one White House visitor reported that Wilson remained 'a very sick man'—with a drooping jaw, vacant eyes, and a fixed scowl."<sup>124</sup> Historian Henry Wilkinson Bragdon states, "Wilson's behavior during this period of tension again suggests that he may have been suffering from an early mild attack of the cerebral arterial sclerosis that laid him low at the height of his fight for ratification of the League of Nations in 1919."<sup>125</sup>

The following passage seems very helpful in an attempt to better understand President Wilson's condition:

Based on the information they gathered for their psychological autopsy, William Bullitt and Sigmund Freud would later present an even bleaker picture. They pinpointed the breakdown [of Wilson] outside Pueblo, Colorado, as the virtual death of Thomas Woodrow Wilson, because from that moment forward, he was "no longer an independent human being but a carefully coddled invalid." He was at the mercy of unpredictable, often illogical synapses, a neurological system gone haywire. "The Woodrow Wilson who lived on," they determined, "was a pathetic invalid, a querulous old man full of rage and tears, hatred and self-pity."<sup>126</sup>

Despite that the facts surrounding Woodrow Wilson's illnesses and lack of mental and physical capacity, particularly during late 1919, take place approximately a century ago, the alarming issue remains that the presidency, the very top of the United States government was materially absent for many months. As biographer Berg writes:

And so began the greatest conspiracy that had ever engulfed the White House. With only virtuous intent, the plot unfolded—one that was hardly a scrupulous interpretation of the Constitution, which provided for "the Case of removal, Death, Resignation or Inability" of the President with the ascension of the Vice President "until the Disability be removed, or a President shall be elected." The devoted wife, the dedicated physician, and—soon—the devout secretary debated among themselves how to proceed, even though the legal issue ought not have been theirs to decide. But the Constitution provided neither means nor measures to determine Presidential disability, so they took the law of the land into their own hands, concluding what best served Woodrow Wilson best served the country. Their behavior tacitly acknowledged that this was a power grab, as they enshrouded the Presidency in as much secrecy as possible.<sup>127</sup>

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<sup>123</sup> See BERG, *supra* note 109, at 643.

<sup>124</sup> *Id.* at 682.

<sup>125</sup> See HENRY WILKINSON BRAGDON, *WOODROW WILSON: THE ACADEMIC YEARS 381–82* (1967).

<sup>126</sup> See BERG, *supra* note 109, at 682.

<sup>127</sup> See *id.* at 644.

## IV. DWIGHT D. EISENHOWER AND RICHARD M. NIXON

We must not gamble with the constitutional legitimacy of our Nation's executive branch. When a President or a Vice President of the United States assumes his office, the entire nation and the world must know without a doubt that he does so as a matter of right. Only a constitutional amendment can supply the necessary air of legitimacy.

Report of the Subcommittee on  
Constitutional Amendments of the  
Senate Committee on the Judiciary  
August 13, 1964<sup>128</sup>

For many years, the lives of Dwight D. Eisenhower and Richard M. Nixon were deeply intertwined. Biographer Irwin F. Gellman observes of President Eisenhower's 1955 heart attack, "[d]uring his recovery that fall and winter, Nixon assumed added responsibilities. Already overworked, he grew weary and suffered from insomnia; physicians prescribed barbiturates to relieve his symptoms. No one knew how incapacitated both the president and vice president were during that period."<sup>129</sup>

A. *Eisenhower Heart Attack*

Experiencing chest pain at 2:30 a.m. on Saturday, September 24, 1955, President Eisenhower was diagnosed "with acute coronary thrombosis" and given morphine to induce sleep.<sup>130</sup> Following an electrocardiogram, doctors confirmed Eisenhower suffered from a heart attack and the President was taken to Fitzsimons Army Hospital in Colorado.<sup>131</sup> Soon thereafter, Ann C. Whitman, personal secretary to President Eisenhower, started the process to determine the legal implications created by the president's heart attack. Reportedly:

She had talked to acting attorney general William Rogers . . . asking him to look into those issues. [Press Secretary James] Hagerty then talked to [Chief of Staff] Jerry Persons about the implications of long-term presidential disability. How would they handle the signing of official documents and the delegation of powers? Hagerty had no answers. They agreed that they should ask Rogers to examine the issues. Ten years later, in the wake of President Kennedy's assassination, the nation would pass the Twenty-Fifth Amendment to the Constitution to address the problem of presidential incapacity; but in 1955 there was only a vague provision in Article II that in the past had provided little guidance.<sup>132</sup>

A full four months later in January 1956, President Eisenhower traveled to the Naval Base in Key West, Florida, an environment more conducive to his recovery than

<sup>128</sup> S. REP. NO. 93-1382, at 9 (1964).

<sup>129</sup> See IRWIN F. GELLMAN, *THE PRESIDENT AND THE APPRENTICE: EISENHOWER AND NIXON, 1952-1961*, 11 (2015).

<sup>130</sup> See *id.* at 260.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 261.

his home in Gettysburg.<sup>133</sup> Biographer Gellman remarks of this time that Eisenhower “rested a minimum of half an hour before lunch, and afterwards, relaxed an hour in an easy chair. Every hour during an extended gathering, he needed to leave the room for ten minutes and be alone to rest.”<sup>134</sup> Richard Nixon provides the following reflection about this experience:

Anyone, I think, can imagine 2 dozen troublesome contingencies which might become involved in passing the powers of a President to a Vice President, and constitutional lawyers, who have studied the question for more than a hundred years, can think of 200 more. President Eisenhower, after studying the problem closely, was intent on solving the practical problem of giving his Vice President the authority to act immediately in a crisis, if necessary. He mentioned several alternatives, but kept coming back to the idea of writing a letter which would give the Vice President alone the authority to decide when the President was unable to carry on—that is, when the President himself was unable to make the decision.

In early February, the President called Rogers and me into his office, commented that he thought he had licked the problem, and handed each of us a copy of a letter. Then he leaned back in his chair and, while we followed on our copies, he read a four-page letter to us, beginning, “Dear Dick.” We made some minor suggestions and he incorporated them into the letter and then sent it to his secretary, Ann Whitman, for final typing. Marked “Personal and Secret,” one copy went to me, one to Bill Rogers as Attorney General, and one to John Foster Dulles, as Secretary of State and ranking member of the Cabinet . . . .

This letter established historical precedent. Eisenhower was the first President in American history to take cognizance of and act upon a serious gap in our Constitution. President Kennedy, even before his inauguration, drew up an identical list of procedures for his Vice President, Lyndon Johnson, to follow in exercising the rights and duties of the President in the event of Kennedy’s incapacity. The new administration adopted in its entirety the section of the Eisenhower letter which was made public . . . .

But what must be clearly understood is that the agreement President Eisenhower set forth in his letter to me, and the one President Kennedy has entered into with Vice President Johnson, are only as good as the will of the parties to keep them. Presidents and Vice Presidents have not always had the mutual trust and the cordial relations President Eisenhower had with me or that President Kennedy has had with Vice President Johnson up to this time. Jealousies and rivalries can develop within an administration which could completely destroy such an agreement.

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<sup>133</sup> *Id.* at 272.

<sup>134</sup> *Id.*

Only a constitutional amendment can solve the problem on a permanent basis.<sup>135</sup>

Irwin Gellman writes, “[t]he president’s heart attack tested how well his administration responded to such an unexpected and devastating event . . . . It also was fortunate that no pressing domestic or international crises erupted.”<sup>136</sup> The experience of President Eisenhower’s three illnesses caused Attorneys General William P. Rogers and Herbert Brownell to propose language to achieve “a method for determining the commencement and termination of a President’s inability, and would not require further action by Congress.”<sup>137</sup>

#### B. Richard M. Nixon

Beginning in January 1952, Vice President Richard Nixon reportedly saw physician Arnold Hutschnecker on numerous occasions.<sup>138</sup> Given the constant pressure of political campaigns and stress of public office, Nixon is reported to often complain of “a tired feeling and tension.”<sup>139</sup> Of importance to our inquiry, then Vice President Nixon’s physician during spring 1956:

[H]ad prescribed several medications to relieve the vice president’s tension and insomnia. Nixon was taking three Equanil, a tranquilizer, during the day and considering reducing that amount. He also took Dexamyl, a stimulant that could elevate mood and lead to psychic dependence . . . . During the evening, he had two or three drinks, which made him “feel good.” Before going to sleep, he had half a Doriden, a potentially addictive drug for those who had trouble sleeping, and if he awoke during the night, he took another half . . . .

During the 1950s, this was the standard of care. All of these drugs were popular and regularly prescribed. Doriden, in higher dosages, was a hypnotic; Equanil was possibly habit forming and discontinued in the 1960s; Seconal was discouraged except for short periods. These drugs were often called “downers.” Dexamyl was a potentially addicting “upper.” Sleeping pills did not have time-released components and usually lasted for four hours; if you awoke, it was customary to take another one to get you back to sleep . . . .

According to Dr. Nikitas Zervanos, who practiced medicine during the 1950s, Nixon was one of many patients who, at least temporarily, “probably abused mood altering medications and needed them for purposes of

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<sup>135</sup> *Hearing on Presidential Inability*, *supra* note 9, at Exhibit No. 4, citing RICHARD M. NIXON, *SIX CRISES* 178–180 (1962).

<sup>136</sup> *See* GELLMAN, *supra* note 129, at 272.

<sup>137</sup> *See Hearing on Presidential Inability*, *supra* note 9 (statement of Estes Kefauver, Chairman of the S. Comm. on Const. Amendments).

<sup>138</sup> *See* GELLMAN, *supra* note 129, at 274.

