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EXTENSIONS ON THE TWENTY-FIFTH AMENDMENT: THE INFLUENCE OF BIOLOGICAL FACTORS ON ASSESSMENTS OF IMPAIRMENT

*Rose McDermott**

The framers of the Twenty-Fifth Amendment, including Senator Birch Bayh, proved particularly prescient in the timing of their legislation. This Amendment was based on earlier law; firstly, Article II, section 1, clause 6, which covered only temporary disability, was included in the Constitution put forward to the states and ratified in 1790.¹ In 1881, Vice President John Tyler's ascension to President upon the death of President William Henry Harrison set the precedent for vice presidential assumption of power upon death of the President.² A law put into place in 1886 solidified this understanding.³ Later concern with extending the coverage of the law to cover permanent disability and other potential problems with presidential succession was instigated as a result of concerns raised by President Dwight D. Eisenhower's medical problems, including a heart attack in 1955, surgery in 1956, and a stroke in 1957.⁴ The Twenty-Fifth Amendment received final ratification and was formally added to the Constitution on February 23, 1967. Although the Amendment thus came into being after the assassination of President John F. Kennedy, Section 2 did allow for smooth transition following the resignation of Vice President Spiro T. Agnew in 1973, and when President Gerald R. Ford nominated Nelson Rockefeller as his Vice President in 1974. Thus, the framers of the

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1. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 657-58 (Max Farrand ed., 1911).

2. See JOHN D. FEERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION 89-92 (1965).

3. Act of Jan. 19, 1886, ch. 4, 24 Stat. 1, *repealed by* Presidential Succession Act of 1947, ch. 264, 61 Stat. 380.

4. See *generally* CLARENCE G. LASBY, EISENHOWER'S HEART ATTACK: HOW IKE BEAT HEART DISEASE AND HELD ON TO THE PRESIDENCY (1997).

Amendment proved able to anticipate future challenges in succession and formulate appropriate responses, which indeed operated as intended to ensure continuity in governance under exceptional and trying circumstances in the political environment.

As we look to the future in considering potential applications of the Twenty-Fifth Amendment, it becomes necessary to consider newfound threats such as the mass simultaneous extermination of political leaders in Washington, D.C. as the result of terrorist action, as was attempted in the 9/11 attacks by Al Qaeda. Perhaps a network approach to succession, which involves regional leaders, much as the Internet was developed in order to thwart the ability of the Soviet Union to deliver a single decisive blow against our command and control structure, would provide some protection against such a catastrophe. If local and regional leaders become part of the chain of succession and command, it would prove much more difficult to destroy American governance in one fell swoop, as might happen if all seventeen potential successors to the Presidency were in Washington at the time of a devastating terrorist strike. And, of course, such contingencies do not only apply to malicious man-made disasters, but also can protect against natural disasters with wide sweep—including pandemic diseases, such as the recent outbreak of H1N1—which can kill many people quite quickly, as occurred in the 1918 flu pandemic.

Developing responses for such potentialities does not speak to limitations in the Twenty-Fifth Amendment as presently constituted, but rather highlights challenges, threats, and capabilities that did not appear to exist at the time of the original framing. Attempting to address these concerns constitutes one of the inevitable processes involved in keeping law as a living response to immediate challenges, providing constraints designed to respond to current risks within the context of enduring political and social values.

Similarly, there are many complex issues surrounding questions of presidential disability more narrowly constrained. As noted above, while the Twenty-Fifth Amendment offers several provisions in the case of presidential disability and outlines lines of succession through seventeen potential successors, it does not present as clear a picture when it comes to who decides when the President is disabled; what constitutes sufficient impairment to warrant removal from office, either temporarily or permanently; and who decides whether the President becomes well enough to resume his duties. From a historical perspective, this does not emerge as a trivial concern because many past Presidents, as well as their families and advisers, have been very invested in hiding their frailties, disabilities, and inabilities from public view. Clearly, institutional specifications of these kinds of provisions would prove very helpful in the event of future presidential impairment.

Most of these ambiguities relate to Section 4 of the Amendment:

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.⁵

In many cases, the flexibility allowed in this assessment can serve a variety of purposes well, providing appropriate guidance should a President be suddenly felled by a massive stroke, as happened to Ariel Sharon in Israel for example. Other situations may not be so clear in their indication. How might evaluations of mental illness be made under these circumstances, for example? Indeed, it may also prove difficult for various actors to determine what kind and degree of impairment crosses the threshold to make a determination that the President is “unable to discharge the powers and duties of his office,”⁶ especially if he does not agree with this judgment.

Because the framers of the Twenty-Fifth Amendment were so prescient in their creation of this legislation, it behooves subsequent scholars to examine additional potential concerns that would not have entered the debate forty years ago. Huge advances have been made in the area of biological and genetic medical knowledge, and this progress could not have been foreseen at the time the original Amendment was written. Yet in the interim, such information has become much more accessible. It becomes important to raise these questions moving forward because political opponents may take advantage of these new concerns, as they arise, and use them for personal political advantage to the detriment of the legitimacy of American political governance.