<sup>139</sup> *Id.* at 276.

keeping him stimulated (uppers) or at other times to sedate (downers) him.”<sup>140</sup>

Other examples of serious health concerns are attributed to Richard Nixon. In *Six Crises*, his first memoir, Nixon describes the time period before reelection nomination as being “‘thrown into another period of agonizing indecision, which more than any overt crisis takes a heavy toll mentally, physically, and emotionally’ [and] while that description might sound exaggerated, it was in fact an understatement.”<sup>141</sup> Again, like many other politicians at that time and throughout history, Nixon “‘tried to keep health concerns hidden from media scrutiny.”<sup>142</sup> During the first six months of 1956 alone, Nixon is reported to have secretly consulted at least ten different physicians, keeping “his flu, tension, insomnia, and other health problems secret, along with the drugs he was taking to relieve his symptoms. He was able to conceal these problems because he was not required to report them to the public.”<sup>143</sup> And here is why, once again, the health of both the president and vice president has implications for the future of the planet. While President Eisenhower’s heart attack and recovery was well known at the time, Nixon’s failure of candor regarding his health “means that at the height of the Cold war, both the president and the vice president could easily have been simultaneously incapacitated, leaving no one responsible for governing. Those health conditions were never known at the time and, fortunately for the nation, their potential consequences were never tested.”<sup>144</sup> Concern about Richard Nixon’s mental health and reaction to stress while serving as President is treated separately, later in this Article.<sup>145</sup>

#### V. JOHN F. KENNEDY

The office’s unremitting responsibilities accompany the president wherever he goes. In these times, a president is never away from means of instant communication with any department of the United States government and with almost any foreign government. Always within reach is the “football,” containing secret codes that enable the president to signal this country’s immediate response if ever it should face a nuclear attack. Even while asleep, a president is always on call, and his aides will rightfully be criticized if, upon learning of a major calamity or an alarming threat to the nation, they do not inform the president immediately.

The National Commission on  
Presidential Disability and the  
Twenty-Fifth Amendment January  
20, 1988<sup>146</sup>

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<sup>140</sup> *Id.* at 277.

<sup>141</sup> *Id.* at 280.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 283.

<sup>144</sup> *Id.* at 284.

<sup>145</sup> See *infra* Section VII.

<sup>146</sup> See COMMISSION ON PRESIDENTIAL DISABILITY, *supra* note 21.



Historian Robert Dallek provides a detailed account of how President Jack Kennedy was far sicker than understood at the time.<sup>147</sup> A war hero while in the Navy, young Kennedy had many health problems: back injury resulting in almost constant pain;<sup>148</sup> gastro-intestinal disease;<sup>149</sup> early duodenal ulcer;<sup>150</sup> trouble digesting food;<sup>151</sup> irritable colon;<sup>152</sup> Addison's disease;<sup>153</sup> arthritis;<sup>154</sup> malaria;<sup>155</sup> and Crohn's disease.<sup>156</sup> Numerous hospitalizations were required over many years.<sup>157</sup>

#### A. Pain and Narcotics

According to Robert Dallek, "Kennedy knew he could not afford to show any signs of . . . any indication of physical or psychological fatigue[.] Thus, in response to the reporters question about his health, he declared himself in 'excellent' shape and dismissed rumors of Addison's disease as false."<sup>158</sup> Dallek also documents a long list of medications taken by Kennedy at various times of his life, including: amphetamines;<sup>159</sup> codeine sulfate;<sup>160</sup> desoxycorticosterone acetate;<sup>161</sup> Ritalin;<sup>162</sup> steroids;<sup>163</sup> and testosterone;<sup>164</sup> just to name a few. From his time in the Navy, back injuries had required "large doses of narcotics."<sup>165</sup>

The health of any one human being is always very fragile and can turn in a heartbeat. The extent to which the fate of the world can depend on the judgment of a single human being, and his or her ability to reason, is captured by historian Dallek in the following passage discussing the Cuban missile crisis:

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<sup>147</sup> See DALLECK, *supra* note 29.

<sup>148</sup> *Id.* at 100, 104.

<sup>149</sup> *Id.* at 103.

<sup>150</sup> *Id.* at 101.

<sup>151</sup> *Id.* at 104.

<sup>152</sup> *Id.* at 102.

<sup>153</sup> *Id.* at 105.

<sup>154</sup> *Id.* at 213.

<sup>155</sup> *Id.* at 101, 105.

<sup>156</sup> *Id.* at 77.

<sup>157</sup> *Id.* at 33–35, 42, 46, 69, 73–81, 86, 100–105, 191, 195–97, 200, 212.

<sup>158</sup> *See id.* at 300.

<sup>159</sup> *Id.* at 398–99.

<sup>160</sup> *Id.* at 471.

<sup>161</sup> *Id.* at 76–77, 80–81, 104, 153, 195.

<sup>162</sup> *Id.* at 471.

<sup>163</sup> *Id.* at 76, 86, 104–05, 123, 156, 195–96, 211, 213, 267, 275, 423.

<sup>164</sup> *Id.* at 471.

<sup>165</sup> *Id.* at 102.

The public had only a limited understanding of how resolute Kennedy had been. Health problems continued to dog him during the crisis. He took his usual doses of antispasmodics to control his colitis; antibiotics for a flareup of his urinary tract problem and a bout of sinusitis; and increased amounts of hydrocortisone and testosterone as well as salt tablets to control his Addison's disease and increase his energy. Judging from the tape recordings of conversations made during the crisis, the medications were no impediment to long days and lucid thought; to the contrary, Kennedy would have been significantly less effective without them and might not even have been able to function. But the medicines were only one element in helping him focus on the crisis . . .

On November 2, he took 10 additional milligrams of hydrocortisone and 10 grains of salt to boost him before giving a brief report to the American people on the dismantling of the Soviet missile bases in Cuba. In December, Jackie asked the president's gastroenterologist, Dr. Russell Boles, to eliminate antihistamines for food allergies. She described them as having a "depressing action" on the president and asked Boles to prescribe something that would ensure "mood elevation without irritation to the gastrointestinal tract." Boles prescribed 1 milligram twice a day of Stelazine, an antipsychotic that was also used as an anti-anxiety medication. When Kennedy showed marked improvement in two days, they removed the Stelazine from his daily medications.<sup>166</sup>

#### VI. LYNDON JOHNSON

Americans demand much from their presidents. They practically require them to be superhuman in all circumstances—cool in moments of stress, compassionate amidst tragedy, resolute in time of war. Yet they are also human. Presidents bleed, grieve, and err like any other citizen . . .

Jeffrey A. Engle  
Thomas J. Knock  
Presidential Historians<sup>167</sup>

Abruptly catapulted into the presidency upon the assignation of John F. Kennedy, much has been written about Lyndon Johnson.<sup>168</sup> As he assumed office, the weight of the very unpopular war in Vietnam had resulted in street protests having become an almost daily occurrence.<sup>169</sup> Since childhood, Lyndon Johnson had suffered from insecurities and feeling unloved resulting from his treatment by a demanding

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<sup>166</sup> *Id.* at 576.

<sup>167</sup> See ENGEL & KNOCK, *supra* note 1, at 1.

<sup>168</sup> See generally CHARLES PETERS, LYNDON B. JOHNSON (2010); VAUGHN D. BORNET, THE PRESIDENCY OF LYNDON B. JOHNSON (1983); LYNDON JOHNSON REMEMBERED: AN INTIMATE PORTRAIT OF A PRESIDENCY (Thomas W. Cowger & Sherwin J. Markman eds., 2003).

<sup>169</sup> Tom Wells, *Vietnam Antiwar Movement*, in THE OXFORD COMPANION TO MILITARY HISTORY (2004).

mother.<sup>170</sup> Historian Randall Woods documents that Lyndon Johnson suffered from fits of depression and that he would “withdraw, sometimes for days on end . . . . There were intimations of a split personality.”<sup>171</sup> In addition:

Charles Marsh, the media mogul and oilman, who was Johnson’s sponsor and cuckold, thought LBJ was bipolar. Marsh knew from experience, having himself been treated several times for manic depression. LBJ’s physician, J. Willis Hurst, later speculated on the possibility that the president suffered from a bipolar disorder: “Extremely interesting people do display many emotions, ranging from anger, to humor to unpredictability, to all kinds of things; up to a point this of course is entirely normal. . . .” His thin skin, his inability to satisfy his expectations of himself, led to subpar health. Not only was there the near-fatal 1955 heart attack but no fewer than six cases of pneumonia, recurrent kidney stones, and two hernia operations.<sup>172</sup>

For any president and those working on crisis situations, physical exhaustion is a common result. For example, Joseph A. Califano served as Secretary of Health, Education and Welfare and as President Johnson’s top White House domestic policy aide.<sup>173</sup> Califano describes that a meeting about the war in Vietnam on February 27, 1968:

[W]as the most depressing three hours in my years of public service. My job left me on the periphery of the war. This was the first time since early 1966 that I had heard the President’s advisors in an intimate discussion of Vietnam. McNamara, Katzenbach, and Bundy were beyond pessimism. They sounded a chorus of despair. Rusk appeared exhausted and worn down.<sup>174</sup>

Secretary Califano describes the health of Lyndon Johnson in another situation months later by writing, “[t]he President was slumped in his chair and he looked very tired. He said he knew he was tired because of his eyes. ‘They hurt and they always hurt when I’m very tired.’”<sup>175</sup> Medical doctors Hyman L. Muslin and Thomas H. Jobe provide a psychologically focused account of Lyndon Johnson in their 1991 book, *Lyndon Johnson, The Tragic Self: A Psychohistorical Portrait*, when they write about his multidimensional personality:

To be comprehensive, this list of Johnson’s myriad personalities must include immobilization by ineptitude and fear of failure; chronic fears of the “enemy”—usually Bobby Kennedy—or the “intellectuals” who might

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<sup>170</sup> See Randall B. Woods, *Lyndon Johnson at Home and Abroad*, in *WHEN LIFE STRIKES THE PRESIDENT: SCANDAL, DEATH, AND ILLNESS IN THE WHITE HOUSE* 211 (Jeffrey A. Engel & Thomas J. Knock eds., 2017).

<sup>171</sup> *Id.* at 214.

<sup>172</sup> *Id.* at 215.

<sup>173</sup> See JOSEPH A. CALIFANO, *THE TRIUMPH & TRAGEDY OF LYNDON JOHNSON: THE WHITE HOUSE YEARS* (1991).

<sup>174</sup> *Id.* at 263.

<sup>175</sup> *Id.* at 269.

find a soft spot in him to attack; his incapacity to share his emotional neediness with anyone, coupled with the need to maintain a vigilant posture of the grandiose self toward his surround. There is the inability to “self-calm,” to subdue his agitation, manifest in the constant activity, usually described as his enormous *energy*; the painful and feared states of emptiness and loneliness; the lack of self-worth, coupled with his insistence on always being the victor, holding center stage, and thereby the admiration of others; his sycophancy evident from adolescence, toward sources of power; the absence of a fixed constellation of values, which permitted him to ally himself with various and sometimes opposing groups and sources of power without experiencing shame or guilt (Caro, 1983; Kearns, 1976; Johnson, 1969; Evans & Novak, 1966; Goldman, 1969; Mooney, 1973; Steinberg, 1968).<sup>176</sup>

Doctors Hyman L. Muslin and Thomas H. Jobe also point to the period in Lyndon Johnson’s life when he “lost the race to become the Democratic candidate for president to Jack Kennedy in 1960, he accepted the vice-presidential slot . . . with the loss of the power . . . as Majority Leader in the Senate, Johnson became deflated and looked and acted clinically depressed (Kearns 1976).”<sup>177</sup> Historian Mark Updegrove observes:

One wonders if the melancholy that [Bill] Moyers and others observed in Johnson was due to another factor entirely. Johnson’s extreme sensitivity, irascibility, portents of bleakness, titanic mood swings, even his monthly fluctuations in weight—all were hallmarks of depression, however mild. . . . Depression may also explain both Johnson’s often erratic behavior and, given the enormity of the burdens he carried in the presidency—almost as formidable as those carried by Lincoln, particularly in Johnson’s last years in office . . . .<sup>178</sup>

Lyndon Johnson had another health issue that is reported to have weighed heavily on his thinking, as he stated in 1964 while considering a run for the presidency, “[t]he men in my family die early,” . . . memories of his near-fatal heart attack in 1955 were there to remind him of his fragile hold on whatever life he had left.”<sup>179</sup>

Doctors Muslin and Jobe document the opinion of George Reedy, a top aide to President Johnson and others:

A further aspect of his hostile leadership was his difficulty—in reality, his inability—to apologize when one of his commands or positions was found to be inaccurate or invalid. No one ever heard Lyndon Johnson admit being wrong or inept. Even after having been proved wrong, he could not endure being in error and the consequent loss of self-worth (Sam Houston Johnson, 1969). The domination he exerted over his dominion—from the ties his male aides wore, to the amount of lipstick his wife used, to the papers left

<sup>176</sup> See HYMAN L. MUSLIN & THOMAS H. JOBE, *LYNDON JOHNSON, THE TRAGIC SELF: A PSYCHOHISTORICAL PORTRAIT* 8 (1991).

<sup>177</sup> *Id.* at 145.

<sup>178</sup> See MARK K. UPDEGROVE, *INDOMITABLE WILL: LBJ IN THE PRESIDENCY* 121 (2012).

<sup>179</sup> *Id.* at 262.

on desks . . . . In Johnson's family, however, all the members—aides, wife, children—worked for him. Johnson was on everyone's case, constantly hounding, constantly exhorting his army to work harder, even though he paid them relatively little . . . .

As a human being, he was a miserable person—a bully, sadist, lout, and egotist. He had no sense of loyalty (despite his protestations that it was the quality he valued above all others) and he enjoyed tormenting those who had done the most for him. He seemed to take a special delight in humiliating those who had cast in their lot with him. It may well be that this was the result of a form of self-loathing in which he concluded that there had to be something wrong with anyone who would associate with him.<sup>180</sup>

In sum, following his 1955 heart attack, Lyndon Johnson's health seems to be something he worried about even before assuming the presidency. Professor Randall Woods writes, "despite his bipolar tendencies—his uncontrollable outbursts and overreaction that were so apparent . . . the president's judgment was not on the whole impaired by mental illness. The Texan, though extremely intelligent, was intellectually limited, and those limitations led at times to his intense frustration."<sup>181</sup> Professor Woods states:

In assessing Lyndon Johnson's performance in the light of the recurrent crises of his mental health, it is important to note that the issue may also be overshadowed by questions regarding his physical well-being. His decision to announce, on March 31, 1968, that he would neither seek nor accept his party's nomination for another term as president stemmed in part from his perception that he had expended all of his political capital; that further domestic reform was impossible, given the urban violence and white backlash that gripped the nation; and that removing himself from the national politics might lead to a more reasonable public discourse on the war in Vietnam. But his abdication was prompted as well by his personal physician's dire warning that he would most certainly not live to see the end of another term. Johnson's 1955 heart attack had nearly killed him, and heart failure would cause his demise in 1972. Indeed, so sure that the stresses of the job would kill her husband, Lady Bird purchased a black dress for the funeral in the fall of 1967. The counterfactual question most often asked about presidents of the Cold War era is what might have happened if Kennedy had lived? But an equally intriguing question is what if LBJ had been healthy enough to keep Richard Nixon out of the Oval Office?<sup>182</sup>

## VII. RICHARD NIXON

His depression deepened in the coming months and recurred more frequently as circumstances at home and abroad worsened. Even a decisive reelection in November 1972 could not stop the pain. Nixon felt himself

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<sup>180</sup> See MUSLIN & JOBE, *supra* note 176, at 19, 23.

<sup>181</sup> See Woods, *supra* note 170, at 227.

<sup>182</sup> *Id.* at 228.

sinking. As he punched at those whom he feared were pushing him under the water, he only gave them more ammunition to hasten his drowning. Depression bred hatred and illegality, which made the most powerful man in the world a sobbing wreck, forced from the office he had struggled so hard to attain.

Jeremi Suri  
Historian<sup>183</sup>

A discussion regarding Richard Nixon's tenure as Vice President to President Dwight D. Eisenhower is presented previously.<sup>184</sup> Presented here is a brief description of concerns about President Nixon's mental health during his presidency. In sum, historian and Professor Jeremi Suri describes Richard Nixon as "a troubled, insecure, and brooding man who often expected the worst and acted in ways that brought on those dreaded consequences. The political scandal known as Watergate, which ultimately eroded his presidency, was a result of Nixon's depression and so were other distortions of domestic and foreign policy."<sup>185</sup> Because of Vietnam, President Nixon inherited an unpopular war; "Nixon entered the White House with a fragile ego and acute sensitivity to the insults he had long endured from leading figures in American society."<sup>186</sup> In addition:

The weight of these challenges and Nixon's isolation from the public, partially self-imposed, contributed to the president's evident bouts of depression. Nixon functioned reasonably well in most public settings, but descended into self-pity, paranoia, and vengeance during private meetings and personal musings. His fears of his enemies multiplied, his sense of victimhood deepened, and his premonitions of failure grew.<sup>187</sup>

The impact of long-term stress and crisis seems to have an impact on physical and mental health. As historian Jeremi Suri writes:

The emotional toll on Nixon was evident to all who worked with him. He could not sleep. He was preoccupied. He displayed the dark and depressive elements of his personality that often appeared in moments of greatest stress. . . . His chief of staff, H.R. Haldeman, commented in his diary that Nixon was dejected, tired, and terribly in need of rest. The president's national security advisor, Henry Kissinger, expressed similar sentiments, registering "deep concern" about Nixon's attitude and his health. Secretary of State William Rogers agreed with Kissinger, which was rare. Rogers and Kissinger both believed that Nixon needed relief from the extreme pressures of the office.<sup>188</sup>

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<sup>183</sup> See Jeremi Suri, *A Depressed and Self-Destructive President: Richard Nixon in the White House*, in *WHEN LIFE STRIKES THE PRESIDENT: SCANDAL, DEATH, AND ILLNESS IN THE WHITE HOUSE* 234, 251 (Jeffrey A. Engel & Thomas J. Knock eds., 2017).

<sup>184</sup> See *infra* Section IV.

<sup>185</sup> See Suri, *supra* note 183, at 234.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 235.

<sup>188</sup> *Id.* at 237.

Very early on the morning of May 9, 1970, after what is reportedly only two hours of sleep, President Nixon made a visit to the Lincoln Memorial to talk with protesters presumably to persuade them to the wisdom of Nixon's views about prosecuting the war in Vietnam.<sup>189</sup> Of this day Professor Suri writes, "Nixon was in a psychologically unstable state, as most people around him recognized, and his erratic behavior (as well as his later efforts to disguise it) grew out of that personal condition."<sup>190</sup> In addition:

The most persuasive explanation for the events at the Lincoln Memorial and Nixon's subsequent impulsive and self-destructive acts is that he suffered from intermittent but acute bouts of depression. When he felt helpless, as he did in early May 1970 (and in many other moments before and after) Nixon became convinced that the world was out to get him, with powerful forces committed to his failure. Even as president, he often perceived himself as a victim, as an outsider (from Whittier, California) suffering from unfair treatment by powerful insiders (Ivy League graduates, Jews, Kennedys, and Rockefellers). Nixon felt failure was almost unavoidable, he expressed self-pity, he lost sleep, and he pushed people away, including family and his wife, Pat.<sup>191</sup>

So, to what extent should the American public be concerned about a president undergoing a personal mental health crisis? Can citizens depend on Congressional oversight to protect them in the event of presidential mental incapacity? What about when the Congress is of the same political party? Looking again at the case of Richard Nixon through the eyes of an historian, his "demands often had serious consequences, especially when they involved his targeting of real and perceived enemies. The wire-tappings, break-ins, and cover-ups that began in Nixon's first months in office in 1969, were facilitated by Haldeman, Ehrlichman, Kissinger, and others."<sup>192</sup> Nixon's secret recordings of his oval office and telephone conversations started in February 1971 and lasted until July 1973. Jeremi Suri writes:

On the tapes he frequently becomes unhinged, issuing rambling tirades about critics and self-justifying soliloquies about his "toughness," his "will," and his "balls." Nixon reportedly seeks validation from his advisors, but he never gets enough. The more they praise him, the more of it he demands. His efforts to gain validation only reinforce his feelings of inferiority and his lonely isolation.

The tapes recount more than just stray salacious comments that Nixon's defenders want to dismiss. The tapes show a powerful man paralyzed by a self-defeating personality. The pattern of rhetoric and rant is one of a man who is filled with hate and self-doubt, and scared of hostile forces.<sup>193</sup>

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<sup>189</sup> *Id.* at 237, 238.

<sup>190</sup> *Id.* at 239.

<sup>191</sup> *Id.* at 240.

<sup>192</sup> *Id.* at 240–41.

<sup>193</sup> *Id.* at 240.

## VIII. RONALD REAGAN AND GEORGE H.W. BUSH

What happens when life strikes the President of the United States and, specifically, how personal crises—in the form of illness, the loss of a loved one, and scandal—have throughout American history shaped presidential decision making in critical moments, at times altering the course of events and the fate of the nation.