As a result, the concerns addressed here regard future assessments of disability, and which factors concerning potential future vulnerability to particular diseases or impairments might warrant the determination of such disability. To be clear, these questions remain open in Section 4 of the Twenty-Fifth Amendment, and yet they concern important factors in deciding what constitutes sufficient disability to remove a President from office. This discussion begins with an outline of some of these factors, provides two illustrative examples, and then concludes with suggestions about how to address some of the concerns.

I. BIOLOGY, GENETICS, AND PRESIDENTIAL IMPAIRMENT

People tend to think of their biology as pretty solid and staid and assume that they are the same physical people from day to day. But, in fact, our biology is every bit as flexible, adaptive and malleable as our Constitution. We change psychologically as well as physically, not only as we age, but also as things happen to us.⁷ Yet many of the biological and genetic factors

5. U.S. CONST. amend. XXV, § 4.

6. *Id.*

7. See Gregory E. Miller et al., *Chronic Interpersonal Stress Predicts Activation of Pro- and Anti-Inflammatory Signaling Pathways 6 Months Later*, 71 *PSYCHOSOMATIC MED.* 57, 60–61 (2009); Gregory Miller et al., *Health Psychology: Developing Biologically Plausible Models Linking the Social World and Physical Health*, 60 *ANN. REV. PSYCHOL.*

which scientists now explore in great depth were not imaginable to the framers of the Twenty-Fifth Amendment even forty years ago.

One of the scientific realities, moving forward, when we think about issues of inability and disability revolves around the massive advances that have been made in biology and genetic sciences which actually now allow much more extensive physiological assessments of people, including genetic typing. Great and rapid progress in the areas of molecular and behavioral genetics has taken place over this period of time. It is now possible to screen individuals for their susceptibility to all kinds of diseases using relatively simple, inexpensive, and non-invasive means. This kind of analysis no longer exists only in the realm of science fiction; for \$150, a person can get an analysis of their DNA, which provides information about their likely ancestry.⁸

Because of this reality, it remains important for us to be as prescient in seeking to set guidelines for this information as were those who sought to address the issue of presidential succession in the 1960s. Whether or not we, as political actors, as policymakers, as scholars, and as academics, think through these issues or not in an ethical, legal, political, and normative manner, science will continue to advance regardless. Scientific progress will occur with or without political permission. Unless we start to address these issues in a forthright manner, some of the consequences of this knowledge may emerge in a way that potentiates political crisis, including threats to succession and governance if prospects of latent genetic vulnerability become fodder for political attacks. Imagine, for example, a female presidential candidate who was found to carry the genes that increase risk for breast cancer, BRCA1 or BRCA2?⁹ Or, even more ominously because its manifestation is even less affected by idiosyncratic environmental factors, a President is found to possess the gene predisposing him toward Huntington's disease?¹⁰

Obviously, the iconic example in terms of genetic risk factors is something like Huntington's disease. If a person possesses that gene, he or she is very likely to develop that illness. But with many other illnesses, the cause and effect relationship does not remain as stark. With breast cancer or depression, for example, one of the problems is that observers cannot know whether or when a susceptible person may fall ill. It is critical to recognize that genetics alone are almost never determinative. Their influence is not absolute. Environmental effects and interaction will

501, 505–12 (2009); Gregory E. Miller et al., *Low Early-Life Social Class Leaves a Biological Residue Manifested by Decreased Glucocorticoid and Increased Proinflammatory Signaling*, 106 PROC. NAT'L ACAD. SCI. 14,716, 14,719–20 (2009).

8. See *Genetic Ancestry Analysis*, DNA TRIBES, <http://www.dnatribes.com> (last visited Oct. 7, 2010).

9. Even the National Cancer Institute has an entire webpage dedicated to just this kind of genetic screening. *BRCA1 and BRCA2: Cancer Risk and Genetic Testing*, NAT'L CANCER INST., <http://www.cancer.gov/cancertopics/factsheet/Risk/BRCA> (last visited Oct. 7, 2010).

10. See generally Richard H. Myers, *Huntington's Disease Genetics*, 1 NEURORX 255 (2004) (reviewing salient genetic features of Huntington's disease, and addressing the utilization of genetic testing for the illness).

continue to exert a decisive influence on whether or not a vulnerable individual will manifest a given problem or a given illness or a given disease. So it is not possible for an observer to claim that if a leader has a particular gene, she will get cancer. But it does mean that that person's risk factor remains higher for that illness than somebody who does not possess the same genetic vulnerability.

The relevant political issues involve more than whether or not personal health information should be made public, as was the case in the debate surrounding whether or not Paul Tsongas's cancer should have been made public at the time that he was running for President.¹¹ But a larger issue arises should someone with a particular genetic susceptibility for a certain illness actually get elected to public office. Is their genetic status something that constitutes an inability or disability that should be accounted for in a systematic way? Should specific rules be put into place to treat all officials suffering from particular susceptibilities similarly and fairly so that such a reality does not simply become political ammunition during the first political campaign or crisis in which it proves relevant? We need to think presciently about how to consider these things as they arise, making attempts to instantiate flexible and adaptable rules prior to partisan crisis, because the science will move forward with or without political constraints in place to control or contain the effects of greater personal biological information becoming available.