Jeffrey A. Engle  
Thomas J. Knock  
Presidential Historians<sup>194</sup>

## A. Assassination Attempt on Reagan

On Monday March 30, 1981, John W. Hinckley, Jr., who suffered from mental illness, shot President Ronald Reagan outside the Washington Hilton Hotel.<sup>195</sup> Hinckley had wounded four individuals with his .22-caliber pistol and President Reagan was taken to George Washington University hospital.<sup>196</sup> President Reagan's physician, Dr. Daniel Ruge, "was in the entourage that rushed Reagan to the hospital."<sup>197</sup> Dr. Ruge had the following statement when asked by The Commission about whether use of the Twenty-Fifth Amendment was considered at the time of crisis:

It was discussed. There is a big difference between Dan Ruge on March 30, 1981, after a shooting when he'd only been on the job two months for one thing, and what Dan Ruge would have been like four years later [at the time of Reagan's colon cancer operation] when he would have actually had time from April 1981 to July 1985 to think about it. I think very honestly in 1981, because of the speed of everything and the fact that we had a very sick president, that the 25th Amendment would never have entered my mind even though I probably had it in my little black bag. I carried it with me. The 25th Amendment never occurred to me.

Q: You think it would have occurred to you if the shooting had happened four years later?

Dr. Ruge: Yes.<sup>198</sup>

Vice President George Herbert Walker Bush had just left Fort Worth Texas and was on his way to Austin when, according to historian Jon Meacham, Vice President Bush was handed a decoded telex informing him:

The president was struck in the back and is in serious condition . . . .  
Medical authorities are deciding now whether or not to operate.  
Recommend you return to D.C. at the earliest possible moment . . . . The

<sup>194</sup> See ENGEL & KNOCK, *supra* note 1, at 1–2.

<sup>195</sup> See JON MEACHAM, *DESTINY AND POWER: THE AMERICAN ODYSSEY OF GEORGE HERBERT WALKER BUSH* 272 (2015).

<sup>196</sup> *Id.* at 273.

<sup>197</sup> See COMMISSION ON PRESIDENTIAL DISABILITY, *supra* note 21.

<sup>198</sup> *Id.*



scope of what was happening was clearer, and more frightening . . . . From the hospital, Meese told Bush that Jerry Parr's decision to go straight to the emergency room had probably saved Reagan's life. The president was still in surgery. News of his condition and prognosis—presuming he survived—was several hours away . . . . The White House counsel, Fred Fielding, was at work on the mechanics of invoking the Twenty-Fifth Amendment in the event Reagan remained unconscious for a long period. "They're preparing papers for the transfer of authority if that becomes necessary," Bush told his staff aboard Air Force Two.<sup>199</sup>

### *B. Reagan's Surgery*

On July 16, 1985, *The New York Times* reported that President Ronald Reagan underwent surgery to remove two feet of intestine around a polyp.<sup>200</sup> The Commission reports three just days earlier, on July 13, 1985:

Reagan signed a letter in which he specifically stated that he was "mindful of the provisions of Section 3." However, he did "not believe that the drafters of this Amendment intended its application to situations such as the instant one." He went on to say, "[n]evertheless, consistent with my long-standing arrangement with Vice President George Bush, and not intending to set a precedent binding anyone privileged to hold this Office in the future," he was passing to the vice president his "powers and duties . . . commencing with the administration of anesthesia to me in this instance."<sup>201</sup>

It further appears that in the case of Ronald Reagan's 1985 surgery, that no decision to apply Section 3 had been made up until the last minute.<sup>202</sup> The Commission reports that counsel to the president, Fred Fielding testified:

Let's go back to the week before the operation. We knew—some of us knew—and I forget when it became public, that the President was going to have his physical. We knew at the time that he was going to have a form of anesthesia, to have the procedure that occurred on Friday, if I recall my dates correctly. He was operated on Saturday, got a procedure on Friday. What was going to happen was that there was a possibility that if something was found that they would have to instantly put the President under. I used that as an opportunity the preceding week to schedule a meeting with the President and the Vice President and Don Regan (then chief of staff). We sat in the Oval Office and we discussed the whole situation: the National Command Authority plus the President's desires on passage of power temporarily if he were suddenly temporarily incapacitated . . . .

The decision was obvious that unless something unexpected occurred on Friday there would be no need for the 25th Amendment in any way, shape

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<sup>199</sup> See MEACHAM, *supra* note 195, at 274–75.

<sup>200</sup> See RICHARD REEVES, *PRESIDENT REAGAN: THE TRIUMPH OF IMAGINATION* 266 (2005).

<sup>201</sup> See COMMISSION ON PRESIDENTIAL DISABILITY, *supra* note 21.

<sup>202</sup> *Id.*

or form. But Don Regan called me down late afternoon on that Friday and said, “We’ve got some problems with the health exam.” And we went through the whole drill—if you will—of what is to be done and where is the Vice President, and what is the press to be advised of and what is not to be told, and the normal procedures that you go through. One of the subjects obviously was the 25th Amendment. I can tell you, and I think it is important for the sake of history, that when we left, no decision of a recommendation to the President had been made although we knew the procedures. I drafted basically two letters: one was a little flushing out of the letter that was already in the book, and the other was basically the letter that the President actually signed.<sup>203</sup>

Professor Richard Reeves observes, “[e]xcept for the President’s thirty-minute State of the Union message . . . Reagan was barely visible in early 1987.”<sup>204</sup> Reagan’s absence from public view for almost six months results from his recovery from minor prostate surgery at Bethesda Naval Hospital, and also happens to correspond with the timing of the first official report about the Iran-Contra controversy.<sup>205</sup> Then, on June 28, 1987 a front page story runs in *The New York Times* under the headline, “Reagan’s Ability to Lead Nation at a Low, Critics and Friends Say,” reporting that “Reagan seemed depressed, particularly by polls indicating the public no longer believed what he was telling them, and that he no longer trusted his own staff after reading and watching the revelations of Iran-contra.”<sup>206</sup> In addition:

Aides said that the President did not bounce back, as the White House has publicly asserted, from his most recent surgery, on the prostate gland last January. And more than ever he is showing signs of his 76 years, so much so that his memory lapses and rambling discourse are no longer a source of friendly jokes, but one of concern, friends say . . . . Public signs are emerging. At a recent news conference, for instance, the President was unable to remember the name of the United Nations Security Council.<sup>207</sup>

Professor Richard Reeves reports in his book published in 2005 that, as of that date, “[m]ore than nine hundred books have been written about Ronald Reagan since he left the White House.”<sup>208</sup> During the time following publication of the Reeves biography no doubt additional titles are now available. However, I believe sufficient discussion appears above to describe President Reagan’s delicate health.

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<sup>203</sup> *Id.*

<sup>204</sup> See REEVES, *supra* note 200, at 375.

<sup>205</sup> *See id.*

<sup>206</sup> *Id.* at 403.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 489.

*C. Health of George H.W. Bush*

George Herbert Walker Bush, forty-first president of the United States, served from January 20, 1989 until January 20, 1993.<sup>209</sup> Generally in good health for a man of age sixty-six, on May 4, 1991 President Bush complained of fatigue while and after running.<sup>210</sup> An EKG revealed a heartbeat irregularity or fibrillation.<sup>211</sup> As historian Jon Meacham writes:

His doctors told him that they might have to put him under a general anesthetic and use electrical shock to restore his heartbeat to its regular rhythm . . . . Such a step would have required him to transfer power, albeit very briefly, to Vice President Quayle, and Bush, alone in the night after Barbara had returned to the White House after kissing her husband goodbye, thought that his condition might be more serious than he had first thought . . . .

His doctors had found that Bush was suffering from Graves' disease, which had also afflicted Barbara since 1989. "An overactive thyroid," wrote *New York Times* medical correspondent Lawrence K. Altman, "can cause symptoms like nervousness, restlessness, hyperactivity and weight loss." He would have to forgo alcohol for a time . . . .

Bush's overactive thyroid had led to his excessively rapid heart rate (the atrial fibrillation). Now that the doctors had handled the fibrillation through medication . . . the question turned to treating his Graves' disease . . . . Bush's doctors introduced medication . . . [but] "[i]t was a difficult balancing act," recalled [a] White House physician . . . If we did not have the medication exactly right, then he . . . would have less energy and less focus than he had in the first part of his presidency . . . . "To those of us who watched him carefully, the old zip was gone," recalled Marlin Fitzwater.<sup>212</sup>

IX. DONALD J. TRUMP

But whatever emerges from Robert Mueller's investigation, it should not obscure the bigger story, which is still not adequately understood . . . namely that Russia has been actively seeking to damage the fabric of American democracy, and the Trump Administration's glandular aversion to even looking at this squarely, much less mounting a concerted response to it, is an appalling national security lapse.

Michael V. Hayden  
Former Director,  
National Security Agency (NSA)

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<sup>209</sup> *George H. W. Bush*, WHITEHOUSE.GOV, <https://www.whitehouse.gov/about-the-white-house/presidents/george-h-w-bush/> (last visited Feb. 14, 2019).

<sup>210</sup> See MEACHAM, *supra* note 195, at 472.

<sup>211</sup> *Id.* at 473.

<sup>212</sup> *Id.* at 474.

Central Intelligence Agency (CIA)<sup>213</sup>

On Saturday morning September 22, 2018, readers of *The New York Times* awoke to read a page one story about how the deputy attorney general, Rod J. Rosenstein had previously advocated the secret White House recording of President Trump, “to expose the chaos consuming the administration, and he discussed recruiting cabinet members to invoke the 25th Amendment to remove Mr. Trump from office for being unfit.”<sup>214</sup>

A. *Concern at the Highest Levels of Government*

The *Times* story had been widely reported the afternoon before, placing Rosenstein’s spring 2017 suggestion after President Trump’s firing of F.B.I. director James B. Comey and having “plunged the White House into turmoil. Over the ensuing days, the president divulged classified intelligence to Russians in the Oval Office, and revelations emerged that Mr. Trump had asked Mr. Comey to pledge loyalty and end an investigation into a senior aide.”<sup>215</sup> The *New York Times* story continues:

Mr. Rosenstein was just two weeks into his job. He had begun overseeing the Russia investigation and played a key role in the president’s dismissal of Mr. Comey by writing a memo critical of his handling of the Hillary Clinton email investigation. But Mr. Rosenstein was caught off guard when Mr. Trump cited the memo in the firing, and he began telling people that he feared he had been used.

Mr. Rosenstein made the remarks about secretly recording Mr. Trump and about the 25th Amendment in meetings and conversations with other Justice Department and F.B.I. officials. Several people described the episodes in interviews over the past several months, insisting on anonymity to discuss internal deliberations. The people were briefed either on the events themselves or on memos written by F.B.I. officials, including Andrew G. McCabe, then the acting bureau director, that documented Mr. Rosenstein’s actions and comments . . . .

The extreme suggestions show Mr. Rosenstein’s state of mind in the disorienting days that followed Mr. Comey’s dismissal. Sitting in on Mr. Trump’s interviews with prospective F.B.I. directors and facing attacks for his own role in Mr. Comey’s firing, Mr. Rosenstein had an up-close view of the tumult. Mr. Rosenstein appeared conflicted, regretful and emotional, according to people who spoke with him at the time.<sup>216</sup>

The Rod Rosenstein story seemed to fuel added focus toward President Trump’s lack of mental stability. For example, journalist Peter Baker writes, “[b]ut what has

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<sup>213</sup> See MICHAEL V. HAYDEN, *THE ASSAULT ON INTELLIGENCE: AMERICAN NATIONAL SECURITY IN AN AGE OF LIES* 7 (2018).

<sup>214</sup> Adam Goldman & Michael S. Schmidt, *Justice Dept No. 2 Floated Proposal to Record Trump*, N.Y. TIMES, Sept. 22, 2018, at A1.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

become increasingly clear in recent days is that the talk has extended not just to those who never supported Mr. Trump, but even to some of those who worked for him.”<sup>217</sup> Indeed, “the very discussion of it [Twenty-Fifth Amendment] within the administration underscores just how volatile this presidency is and how fractured the team around Mr. Trump is.”<sup>218</sup> By late September 2018, reports of President Trump’s mental instability had become legion. Bob Woodward mentions a senior White House official describing of President Trump’s behavior, “[i]t seems clear that many of the president’s senior advisors, especially those in the national security realm, are extremely concerned with his erratic nature, his relative ignorance, his inability to learn, as well as what they consider his dangerous views.”<sup>219</sup> Woodward has also reported that “*Politico* had run a long piece on Trump’s anger issues, calling Trump ‘driven by his temper’ and saying ‘anger serves as a way to manage staff, express his displeasure or simply as an outlet that soothes him.’”<sup>220</sup> The *Arizona Republic* reports on May 30, 2017, that Arizona Republican U.S. Senator John McCain while:

In Australia for talks on security in the Asia-Pacific region, McCain urged Australia to not give up on its alliance with the United States over jitters about Trump. “I realize that some of President Trump’s actions and statements have unsettled America’s friends,” McCain said. “They have unsettled many Americans as well.” That referred to a testy phone call between the newly installed Trump and Australian Prime Minister Malcolm Turnbull, which allegedly ended with Trump hanging up on Turnbull. McCain later helped to smooth over the incident.<sup>221</sup>

As early as August 2017, Republican U.S. Senator Bob Corker, addressing a Rotary Club meeting in Chattanooga, Tennessee stated, “[t]he president has not yet been able to demonstrate the stability, nor some of the competence, that he needs to demonstrate in order for him to be successful—and our nation and our world needs for him to be successful, whether you are Republican or Democrat.”<sup>222</sup>

Harvard law graduate, former Rhodes Scholar, and White House staff secretary Rob Porter is credited with saying, “[a] third of my job was trying to react to some of the really dangerous ideas that he had and try to give him reasons to believe that maybe

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<sup>217</sup> See Baker, *supra* note 48; Nicholas Fandos & Adam Goldman, *Former Top F.B.I. Lawyer Says Rosenstein Was Serious About Taping Trump*, N.Y. TIMES (Oct. 11, 2018), <https://www.nytimes.com/2018/10/10/us/politics/james-baker-rosenstein-secretly-taping-trump.html>.

<sup>218</sup> Baker, *supra* note 48.

<sup>219</sup> BOB WOODWARD, *FEAR: TRUMP IN THE WHITE HOUSE* 226 (2018).

<sup>220</sup> *Id.*

<sup>221</sup> See Mary Jo Pitzl & Dan Nowicki, *The McCain-Trump Feud: A Running List of Clashes, Snubs and Conflicts*, ARIZONA REPUBLIC (Aug. 24, 2018), <https://www.azcentral.com/story/news/politics/arizona/2018/08/24/mccain-trump-feud-running-list-clashes-snubs-and-conflicts/1089090002/>.

<sup>222</sup> See Michael Collins, *Republican Sen. Bob Corker: Trump Has Not Shown ‘Competence’ Needed to Lead*, TENNESSEAN (Aug. 17, 2017), <https://www.tennessean.com/story/news/politics/2017/08/17/republican-sen-bob-corker-donald-trump-has-not-shown-competence-needed-lead/577240001/>.

they weren't such good ideas."<sup>223</sup> By May 9, 2018 *The Washington Post's Fact-Checker blog* is reported to have documented more than "3,000 false or misleading statements in 466 days in office" by the president.<sup>224</sup> As more fully developed elsewhere:

On June 25, 2017 *The New York Times* states, "we believe his [Trump's] long pattern of using untruths to serve his purposes, as a businessman and as a politician, means that his statements are not simply careless errors."<sup>225</sup> *The New York Times* continues, "[w]e are using the word 'lie' deliberately. Not every falsehood is deliberate on Trump's part. But it would be the height of naïveté to imagine he is merely making honest mistakes. He is lying."<sup>226</sup> Why is it important that *The Los Angeles Times* warns that President Trump:

[I]s dangerous. His choice of falsehoods and his method of spewing them . . . as if he spent his days and nights glued to his bedside radio and was periodically set off by some drivel uttered by a talk show host . . . are a clue to Trump's thought processes and perhaps his lack of agency . . . .

He has made himself the stooge, the mark, for every crazy blogger, political quack, racial theorist, foreign leader or nutcase peddling a story that he might repackage to his benefit as a tweet, an appointment, an executive order or a policy. He is a stranger to the concept of verification, the insistence on evidence and the standards of proof that apply in a courtroom or medical lab—that ought to prevail in the White House.<sup>227</sup>

Former Exxon Chief Executive Officer and Secretary of State Rex Tillerson is famously reported to have described president Trump as a "moron."<sup>228</sup> Unfortunately, many other less-than-flattering assessments have been made regarding President Trump.<sup>229</sup> Perhaps President Trump is simply incapable of processing or has no interest in new ideas, as shown in Bob Woodward's comment about those issues where he had formed "decades of opinions, arguments were pointless. One of the most experienced West Wingers in 2017 and 2018 said, 'there's some things where he's

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<sup>223</sup> See WOODWARD, *supra* note 219, at xix.

<sup>224</sup> See Chris Cillizza, *President Trump Lied More Than 3,000 Times in 466 Days*, CNN (May 9, 2018), <https://www.cnn.com/2018/05/01/politics/donald-trump-3000/index.html>.

<sup>225</sup> See Adam Rogers, *The President Does Not Lie Like You And Me*, WIRED (Jul. 2, 2017), <https://www.wired.com/story/president-trumps-lies-and-untruths/>.

<sup>226</sup> *Id.*

<sup>227</sup> See Lawrence J. Trautman, *Grab 'Em By the Emoluments: The Crumbling Ethical Foundation of Donald Trump's Presidency*, 17 CONN. PUB. INT. L. J 169 (2018), citing The Editorial Board, *Why Trump Lies*, L.A. TIMES (Apr. 3, 2017), <http://www.latimes.com/projects/la-ed-why-trump-lies/>.

<sup>228</sup> See Summer Meza, *Trump Team's Many Insults for the President Included 'Dumb' and a 'Dope,' Claims New Book*, NEWSWEEK (Jan. 4, 2018), <https://www.newsweek.com/trump-insults-wolff-fire-fury-insults-priest-mnuchin-mcmaster-770887>.

<sup>229</sup> See Trautman, *supra* note 227.

already reached the conclusion and it doesn't matter what you say. It doesn't matter what arguments you offer. He's not listening."<sup>230</sup>

### B. *The World Has Changed*

It has been almost a century since Woodrow Wilson held the presidency while wife Edith for seventeen months filtered all information presented to the president and made decisions as to what should go to him for signature. The world has changed dramatically. Rapid technological advances have resulted in the time line for global warfare being reduced from months of necessary preparation during the time of Woodrow Wilson (1919) to just minutes or seconds for deployment of deadly, civilization ending weapons today.<sup>231</sup> Cyber threats are a daily reality and just as our personal communications and household control devices are vulnerable, so too are national security communications and control functions.<sup>232</sup> As The Commission observed in 1988, “[w]e must be better prepared to cope with the frailties of man in this nuclear age. The national interest demands it; the 25th Amendment can help.”<sup>233</sup>

### C. *Duty to Warn*

A large and growing body of literature from many psychiatrists and other highly regarded mental health experts warn of a clear and present concern about the mental fitness of our current president, Donald Trump.<sup>234</sup> While an exhaustive treatment is

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<sup>230</sup> See WOODWARD, *supra* note 219, at 232.

<sup>231</sup> See Lawrence J. Trautman, *Is Cyberattack the Next Pearl Harbor?*, 18 N.C. J. L. & TECH. 232 (2016).

<sup>232</sup> See Lawrence J. Trautman, *Managing Cyberthreat*, 33 SANTA CLARA HIGH TECH. L.J. 230 (2017); Lawrence J. Trautman, *The Board's Responsibility for Crisis Governance*, 13 HASTINGS BUS. L.J. 275 (2017); Lawrence J. Trautman, *Bitcoin, Virtual Currencies and the Struggle of Law and Regulation to Keep Pace*, 102 MARQ. L. REV. 447 (2018); Lawrence J. Trautman & Peter C. Ormerod, *Corporate Directors' and Officers' Cybersecurity Standard of Care: The Yahoo Data Breach*, 66 AM. U. L. REV. 1231 (2017); Lawrence J. Trautman, *Congressional Cybersecurity Oversight: Who's Who & How It Works*, 5 J.L. & CYBER WARFARE 147 (2016); Lawrence J. Trautman & Peter C. Ormerod, *Industrial Cyber Vulnerabilities: Lessons from Stuxnet and the Internet of Things*, 72 U. MIAMI L. REV. 761 (2018); Lawrence J. Trautman, *How Google Perceives Customer Privacy, Cyber, E-Commerce, Political and Regulatory Compliance Risks*, 10 WM. & MARY BUS. L. REV. (2018).