Should candidates be required to be screened for their vulnerability to such particularly devastating illnesses? Does that not constitute an undue invasion of privacy? Might such information be used to try to remove a President from office under Section 4 of the Twenty-Fifth Amendment, since he or she might arguably be impaired in some meaningful way? Even if candidates themselves can sidestep such issues, the other unaddressed question remains: what can, and will, political opponents and leaders do with this information?

To be clear, this argument is not intended to be blunt or crass in nature. As noted earlier, it is simply ridiculous to talk about "a gene for" any complex political or social trait; all such behaviors emerge in dynamic interaction with environmental triggers and contingencies. However, it can prove exceedingly difficult to talk about these topics or to properly present them to the public in a nuanced or sophisticated fashion in the current media climate. These arguments are often subtle.

Genetic influences are not simple nor are they straightforward. They may influence many important political factors, and not just among leaders. They may influence political ideology,¹² voter turnout,¹³ and political

11. Lawrence K. Altman, *Tsongas's Legacy: Checking Health of Candidates*, N.Y. TIMES, Jan. 21, 1997, at C3.

12. See Peter K. Hatemi et al., *Is There a "Party" in Your Genes?*, 62 POL. RESEARCH Q. 584, 589, 596 (2009) (determining that genes play a pivotal role in shaping the strength of an individual's party identification); Jamie E. Settle et al., *The Heritability of Partisan Attachment*, 62 POL. RES. Q. 601, 607 (2009) (suggesting that parent-child correlation in

participation¹⁴ among the mass public as well. These findings may not hold up to scrutiny and replication, but the scientific investigation in their influence on social and political behavior will continue unabated. But again, genetic factors always involve an environmental component as well. Their effects can be subtle and they can be profound. They are worthy of larger political and legal discussion. And yet it remains very difficult to represent it in a thirty-second sound bite. Certain in-depth news programs such as *Charlie Rose* or the PBS *Newshour* may allow deep discussion of these issues, but most partisan political news and punditry, deriving no obvious immediate benefit from a more sophisticated analysis, tend to revert to scare tactics which emphasize the past misuse of this kind of information by malign actors seeking personal benefit from such a misrepresentation. This is not to say that such past abuses were not real, or did not cause harm or suffering; they did. But in the wrong hands, information about social practices can cause extreme suffering as well, as illustrated by those like John Money who believed that sex could be randomly reassigned¹⁵ or those who argued that bad mothering caused schizophrenia.¹⁶ Sophisticated discussion shorn of sensation-seeking power grabs remains critical if appropriate constraints, which allow for positive benefits such as those that might derive from stem cell research, are to be fully discussed and imposed in a consensual fashion. As the science moves forward, it can be increasingly challenging to think about the ways that society might accommodate the scientific advances that would have been unimaginable at the time the Constitution was originally framed, or even as recently as the creation of the Twenty-Fifth Amendment.

Indeed, such screening might provide information in the future about positive as well as negative characteristics. What if certain biological or genetic factors were discovered which correlated with good leadership qualities? For example, perhaps certain biological factors might render some individuals more capable of regulating their negative emotions under conditions of stress. Such a characteristic might prove highly desirable in leaders, making them less likely to react impulsively in the face of crisis or threat in ways that might potentially harm the nation, by, for example, starting an ill-conceived war out of motivations seated in personal vengeance. Certainly Professor Blema Steinberg has documented at least three significant cases where Presidents Eisenhower, Johnson, and Nixon

political affiliation may be due not only to parent socialization, but also to genetic heritability).

13. See James H. Fowler & Christopher T. Dawes, *Two Genes Predict Voter Turnout*, 70 J. POL. 579, 587–88 (2008) (identifying two specific genes that may predict likelihood of an individual voting in an election).

14. See James H. Fowler et al., *Genetic Variation in Political Participation*, 102 AM. POL. SCI. REV. 233, 240–41 (2008) (suggesting that humans exhibit genetic variation in their tendency to participate in political activities).

15. See JOHN COLAPINTO, AS NATURE MADE HIM: THE BOY WHO WAS RAISED AS A GIRL 33–34 (2000).

16. See, e.g., Gregory Bateson et al., *Toward a Theory of Schizophrenia*, 1 BEHAVIORAL SCI. 251, 256–61 (1956).

appeared to have been driven to perpetuate the war in Vietnam based, in part, on personal feelings of shame and humiliation.¹⁷ In addition, Professor Jerrold M. Post has argued that malignant narcissism helps explain Saddam Hussein's behavior prior to the first Gulf War.¹⁸

Rather, the goal is to look forward and consider the reality that such information, and access to it, will only increase over time, whether or not the public or political leadership approves of these processes. The effects of these forces are not simple or straightforward, and no credible scientist would ever claim that a single gene, or hormone, or any biological factor, could explain any complex behavior. Rather, the influence of these distal factors remains subtle but often profound in nature.