<sup>233</sup> COMMISSION ON PRESIDENTIAL DISABILITY, *supra* note 21.

<sup>234</sup> See Leonard Cruz & Steven Buser, *Introduction to Narcissistic Personality Disorder*, in A CLEAR AND PRESENT DANGER: NARCISSISM IN THE ERA OF PRESIDENT TRUMP ix (Leonard Cruz & Steven Buser eds., 2017) [hereinafter NARCISSISM]; Jean Shinoda Bolen, *The Wounded Healer: Transformation Through Compassion*, in NARCISSISM, *supra* note 234, at 203; Steven Buser, *Post Trump-matic Stress Disorder & Other Psychological Aftermath from President Trump's Victory*, in NARCISSISM, *supra* note 234, at 3; Leonard Cruz, *Trumplethinskin: Narcissism & the Will to Power*, in NARCISSISM, *supra* note 234, at 69; Leonard Cruz, *Commentary on Post Trump-matic Stress Disorder*, in NARCISSISM, *supra* note 234, at 11; Leonard Cruz & Steven Buser, *The Goldwater Rule: Crossing the Border of Assessing Public Figures*, in NARCISSISM, *supra* note 234, at xiii; Lance Dodes, *Sociopathy*, in THE DANGEROUS CASE OF DONALD TRUMP: 27 PSYCHIATRISTS AND MENTAL HEALTH EXPERTS ASSESS A PRESIDENT 83 (Bandy X. Lee, ed., 2017) [hereinafter DANGEROUS CASE]; Nanette Gartrell & Dee Mosbacher, *He's Got the World in His Hands and His Finger on the Trigger: The Twenty-Fifth Amendment Solution*, in DANGEROUS CASE, *supra* note 234, at 343; James Gilligan, *The*

beyond the scope of this Article, enough coverage is presented to adequately make the case and point interested readers to much more information. In *Tarasoff v. Regents of California*, we find the landmark case establishing a duty of reasonable care upon mental health care professionals requiring that they provide third parties, or likely victims, of their dangerous patients with a warning of such danger.<sup>235</sup> The “duty to warn” holding in *Tarasoff* has generated considerable discussion recently among mental health professionals because of the conflicting guidance provided between *Tarasoff* and the “Goldwater Rule.”

Bandy X. Lee, M.D., M. Div., is Assistant Clinical Professor in Law and Psychology at Yale School of Medicine.<sup>236</sup> She also teaches at Yale Law School, cofounded Yale’s Violence and Health Study Group, author of more than one hundred peer-reviewed articles, and author or editor of numerous academic books.<sup>237</sup> Professor Lee explains:

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*Issue Is Dangerousness, Not Mental Illness*, in DANGEROUS CASE, *supra* note 234, at 170; Leonard L. Glass, *Should Psychiatrists Refrain from Commenting on Trump’s Psychology?*, in DANGEROUS CASE, *supra* note 234, at 151; Henry J. Friedman, *On Seeing What You See and Saying What You Know: A Psychiatrist’s Responsibility*, in DANGEROUS CASE, *supra* note 234, at 160; Judith Lewis Herman, *Professionals and Politics*, in DANGEROUS CASE, *supra* note 234, at 1; Luba Kessler, *Birtherism and the Deployment of the Trumpian Mind-Set*, in DANGEROUS CASE, *supra* note 234, at 261; Bandy X. Lee, *Our Duty to Warn*, in DANGEROUS CASE, *supra* note 234, at 11; Robert Jay Lifton, *Our Witness to Malignant Normality*, in DANGEROUS CASE, *supra* note 234, at xv; Kathryn Madden, *The Hall of Mirrors: Narcissism and Celebrity in the World of Twitter and Reality TV*, in NARCISSISM, *supra* note 234, at 145; David M. Reiss, *Cognitive Impairment, Dementia, and POTUS*, in DANGEROUS CASE, *supra* note 234, at 126; Tom Singer, *President Trump and the American Selfie: Archetypal Defenses of the Group Spirit*, in NARCISSISM, *supra* note 234, at 17; Steve Wruble, *Trump’s Daddy Issues: A Toxic Mix for America*, in DANGEROUS CASE, *supra* note 234, at 268.

<sup>235</sup> *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 340 (Cal. 1976); *see also* Paul S. Appelbaum, *Tarasoff and the Clinician: Problems in Fulfilling the Duty to Protect*, 142 AM. J. PSYCHIATRY 425 (1985); W. Jonathan Cardi, *A Pluralistic Analysis of the Therapist/Physician Duties to Warn Third Parties*, 44 WAKE FOREST L. REV. 877 (2009); Ann Hubbard, *The Future of ‘The Duty to Protect’: Scientific and Legal Perspectives on Tarasoff’s Thirtieth Anniversary*, 75 U. CIN. L. REV. 429 (2006); Elisia M. Klinka, *It’s Been a Privilege: Advising Patients of the Tarasoff Duty & Its Legal Consequences for the Federal Psychotherapist-Patient Privilege*, 78 FORDHAM L. REV. 863 (2009); Vanessa Merton, *Confidentiality and the ‘Dangerous’ Patient: Implications of Tarasoff for Psychiatrists and Lawyers*, 31 EMORY L.J. 263 (1982); John Monahan, *Tarasoff at Thirty: How Developments in Science and Policy Shape the Common Law*, 75 U. CIN. L. REV. 497 (2006); Douglas Mossman, *Critique of Pure Risk Assessment or, Kant Meets Tarasoff*, 75 U. CIN. L. REV. 523 (2006); Mark A. Rothstein, *Tarasoff Duties After Newtown*, 42 J.L. MED. & ETHICS 104 (2014); Christopher Slobogin, *Tarasoff as a Duty to Treat: Insights from Criminal Law*, 75 U. CIN. L. REV. 645 (2006); LEON VANDECREEK & SAMUEL KNAPP, *TARASOFF AND BEYOND: LEGAL AND CLINICAL CONSIDERATIONS IN THE TREATMENT OF LIFE-ENDANGERING PATIENTS* (3rd ed. 2001). *But see* Charles Cantu & Margaret Jones Hopson, *Bitter Medicine: A Critical Look at the Mental Health Care Provider’s Duty to Warn in Texas*, 31 ST. MARY’S L.J. 359 (2000).

<sup>236</sup> Yale School of Medicine, *Psychiatry*, Bandy X. Lee, M.D., M. Div., [https://medicine.yale.edu/psychiatry/people/bandy\\_lee.profile](https://medicine.yale.edu/psychiatry/people/bandy_lee.profile).

<sup>237</sup> *Id.*



Norms and rules guide professional conduct, set standards, and point to the essential principles of practice. For these reasons, physicians have the *Declaration of Geneva* (World Medical Association 2006) and American Medical Association *Principles of Medical Ethics* (2001), which guide the American Psychiatric Association's code for psychiatry (American Psychiatric Association 2013). The former confirms the physician's dedication to the humanitarian goals of medicine, while the latter defines honorable behavior for the physician. Paramount in both is the health, safety, and survival of the patient.

Psychiatrists' code of ethics derive directly from these principles. In ordinary practice, the patient's right to confidentiality is the bedrock of mental health care dating back to the ethical standards of the Hippocratic Oath. However, even this sacrosanct rule is not absolute. No doubt, the physician's responsibility is first and foremost to the patient, but it extends "as well to society" (American Psychiatric Association 2013, p.2). It is part of professional expectation that the psychiatrist assess the possibility that the patient may harm himself or others. When the patient poses a danger, psychiatrists are not merely allowed but mandated to report, to incapacitate, and to take steps to protect.

If we are mindful of the dangers of politicizing the professions, then certainly we must heed the so-called "Goldwater rule," or Section 7.3. of the APA code of ethics (American Psychiatric Association 2013, p.6), which states: "it is unethical for a psychiatrist to offer a professional opinion [on a public figure] unless he or she has conducted an examination and has been granted proper authorization for such a statement." This is not divergent from ordinary norms of practice: the clinical approach that we use to evaluate patients require a full examination. Formulating a credible diagnosis will always be limited when applied to public figures observed outside this intimate frame; in fact, we would go so far as to assert that it is impossible.

The Goldwater rule highlights the boundaries of practice, helps to preserve professional integrity, and protects public figures from defamation. It safeguards the public's perception of the field of psychiatry as credible and trustworthy. It is reasonable to follow it. But even this respectable rule must be balanced against the other rules and principles of professional practice. A careful ethical evaluation might ask: Do our ordinary norms of practice stop at the office of president? If so, why? If the ethics of our practice stipulate that the health of our patient and the safety of the public be paramount, then we should not leave our norms at the door when entering the political sphere. Otherwise, a rule originally conceived to protect our profession from scandal might itself become a source of scandal. For this very reason, the "reaffirmation" of the Goldwater rule in a separate statement by the American Psychiatric Association (2017) barely two months into the new administration seems questionable to us . . . .

A psychiatrist who disregards the basic procedures of diagnosis and treatment and acts without discretion deserves reprimand. However, the

public trust is also violated if the profession fails in its duty to alert the public when a person who holds the power of life and death over us all shows signs of clear, dangerous mental impairment. We should pause if professionals are asked to remain silent when they have seen enough evidence to sound an alarm in every other situation . . . .

Assessing dangerousness is different from making a diagnosis: it is dependent on the situation, not the person. Signs of likely dangerousness due to mental disorder can become apparent without a full diagnostic interview and can be detected from a distance, and one is expected to err, if at all, on the side of safety when the risk of inaction is too great.<sup>238</sup>

Writing in 2017, during just the first few months of the Trump Administration, Professor Lee states concerns held by many mental health professionals:

It doesn't take a psychiatrist to notice that our president is mentally compromised. Members of the press have come up with their own diagnostic nomenclature, calling the president a "mad king" (Dowd 2017), a "nut job" (Collins 2017), and "emotionally unhinged" (Rubin 2017). Conservative columnist George Will (2017) writes that the president has a "disorderly mind." By speaking out as mental health professionals, we lend support and dignity to our fellow citizens who are justifiably alarmed by the president's furious tirades, conspiracy fantasies, aversion to facts, and attraction to violence . . . . When he lies, does he know he is lying, or does he believe his own lies? When he makes wild accusations, is he truly paranoid, or is he consciously and cunningly trying to deflect attention from his misdeeds? . . . A man can be both evil and mentally compromised—which is a more frightening proposition. Power not only corrupts but also magnifies existing psychopathologies, even as it creates new ones. Fostered by the flattery of underlings and the chants of crowds, a political leader's grandiosity may morph into grotesque delusions of grandeur. Sociopathic traits may be amplified as the leader discovers that he can violate the norms of civil society and even commit crimes with impunity. And the leader who rules through fear, lies, and betrayal may become increasingly isolated and paranoid, as the loyalty of even his closest confidants must forever be suspect.<sup>239</sup>

Here is the author's personal disclaimer. Having absolutely no training in medicine or mental health, I am reluctant to devote too much ink to any diagnosis, long-distance or otherwise, regarding the mental health status of any political actor. For purposes of this Article, the relevant areas of my scholarship include: many years inquiry into matters of law, governance, and international relations—all with a particular interest in fostering the greater probability of world peace. However, the sheer volume of scholarship from mental health professionals expressing serious concern about President Trump's mental stability is alarming. Before moving on, let us pause to consider the following passages from mental health professionals Philip Zimbardo and Rosemary Sword who state:

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<sup>238</sup> DANGEROUS CASE, *supra* note 234, at 3.

<sup>239</sup> *Id.*

Whether or not Donald Trump suffers from a neurological disorder—or narcissistic personality disorder, or any other mental health issue, for that matter—will, undeniably, remain conjecture unless he submits to tests, which is highly unlikely given his personality. However, the lack of such tests cannot erase the well-documented behaviors he has displayed for decades and the dangers they pose when embodied in the president of the United States.<sup>240</sup>

Clinical psychologist and Lecturer for Harvard Medical School Craig Malkin's experience include helping families, couples and individuals for more than twenty-five years.<sup>241</sup> Discussing pathological narcissism, he states:

The diagnosis of a mental illness . . . is not by itself a judgment about whether a person is a capable leader . . . .

What mental health experts concern themselves with most when it comes to assessing the *dangers* of mental illness are “functional impairments.” That is, how much do the symptoms of a person's mental illness interfere with their ability to hold down a job, maintain meaningful relationships, and—most importantly—manage their intense feelings, such as anger or sadness or fear, without becoming a danger to themselves or others? This is particularly important when it comes to positions as powerful as president of the United States. Steve Jobs calling another CEO “a piece of shit” has far less troubling implications than the leader of the free world telling a volatile dictator he's “very dumb.”

. . .

The greatest danger, as we saw with Nixon, is that pathological narcissists can lose touch with reality in subtle ways that become extremely dangerous over time. When they can't let go of their need to be admired or recognized, they have to *bend* or *invent* a reality in which they remain special despite all messages to the contrary. In point of fact, they become *dangerously* psychotic. It's just not always obvious until it's too late . . . .

Pathological narcissists abhor admitting to vulnerability—feeling scared, insecure, unsure of themselves—because they don't trust people to support them when they're upset, a problem called *insecure attachment* in the research . . . .

As pathological narcissists become increasingly thought-disordered, their vision becomes clouded. That's because if you see the world not as it is, but as you *wish* or *need* it to be in order to preserve the belief you're special, you lose touch with crucial information, brute facts, and harsh realities.<sup>242</sup>

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<sup>240</sup> See Philip Zimbardo & Rosemary Sword, *Unbridled and Extreme Present Hedonism: How the Leader of the Free World Has Proven Time and Again He Is Unfit for Duty*, in DANGEROUS CASE, *supra* note 234, at 46.

<sup>241</sup> See Craig Malkin, *Meet Dr. Malkin*, <http://www.drcreigmalkin.com/meet-dr-malkin> (last visited March 5, 2019).

<sup>242</sup> See Craig Malkin, *Pathological Narcissism and Politics: A Lethal Mix*, in DANGEROUS CASE, *supra* note 234, at 59.

*D. Loyalty to the Person of the Presidency or to the Nation?*

Having had time to reflect on lessons to be gleaned from the assassination attempt on President Reagan and to consider the needs of the nation in times of crisis involving presidential disability, The National Commission on Presidential Disability and the Twenty-Fifth Amendment concludes the following:

Not having a [rational and effective] leader during a national emergency or world crisis would exacerbate the problem. Such considerations ought to convince every responsible presidential aide that, whenever or however a situation arises for applying the 25th Amendment, he or she must not withhold information about the president's health or otherwise discourage using this constitutional remedy for a presidential illness. In addition, the American people must understand that their presidents, whoever they may be, are not superhuman. They are human beings subjected to enormous pressures and responsibilities and, like the average citizen, they may face disabling infirmities. The Commission believes that the 25th Amendment provides the nation the means of insuring that the powers and duties of the presidency are always in the hands of someone able to perform them. The Commission believes that this Amendment must be utilized whenever necessary as a normal ingredient in the governmental process.<sup>243</sup>

*E. Rosenstein Denial*

*The New York Times* account of September 22, 2018 was disputed by Mr. Rosenstein, stating "The New York Time's story is inaccurate and factually incorrect . . . I will not further comment on a story based on anonymous sources that are obviously biased against the department and are advancing their own personal agenda."<sup>244</sup> Mr. Rosenstein continues, "[b]ut let me be clear about this: Based on my personal dealings with the president, there is no basis to invoke the 25th Amendment."<sup>245</sup>

David Simon is author, journalist, writer, producer, and creator of such popular television shows as: *The Wire*; *The Deuce*; and *Treme*.<sup>246</sup> Mr. Simon provides one of the most thoughtful and interesting observations I have seen thus far about the Rosenstein-Twenty-Fifth Amendment story when he describes *The New York Times* as having "foolishly made itself party to what amounts to a first-news-cycle justification for an authoritarian to fire a torpedo into the very idea that we are a nation of laws . . . These are perilous times. Much is no longer normal in our governance. The stakes are high."<sup>247</sup> Mr. Simon continues:

[W]e are a nation that is at the cusp of a profound Constitutional crisis. That reality had already been made obvious and manifest when Mr. Comey was

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<sup>243</sup> See COMMISSION ON PRESIDENTIAL DISABILITY, *supra* note 21.

<sup>244</sup> See Goldman & Schmidt, *supra* note 214.

<sup>245</sup> *Id.*

<sup>246</sup> See David Simon, IMDB, [https://www.imdb.com/name/nm0800108/?ref\\_=nv\\_sr\\_1](https://www.imdb.com/name/nm0800108/?ref_=nv_sr_1) (last visited March 5, 2019).

<sup>247</sup> See David Simon, *Malpractice, The Audacity of Despair: Collected Prose, Links and Occasional Venting* (Sept. 24, 2018), <https://davidsimon.com/malpractice/>.

fired and he informed others in DOJ that judicial independence was at issue in his contacts with the new POTUS. In the wake of that firing, any and every discussion that competent DOJ professionals had about the matter would have engaged with the tactics, fears, frustrations, considerations, pitfalls and risks of proceeding to operate ethically and independent of any executive obstruction of judicial procedure. In short, if they WEREN'T sitting in rooms, stressed, trying to chart their way around an ethical minefield and still do their jobs, it reflects incompetence or, worse, abdication.

Having covered federal law enforcement, I know this much: These are men and women who occupy a unique ethical space in our governance, serving as they do at the pleasure of the U.S. president, but maintaining their fundamental oath and loyalty not to the president, but to the Constitution. There is conflict and nuance baked into that reality in the best of circumstances; the U.S. President overtly demanding loyalty and the intervention in DOJ casework by the FBI director, then firing the man is scarcely the best of circumstances. For DOJ professionals attempting to continue in their positions after such an event, talking it all out and contemplating every option, risk and scenario is elemental to the job . . . . The Times is essential in this historical moment. It needs to be smarter. And more deliberate. And careful. And its best editors need to reflect on their role with some greater measure of self-awareness. Or—and I don't think I am being hyperbolic at this point—they may help us lose our republic.<sup>248</sup>

#### *F. Mental Health and the Presidency*

And now for a truly difficult conundrum—what about the objectively verifiable mental health of our nation's top leaders? Is having a minimum standard for presidential mental health an overly rational objective? Is passing a required mental health examination as a condition to holding office by our top political leaders simply unattainable? As *The Washington Post* reported in 1972, “Democratic nominee George S. McGovern's presidential hopes virtually evaporated when it was revealed shortly after the party convention that his newly chosen vice presidential running mate, Missouri U.S. Sen. Thomas F. Eagleton, had been hospitalized on three occasions for depression and had undergone electroshock therapy.”<sup>249</sup>

Would such a mental health examination requirement serve as a deterrent resulting in a candidate or elected official not seeking professional help when needed? These are difficult issues that should be addressed. As historian Jonathan Zimmerman has observed about President Trump:

Perhaps the post-Comey investigations will show that Trump colluded with Russia, which could be cause for impeachment. But incapacity is something else altogether. Do we really want to set a precedent where we remove presidents for their infirmities, however ill-defined? Where will that end?

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<sup>248</sup> *Id.*

<sup>249</sup> See *Thomas Eagleton's Mental Health—1972*, <https://www.washingtonpost.com/wp-srv/politics/special/clinton/frenzy/eagleton.htm?noredirect=on> (last visited March 5, 2019).

President Trump has run roughshod over some of America's most cherished civic norms and traditions. Now his enemies are doing the same thing, by invoking an amendment for purposes that its authors expressly renounced.

Go ahead and impeach the guy, if he has done something to deserve that. But stop trying to pretend he's incapable, when what you really mean is he's despicable. The entire future of the presidency could hinge on the difference.<sup>250</sup>

#### X. CONCLUSION

The number of times an American president has been unable to discharge the powers and duties of his office is disturbing. Politicians are known throughout history to have understated health problems or kept them secret. A brief history of known instances where this diminished capacity has been shielded from the American public is truly frightening. Is it time for a reasonable society to insist upon a favorable report from a bipartisan commission of highly regarded physicians and mental health professionals as a minimal requirement from candidates seeking the nation's highest offices? In an age when technology has enabled the destruction of the Earth and elimination of all living beings within a matter of minutes, the Twenty-Fifth Amendment may prove the last best hope for peace.