One of the critical founding principles in behavioral genetics regards the essential interaction between genes and environment in precipitating the expression and manifestation of any behavioral trait or illness. It simply makes no sense to discuss one without the other; the influence of each remains inextricably intertwined in affecting outcomes of interest. One of the most interesting and important insights offered by such work in the area of depression involves the interaction of particular genetic vulnerability involving the serotonin transporter with traumatic early life events.¹⁹

In other words, the genetic vulnerability alone is not sufficient to cause depression; it is only when the carrier experiences difficult life circumstances that such illness emerges. Only a very few genetic vulnerabilities tend to lead unerringly to a particular outcome; Huntington's disease provides perhaps the most iconic example of this occurrence.²⁰ Sufficient external stress alone can certainly precipitate illness in many. But in cases where the vulnerability exists, then the appearance of stressful life events can precipitate the actual emergence of the illness.²¹

Similarly, in my own work on aggression, it appears that a particular genetic polymorphism in monoamine oxidase (MAOA) can potentiate aggression under conditions of provocation among those who have had traumatic early life events.²² That means that somebody finding themselves in that kind of circumstance may be more likely to respond aggressively to a challenge, in the face of either domestic or foreign policy crises. It remains important to think about how these things may emerge and whether or not such a factor would be something voters would want to screen for or

17. BLEMA S. STEINBERG, *SHAME AND HUMILIATION: PRESIDENTIAL DECISION MAKING ON VIETNAM* (1996).

18. Jerrold M. Post, *Saddam Hussein of Iraq: A Political Psychology Profile*, 12 *POL. PSYCHOL.* 279, 283–85 (1991).

19. See generally Avshalom Caspi et al., *Influence of Life Stress on Depression: Moderation by a Polymorphism in the 5-HTT Gene*, 301 *SCI.* 386 (2003) (concluding that individuals with a certain gene tend to exhibit depressive symptoms more readily than others without the gene when triggered by similar stressful life experiences).

20. See, e.g., Myers, *supra* note 10, at 255–58.

21. See Kenneth S. Kendler et al., *Causal Relationship Between Stressful Life Events and the Onset of Major Depression*, 156 *AM. J. PSYCHIATRY* 837, 840–41 (1999).

22. See, e.g., Rose McDermott et al., *Monoamine Oxidase A Gene (MAOA) Predicts Behavioral Aggression Following Provocation*, 106 *PROC. NAT'L ACAD. SCI.* 2118 (2009).

think about in making their decision about which candidate to support. Would such a propensity constitute a disability that would allow somebody to be removed from office, either for real reasons or for political reasons, or would it represent a strength in time of war? The threat and quandary emerges when an opponent wants to obtain a political advantage, and so decides to use such information as an excuse to try to have a person removed from contention, or from office, for reasons that may, in fact, be personal and political, rather than medical or psychological in nature.

As with depression, the interaction between genetic vulnerability and particular life circumstances precipitates the elicitation of the behavior of interest. The behavior we seek to understand and regulate, whether aggression or cooperation, exists in a particular context of distinct political ecology. It is not that a depressed leader is inevitably going to be depressed. But certain events can happen—unexpected events, certainly undesirable events—which can affect people and profoundly shift their judgment and decision making on the matters that we care about and that we elect them to address. So someone like Abraham Lincoln may not have necessarily gotten depressed if he had not lost both his children, but once that circumstance arises, there are certain kinds of consequences. And yet, despite his personal pain, he became an extraordinary President, showing that illness alone does not militate against effective leadership any more than physical and psychological health ensures it.

There are two important aspects to this claim. First, some personal characteristics remain better suited for some challenges than for others. Negative consequences are not the only ones that may emerge as a result of increased genetic understanding. It may be that we learn over time that there are certain characteristics that actually select people to be more effective leaders, in one way or another. They are more charismatic. They have greater resilience. Maybe they just have more enduring biology. They are likely to live longer. They are less likely to be alcoholics. They are more likely to be able to have greater intelligence or greater lung capacity—in short, they possess unique individual variants that can be very subtle, but nonetheless have, at least in comparison, an impact on their ability and their skill as individual leaders.

If such information emerges, that does not necessarily mean that such characteristics should become something that candidates should test for, or that they should be required to release such information to the public. After all, such information might remain private, but it is imaginable that candidates might use such positive information to their advantage by disclosing it, or, finding a weakness in the opposition, leaking that information for personal political benefit. Is that a legitimate basis upon which to influence a voter's decision? If we can legitimately make a decision that says, "This person is less biologically able to be a leader at this point in time, so we will screen them out," can voters simultaneously say that they prefer people who possess better leadership characteristics, and demand such testing and information on various critical factors, once these become known?

Under conditions of war, the public may need and want strong, decisive, even aggressive leaders. Under conditions of peace, they may prefer a more mild-mannered politician. Perhaps the best example of this trade-off came with the shocking defeat of Prime Minister Winston Churchill in favor of Clement Atlee at the very end of the World War II.²³ Of course the factors that go into creating any given leader, or which inspire a population to vote for one candidate over another, remain myriad and complex in nature, but there is no one leadership type that will emerge optimal for every kind of political environment or challenge.