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<sup>250</sup> Jonathan Zimmerman, *25th Amendment Won't Cut It to Remove Trump*, S.F. CHRON. (May 25, 2017), <https://www.sfchronicle.com/opinion/article/25th-Amendment-won-t-cut-it-to-remove-Trump-11175040.php>; see also Lawrence J. Trautman, *Presidential Impeachment: A Contemporary Analysis*, U. DAYTON L. REV. (forthcoming), <https://ssrn.com/abstract=3290722>.

## XI. APPENDICES

## A. Appendix A: Statutory Succession Laws

## The Commission on Presidential Disability and the Twenty-Fifth Amendment

*Act of July 18, 1947*

(a) (1) If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is neither a president nor vice president to discharge the powers and duties of the office of president, then the speaker of the House of Representatives shall, upon his resignation as speaker and as representative in Congress, act as president.

(2) The same rule shall apply in the case of the death, resignation, removal from office, or inability of an individual acting as president under this subsection.

(b) If, at the time when under subsection (a) of this section a speaker is to begin the discharge of the powers and duties of the office of president, there is no speaker, or the speaker fails to qualify as acting president, then the president pro tempore of the Senate shall, upon his resignation as president pro tempore and as senator, act as president.

(c) An individual acting as president under subsection (a) or subsection (b) of this section shall continue to act until the expiration of the then current presidential term, except

(1) If his discharge of the powers and duties of the office is founded in whole or in part on the failure of both the president-elect and the vice president-elect to qualify, then he shall act only until a president or vice president qualifies; and

(2) If his discharge of the powers and duties of the office is founded in whole or in part on the inability of the president or vice-president, then he shall act only until the removal of the disability of one of such individuals.

(d) (1) If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is no president pro tempore to act as president under subsection (b) of this section, then the officer of the United States who is highest on the following list, and who is not under disability to discharge the powers and duties of the office of president shall act as president: secretary of state, secretary of the treasury, secretary of defense, attorney general, postmaster general, secretary of the interior, secretary of agriculture, secretary of commerce, secretary of labor.\*

(2) An individual acting as president under this subsection shall continue so to do until the expiration of the then current presidential term, but not after a qualified and prior-entitled individual is able to act, except that the removal of the disability of an individual higher on the list contained in paragraph (1) of this subsection or the ability to qualify on the part of an individual higher on such list shall not terminate his service.

(3) The taking of the oath of office by an individual specified in the list in paragraph (1) of this subsection shall be held to constitute his resignation from the office by virtue of the holding of which he qualifies to act as president.

(3) Subsections (a), (b), and (d) of this section shall apply only to such officers as are eligible to the office of president under the Constitution. Subsection (d) of this section shall apply only to officers appointed, by and with the advice and consent of the Senate, prior to the time of death, resignation, removal from office, inability, or failure to qualify, of the president pro tempore, and only to officers not under impeachment by the House of Representatives at the time the powers and duties of the office of president devolve upon them.

(F) During the period that any individual acts as president under this section, his compensation shall be at the rate then provided by law in the case of the president.

*Act of January 19, 1886*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in case of removal, death, resignation, or inability of both the president and vice president of the United States, the secretary of state, or if there be none, or in case of his removal, death, resignation, or inability, then the secretary of the treasury, or if there be none, or in case of his removal, death, resignation, or inability, then the secretary of War, or if there be none, or in case of his removal, death, resignation, or inability, then the attorney-general, or if there be none, or in the case of his removal, death, resignation, or inability then the postmaster general, or if there be none, or in case of his removal, death, resignation, or inability, then the secretary of the navy, or if there be none, or in case of his removal, death, resignation, or inability, then the secretary of the interior, shall act as president until the disability of the president or vice president is removed or a president shall be elected: Provide, That whenever the powers and duties of the office of president of the United States shall devolve upon any of the persons named herein, if Congress be not then in session, or if it would not meet in accordance with law within twenty days thereafter, it shall be the duty of the person upon whom said powers and duties shall devolve to issue a proclamation convening Congress in extraordinary session, giving twenty days' notice of the time of meeting.

Sec. 2. That the preceding section shall only be held to describe and apply to such officers as shall have been appointed by the advice and consent of the Senate to the offices therein named, and such as are eligible to the office of president under the Constitution, and not under impeachment by the House of Representatives of the United States at the time the powers and duties of the office shall devolve upon them respectively.

Sec. 3. That sections one hundred and forty-six, one hundred and forty-seven, one hundred and forty-eight, one hundred and forty-nine, and one hundred and fifty of the Revised Statutes are hereby repealed.

*Act of March 1, 1792*

Sec. 9. And be it further enacted, That in case of removal, death, resignation or inability both of the president and vice president of the United States, the president of the Senate pro tempore, and in case there shall be no president of the Senate [pro tempore], then the speaker of the House of Representatives, for the time being shall act as president of the United States until the disability be removed or a president shall be elected.

Sec. 10. And be it further enacted, That whenever the offices of president and vice president shall both become vacant, the secretary of state shall forthwith cause a notification thereof to be made to the executive of every state, and shall also cause the same to be published in at least one of the newspapers printed in each state, specifying that electors of the president of the United States shall be appointed or chosen in the several states within thirty-four days preceding the first Wednesday in December then next ensuing: Provided, There shall be the space of two months between the date of such notification and the said first Wednesday in December, but if there shall not be the space of two months between the date of such notification and the first Wednesday



in December; and if the term for which the president and vice president last in office were elected shall not expire on the third day of March next ensuing, then the secretary of state shall specify in the notification that the electors shall be appointed or chosen within thirty-four days preceding the first Wednesday in December in the year next ensuing, within which time the electors shall accordingly be appointed or chosen, and the electors shall meet and give their votes on the first Wednesday in December, and the proceedings and duties of the said electors and others shall be pursuant to the directions prescribed in this act.

*B. Appendix B: Statement Regarding Importance of the President's Physician*

## The Commission on Presidential Disability and the Twenty-Fifth Amendment

In the 1981 Congressional Directory, the first issued during the Reagan administration, the staff listing for the Executive Office of the President (that is, the White House office) contained 55 names. It began with the counselor to the president, the chief of staff, his deputy, a raft of varied assistants to the president, then deputy assistants and special assistants. The last name on the list was the chief usher; the name just before his—54th of 55—was that of the physician to the president, preceded by the curator of White House artifacts.

This Commission has been shocked at the low rank and, sometimes, the seemingly low esteem accorded to the physician—and not just in the current administration.

Dr. Ruge, Reagan's first White House physician, told this Commission that "despite its glamorous name, the office of the White House physician is somewhat blue collar."

But it is far easier to say the physician's job should be upgraded than to suggest how to do it. Among other eminent and knowledgeable figures in both medicine and the structure and workings of the White House office, this Commission has talked with Dr. William Lukash, who served Presidents Johnson, Nixon, Ford, and Carter. It is apparent that each president has his own habits in his relation with his physician and that these have varied almost as greatly as have presidential foreign and domestic policies.

This leads us to conclude, first of all, that the president's physician must remain a person of the president's own choice, that he or she should not be subject to Senate confirmation or to approval by any other body, medical or otherwise. The president and his personal physician must have total mutual confidence and confidentiality, as a symbiotic relationship. But each of them must also realize that the physician has a dual obligation. As Dr. Lukash agreed, such physicians are "accepting a dual loyalty to their own patients but also to the public."

Further, it should be noted, the post of physician to the president has grown from a onedocor role to what Dr. Lukash called providing "health care for the fifteen hundred constituents in the White House," with a second medical office in the adjoining Executive Office Building and "two assistant physicians to help with the traveling" groups that go with a chief executive, including the Secret Service, the press, the military, and those involved in communications.

Still, the 25th Amendment centers directly on the president and, under certain circumstances, the vice president. This is the role being considered in this appendix. All other medical functions are strictly secondary.

We must, and do, assume that any future presidential physician will not only be a skilled professional, but be highly knowledgeable of both the medical and political aspects of the 25th Amendment as well. He or she must consider that he or she, and all those physicians who assist from time to time, are responsible not only for the care of the chief executive but also for the "care of the country."

To be an effective personal physician, the time-honored concept of patient-doctor confidentiality must be maintained in broad terms. The physician must become acquainted with the vice president and have unquestioned access to the president.

The Commission suggests that a possible "code of conduct" for the president's physician should include:

a. From the beginning of his appointment, the physician must know the history, medical and political implications, and use of the 25th Amendment.

b. He or she should abide by the views of the American Medical Association Council on Medical Ethics regarding patient-doctor confidentiality and those instances when it can be abridged in the national or community interest. The Commission considered recommending a statute stating that the presidential physician had a positive duty to communicate details concerning the president's condition if it jeopardized the national interest, but concluded that such a statute was not necessary and probably would be self-defeating.

c. He or she should meet during the transition period with the president-elect regarding the potential use of the 25th Amendment's disability provisions. With the president-elect, the vice president-elect, and those who will become the president's chief of staff and legal counsel, the physician should undertake during the transition to establish, if possible, a written protocol regarding the use of these provisions.

d. He or she should possess the knowledge, humility, and expertise to obtain consultation to insure the best medical care for the president. Any presidential physician, if only because of his office, has easy access to any consultant or group of consultants that he wishes to have seen the president to aid in treatment or to make the difficult decision of evaluating disability (the latter being the key issue to invoke or not invoke Section 4).

In order to reinforce the presidential physician's influence whenever the 25th Amendment might come into play, numerous persons have suggested in various studies that an independent board of physicians be created to examine the president's physical and mental health from time to time. The Commission and the medical advisory group to the Commission discussed this concept. The general conclusion was that, while such a board would officially "protect" the president's physician, it would prevent or hinder a real doctor-patient relationship between the president and his or her physician.

The political and world situation, the power of the White House staff and, most of all, the president's wishes will always determine when and how Section 3 will be used. We urge that, because of his or her unique status, the president's physician, with consultants if he or she desires, play a major role. The physician should help the president make the decision to invoke Section 3 and to reassume office if the Amendment is used.