Second, voters and other politicians can make extremely logical and justifiable choices to favor a clearly impaired leader over a strong and healthy one. The most obvious example of this is the victory of a clearly exhausted and ill Franklin Roosevelt in 1944 over his rival, a much younger and fitter Thomas Dewey.²⁴ Given the nature of the war, and the close relations that Roosevelt had built with British Prime Minister Winston Churchill and Soviet leader Josef Stalin,²⁵ voters were right to judge that even four hours a day of Roosevelt at the helm was more valuable than sixteen hours a day of anyone else who would lack the history and knowledge necessary to pursue a successful completion of the war effort. In this way, the physically stronger candidate clearly represented the weaker choice in every meaningful way.

II. TWO ILLUSTRATIONS

While it is fine to think about the application of these biological and genetic factors to presidential politics, it may be easier to examine potential implications within the context of specific examples. The first, involving Woodrow Wilson's reaction to Mexico in the wake of his bereavement following the death of his first wife, Ellen Axson, concerns mental health issues.²⁶ The second, involving the medical sequelae of John F. Kennedy's Addison's disease, involves physical illness.

A. *Wilson's Complicated Bereavement*

Given sufficient stress, anyone can become depressed. However, susceptibility to major depression clearly has a genetic component in at least some percentage of those affected.²⁷ Similarly, anyone who

23. See PETER HENNESSY, *NEVER AGAIN: BRITAIN, 1945–1951*, at 65–67, 87 (1993).

24. See Phillip A. Grant, Jr., *Roosevelt, the Congress, and the United Nations*, 13 *PRESIDENTIAL STUD.* Q. 279, 280 (1983); Arthur Krock, *Dewey Concedes: His Action Comes as Roosevelt Leads in 33 States*, *N.Y. TIMES*, Nov. 8, 1944, at 1.

25. See generally Warren F. Kimball, *Naked Reverse Right: Roosevelt, Churchill, and Eastern Europe from TOLSTOY to Yalta—and a Little Beyond*, as reprinted in 9 *DIPLOMATIC HIST.* 1 (1985) (examining, through correspondence between Roosevelt and Churchill, the leaders' respective Russian wartime policies and relationship with Stalin).

26. For a broader discussion of Wilson's psychological precipitants and consequences of this experience, see ROSE MCDERMOTT, *PRESIDENTIAL LEADERSHIP, ILLNESS, AND DECISION MAKING* 60–61 (2008).

27. See Caspi et al., *supra* note 19, at 386; Kenneth S. Kendler & Laura Karkowski-Shuman, *Stressful Life Events and Genetic Liability to Major Depression: Genetic Control*

experiences the loss of a close friend, relative, or beloved animal, can grieve in a way that affects their normal functioning in detrimental ways. In most cases, that grieving process has a self-limiting quality, and the person resumes their everyday activities over time. Sometimes, however, grieving can be complicated. In the case of President Calvin Coolidge, for example, the complicated bereavement he experienced in the wake of his son Calvin's death prevented him from being able to function as he once had for the remainder of his Presidency.²⁸

President Woodrow Wilson seemed to experience a similar lack of judgment following the death of his wife Ellen from Bright's disease, a kidney ailment, in 1914. It should be noted that Wilson, like Lincoln,²⁹ had been subject to frequent and often enduring bouts of melancholia and depression throughout his life,³⁰ indicating the possibility of a genetic vulnerability that becomes activated in the face of challenging life events, as might be experienced when a loved one dies. Wilson had been particularly susceptible to such experiences when he felt lonely or unloved; in the parlance of an older psychoanalytic model, which has recently found new traction, he would have been said to suffer from what was called an anaclitic depression.³¹ These forms of depression occur when someone suffers the loss of a particularly deeply felt personal attachment. This had happened to Wilson earlier in his life when he had fallen in love with a cousin, Harriet Woodrow, who refused his offer of marriage. He subsequently married his wife Ellen.

When Ellen died, Wilson was utterly bereft. He complained of problems with his concentration and memory. His doctor, Cary Grayson, was extremely concerned about his health. In fact, Ellen's last words implored Dr. Grayson to look after her husband. During the time surrounding Ellen's death, Wilson pursued an unusually aggressive foreign policy toward Mexico.³² A rapid sequence of leadership overthrows had rendered Mexico's government relatively unstable at the time. A longtime dictator, Porfirio Diaz, had been unseated by another, Francisco Madero, who himself was overthrown by General Vitoriano Huerta. But U.S. interest in the region remained high; Americans owned forty-three percent of the property in Mexico, and American investment in the region exceeded two billion dollars a year. Huerta had encouraged British oil interests that conflicted with those of Americans.

of Exposure to the Environment?, 27 *PSYCHOL. MED.* 539, 539 (1997). See generally H. Perris et al., *Genetic Vulnerability for Depression and Life Events*, 8 *NEUROPSYCHOBIOLOGY* 241 (1982).

28. This case has been meticulously and brilliantly illuminated in ROBERT GILBERT, *THE TORMENTED PRESIDENT: CALVIN COOLIDGE, DEATH, AND CLINICAL DEPRESSION* (2003).

29. See generally JOSHUA WOLF SHENK, *LINCOLN'S MELANCHOLY: HOW DEPRESSION CHALLENGED A PRESIDENT AND FUELED HIS GREATNESS* (2006).

30. See MCDERMOTT, *supra* note 26, at 45–82.

31. See, e.g., Michael B. Hennessy et al., *Separation, Sickness, and Depression: A New Perspective on an Old Animal Model*, 18 *CURRENT DIRECTIONS PSYCHOL. SCI.* 227 (2009).

32. For a fuller discussion of Wilson's treatment of Mexico, see WALTER LAFEVER, *THE AMERICAN AGE: U.S. FOREIGN POLICY AT HOME AND ABROAD* 277–81 (2d ed. 1994).

Wilson was not happy with Huerta's actions. Initially, he demanded that Mexico hold democratic elections acceptable to the United States; these requests were made at the same time that Wilson tried several unsuccessful covert attempts to unseat Huerta. Things escalated around the time that Ellen became terminally ill and died. When Huerta arrested seven American soldiers, who likely were involved in the attempt to overthrow him, Wilson ordered an invasion of Mexico. This attack led to the death of an additional nineteen American soldiers and over 300 Mexicans. Huerta broke off diplomatic relations with the United States. In response, Wilson mobilized more American forces along the border of Texas. This act appeared to unite disparate Mexican factions and all but precipitated a war between the United States and Mexico. However, once word reached Wilson of the deaths of the original soldiers, he was overcome with the grief he had caused others and reversed his original decision to invade.

Not coincidentally, Dr. Grayson had taken his oath to Ellen seriously and had worked to find Wilson a new wife. He introduced Wilson to Edith Bolling Galt, a socialite widow, who quickly became Wilson's second wife, making Wilson the second man, after John Tyler, to remarry while in the White House. Wilson's growing attachment to Edith coincided with his withdrawal from more belligerent action against Mexico.

The interesting question regards the extent to which Wilson's susceptibility to depression might have had a genetic component. Given his long history of depression over the course of his life, it seems likely that at least some part of his vulnerability may have been genetic in origin. Should such a vulnerability be screened for prior to running for office? If such susceptibility is found, should it disqualify a candidate, particularly in light of the many effective pharmaceutical interventions now available that treat depression? Would his behavior have been different had he not been depressed? This appears likely, given that his foreign policy actions did not tend toward aggressive intervention in general; in fact, he continually frustrated his European allies for his failure to join in the Allied military effort against the Germans in World War I until it became clear they would not let him broker the peace, which he desperately desired, until he entered the fray. In the case of Mexico, Wilson's actions stopped short of precipitating an unnecessary war, but did nonetheless needlessly cost a significant number of lives.

Clearly, knowing that someone possessed a susceptibility to depression may not, standing alone, disqualify him for leadership. President Lincoln's well-known depression did not render him an ineffective leader during the nation's most serious crisis over slavery that resulted in the Civil War. As with President Roosevelt's election in 1944, northerners would have been extremely ill advised to vote against the incumbent, Lincoln, and in favor of his opponent, George McClellan during such a critical time in our nation's history. Nonetheless, opposition candidates might use such susceptibility in attempting to impugn the ability of a particular leader to handle the stress that inevitably arises concomitant with election to a high office such as the Presidency.

*B. John F. Kennedy and Addison's Disease*³³

President John F. Kennedy provides a clear illustration of the interaction between biological vulnerability and environmental circumstance, and certainly illustrates the profound ability of individual will and tenacity to overcome the biological and genetic limitations that nature can impose on particular individuals.

Kennedy suffered from many physical ailments, not the least of which was the perpetual back pain he endured as a result of a congenital malformity that rendered one of his legs shorter than the other, which threw off the balance in his back. This pain—initially attributed to an injury sustained in a football game at Harvard and later claimed to result from the heroic incident involving his PT-109 boat being blown out from under him during his Navy service in World War II—caused debilitating impairment. The rocking chair that became emblematic of his presidency represented one of the few implements that offered him respite from his chronic pain. Surgery, a lift in his shoe, and physical therapy eventually improved this condition, but the pain never completely remitted.

However, the condition that posed the greatest risk to his life, if not his comfort, was Addison's disease, an illness that can be caused by various factors, but which in Kennedy's case ran in his family; his sister Eunice Kennedy Shriver suffered from the same ailment. At the time of Kennedy's original diagnosis, the disease was largely fatal in a relatively short period of time. Kennedy beat the odds in many ways, receiving new treatments, such as the recently synthesized variant of cortisone developed by Merck, which allowed him the possibility of a normal life span.

Given the amount of pain he was in, and given that he needed to take steroids for the proper treatment of his Addison's disease, it is not surprising that Kennedy used and abused a wide variety of drugs and medication over the course of his life. Clearly, his decision-making skills improved greatly between the time of the Bay of Pigs incident early in 1961 and the Cuban Missile Crisis in October of 1962. The medical changes during this time period are significant: his back pain had improved with physical therapy under the care of Hans Kraus; his military physician, Dr. George Burkley, had reduced and controlled his medication intake; and he had come out from under the influence of the illicit drugs he received from Dr. Max Jacobson.

There were many additional instances where Kennedy's pain, illness, and medication affected his decision making. But noteworthy among these were his interactions with Nikita Khrushchev during the conference in Vienna in 1961. During a period of particularly bad back pain, Kennedy received injections of a combination of steroids and amphetamines prior to his meetings with French President Charles de Gaulle as well as the Soviet leader; Dr. Jacobson flew on this trip on a separate plane at the taxpayers' expense. The meetings were quite contentious and involved a number of difficult issues including Laos, the nuclear test ban treaty, Cuba, and

33. For a fuller discussion of this account, see MCDERMOTT, *supra* note 26, at 131–56.

questions surrounding the German peace treaty and the management of Berlin. Kennedy expected the Soviet premier to be a politician who he could bargain with like any other; he appeared absolutely blindsided by the ideological commitment demonstrated by Khrushchev. The Soviet ultimatum regarding control of Berlin led Kennedy to believe war might result.

Kennedy was clearly shaken up by the meeting. He told his brother that Khrushchev was just like their father, “All give and no take.”³⁴ Immediately after the meeting, he granted an interview to James Reston of the *New York Times*, where Kennedy described the interview as the “[r]oughest thing in my life [H]e just beat the hell out of me.”³⁵ Kennedy spoke about the need to push back against the Soviets, and, for the first time, indicated that the place to do this was Vietnam. The timing of this decision to intervene in Vietnam reveals a striking story about Kennedy’s desire to get back at Khrushchev for besting him in one arena by applying pressure in another. Although responsibility for the war in Vietnam rests at the feet of several Presidents (including Eisenhower, who sent in the first troops; Johnson, who initiated the massive escalation; and Nixon, who became—in Senator J. William Fulbright’s words—“the greatest bomber of all time”³⁶), Reston traces the inception of American military involvement in Vietnam to the moment in time when Kennedy needed to prove himself against the Soviet leader who had bullied him into quiescence during the conference.³⁷

Khrushchev’s take on Kennedy’s actions mirrored Kennedy’s evaluation of his own poor performance. Reports indicated that Khrushchev thought Kennedy looked nervous and upset, and his advisers reported that Khrushchev felt Kennedy possessed more the feel of a second-in-command than a leader. This appears to be the moment when Khrushchev started to believe that he could take Kennedy, and began to plan for the installation of the missiles into Cuba, which began the following year. If both the Cuban Missile Crisis and the American incursion into Vietnam began as responses to Kennedy’s behavior at the conference in Vienna in 1961, then clearly the precipitants of his behavior deserve examination.

Kennedy’s back had been in bad shape prior to the trip. As noted, he took along three of his doctors (Burkley, Travel, and, illicitly, Jacobson) for help and support. He was aware that his performance at the conference had been wanting, and immediately exiled Jacobson after the meeting. Indeed, with one exception during his subsequent stay in London, there is no record that Jacobson treated the President again, although there are numerous records of him coming to the White House to treat Jackie after that time.

34. MICHAEL R. BESCHLOSS, *THE CRISIS YEARS: KENNEDY AND KHRUSHCHEV, 1960–1963*, at 234 (1991).

35. *Id.* at 224–25; see JAMES RESTON, *DEADLINE: A MEMOIR* 290 (1991) (describing this interview, and the President as being “shaken and angry”).

36. MCDERMOTT, *supra* note 26, at 190.

37. RESTON, *supra* note 35, at 290–95.

Upon his return to Washington, Kennedy stayed out of public view for over a month.

Again, the question remains whether someone else, less affected by medical illness, would have responded in a similar manner. Given that the primary illness in this case had a component of genetic vulnerability, should candidates be screened for such illnesses prior to running for office? And what illnesses should disqualify a leader from being able to run? Perhaps it is sufficient to inform the public about the nature of a given candidate's vulnerabilities and allow voters to make their own determination as to suitability for leadership and public office. But this does allow the possibility for tremendous invasion of personal privacy.

There are reports that Nixon was aware of Kennedy's Addison's disease and decided not to use this information during the 1960 presidential campaign, claiming the information was too personal and irrelevant to the campaign.³⁸ While it is hard to believe that Nixon would have withheld any information that might have been used to his advantage given his later behavior during Watergate, it is perhaps less surprising to imagine that he would not have used information against Kennedy if he believed Kennedy's camp may have held similarly damaging information about him regarding his drinking, for example. Many political opponents remain remarkably strategic and relentless in their pursuit of political advantage and might not restrain themselves from using any information available in order to gain the upper hand in their strivings to attain and maintain political power and dominance.

III. MAKING ASSESSMENTS OF DISABILITY IN A NEW AGE OF BIOLOGICAL INFORMATION

Assessments of disability remain an ambiguous loophole in the Twenty-Fifth Amendment. While a President can be removed from office by the Vice President, in concert with members of the executive Cabinet, or another body deemed appropriate by Congress, and with proper notification to appropriate congressional representatives, the determination of what constitutes the inability to discharge duties properly remains unclear. This flexibility can allow for the application of this law to a wide variety of circumstances, including medical and psychological illness, temporary as well as permanent forms of disability, and perhaps even under strategic considerations as, for example, might occur if a President were kidnapped and held hostage. The adaptability of the law to myriad contingencies certainly represents a strength, but also poses some potential pitfalls.

While many observers might fear that the risk lies in a Vice President trying to make a power grab by pushing the President out the way, the historical record indicates a strong tendency toward caution in this regard, even when such an assertion of leadership might have benefited the country, as certainly was the case following President Wilson's major stroke in

38. See JOHN C. LUNGREN & JOHN C. LUNGREN JR., HEALING RICHARD NIXON: A DOCTOR'S MEMOIR 61-64 (2003).

October of 1919, after which time his debilitation appeared severe enough that he should not have remained in office.

Rather, the concern arises in the wake of the kinds of information that might be brought to bear in attempting to disqualify a President on the basis of future contingencies. Can leaders be required to submit to genetic screening for major psychiatric and physical illnesses known to have a genetic component and to affect the nature and quality of decision making, such as depression? Should this assessment depend on evidence that such an illness or disease has manifested among other family members, rendering its relevance more salient? If such a vulnerability is found, can, or should, such a person be removed from office under the disability clause even if they have not yet demonstrated any symptoms or problems? Should such information be made public so that voters can make up their own minds?

Certainly the public reaction to Senator Thomas Eagleton's disclosure that he had received electroshock treatment for depression during Governor George McGovern's presidential run in 1972 should not leave any observers sanguine about public understanding, tolerance, or acceptance of susceptibility to mental illness in particular.³⁹ McGovern, forced to jettison Eagleton off the ticket, received widespread criticism for his bad political judgment in making such a poor choice for a running mate. This despite the fact that Eagleton's depression had occurred many years prior, and had not recurred since.

Medical leaders such as George Annas have argued that potentially prejudicial genetic testing, including for terminal diseases such as Huntington's, should never be revealed.⁴⁰ This seems ill considered in light of the fact that this disease in particular, in addition to placing the life of the victim at risk, would also severely compromise any affected person's ability to properly lead, given the dementia that inevitably results prior to death.

The public and relevant leaders can decry the use of such information, and the existence of such technology, for purposes of pursuing personal political power. But in this regard, such information only differs in quality, not in kind, from other sorts of personal information, including illicit sexual liaisons, which, once considered off-limits, now regularly litter the political landscape. If such information exists, or if such knowledge can be gained by analyzing the remains of a water glass, certain political actors will try to obtain and use that information for personal political benefit. Seeking such advantage lies at the very heart of the competitive political structure.

However, the benefit of law lies in its ability to restrain certain actors from engaging in behavior that the majority considers inappropriate for achieving the goals of peace and prosperity that those individuals living in democratic communities typically desire. As a society, we can bury our

39. See, e.g., Associated Press, *McGovern Calls Eagleton Affair "Saddest Part"*, N.Y. TIMES, Dec. 13, 1972, at 47; Douglas E. Kneeland, *Eagleton Tells McGovern It Was "the Only Decision"*, N.Y. TIMES, July 31, 1972, at 1.

40. See George J. Annas, *The Health of the President and Presidential Candidates*, 333 NEW ENG. J. MED. 945 (1995).

heads in the sand, pretend such information does not exist and could not be used for nefarious ends. But, as with weapons and technology, once new information is discovered, it tends to be used, and not always for good purposes. Once biological information about leaders can fall into the hands of people who want to use it to manipulate it for political advantage, such information can become dangerous, particularly if the public is not properly educated about the nature, meaning, and susceptibility to illness based on genetic risk. It is important to start considering the legal implications that follow from the potential political manipulation of such private information before an actual crisis emerges. Political opponents will use potentially damaging information for political advantage if they can, whether or not the public agrees with using this kind of information in that way. As scholars consider assessments of disability and inability, it becomes critical to set guidelines on the use of the kind of biological and physiological factors which constitute grounds for disability, either temporary or permanent. If some actors will employ this information in ways that others find problematic, unethical, or potentially destructive, it becomes incumbent on legislators to investigate possible compromises in its use, with an eye to avoiding misuse, and to begin to establish institutional constraints that can restrict the more egregious violations from destroying prospects for effective leadership and smooth transition.

The answers to the questions raised in this discussion are not clear or obvious. The solutions to problems that have not yet emerged do not arise quickly. But, as the original framers of the Twenty-Fifth Amendment believed, that does not mean that we as a society should not begin to embark on a path of inquiry into the nature and dimensions of these challenges with an eye toward creating the kinds of enduring legislation which can flexibly adapt to the future challenges we will inevitably confront.