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Fifty Years After the Twenty-Fifth Amendment: Recommendations for Improving the Presidential Succession System

Second Fordham University School of Law Clinic on Presidential Succession
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Fifty Years After the Twenty-Fifth Amendment: Recommendations for Improving the Presidential Succession System

Erratum

Law; Constitutional Law; Law and Politics; Law and Society; Legal History; President/Executive Department; Legislation

REPORT

**FIFTY YEARS AFTER
THE TWENTY-FIFTH AMENDMENT:
RECOMMENDATIONS FOR IMPROVING
THE PRESIDENTIAL SUCCESSION SYSTEM**

*Second Fordham University School of Law
Clinic on Presidential Succession**

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* The Second Fordham University School of Law Clinic on Presidential Succession developed this seminal Report to continue the discussion around presidential disability and the Twenty-Fifth Amendment. The Clinic’s fourteen students developed this Report under the supervision of Dean John D. Feerick and Professor John G. Rogan. Professor Rogan edited the Report. The Clinic students are Naomi Babu, Jonathan Coppola, Timothy Deal, Morgan Green, Gareth Horell, Marcella Jayne, Nicole Manganiello, Edgar Mendoza, Nikole Devaris Morgulis, Alison Park, Bronwyn Roantree, Ryan Surujnath, Javed Yunus, and Kaitlyn Zacharias. The students presented the Clinic’s recommendations at the symposium entitled *Continuity in the Presidency: Gaps and Solutions* held at Fordham University School of Law on September 27, 2017. For an overview of the symposium, see Matthew Diller, *Foreword: Continuity in the Presidency: Gaps and Solutions*, 86 FORDHAM L. REV. 911 (2017). For a video recording of the panel, see *Continuity in the Presidency: Gaps and Solutions—Building on the Legacy of the Twenty-Fifth Amendment, Part 2*, FORDHAM L. ARCHIVE SCHOLARSHIP & HIST. (Sept. 27, 2017), http://ir.lawnet.fordham.edu/twentyfifth_amendment_photos/11/ [https://perma.cc/JR2C-W587].

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INTRODUCTION

On February 10, 2017, the United States marked the fiftieth anniversary of the ratification of the Constitution's Twenty-Fifth Amendment. Born out of the tragedy of the assassination of President John F. Kennedy in 1963, the Amendment's provisions on presidential succession and inability have supplied stability in other times of crisis during the Amendment's first fifty

years.¹ Nevertheless, scholars and experts have identified remaining flaws and gaps in the presidential succession system.²

Fordham University School of Law has a history of promoting solutions to flaws in the nation's presidential succession system,³ beginning with John D. Feerick's October 1963 *Fordham Law Review* article, "The Problem of Presidential Inability—Will Congress Ever Solve It?"⁴ and his two articles during the Twenty-Fifth Amendment's drafting and reformation.⁵ The law school then hosted a symposium on the vice presidency in 1976.⁶ In the past decade, Fordham has continued its engagement on presidential succession issues through a symposium in 2010⁷ and a Presidential Succession Clinic that published a report with reform recommendations in 2012.⁸

In August 2016, Fordham University School of Law formed a second Presidential Succession Clinic that met during the 2016 to 2017 academic year. Like the first Clinic, the second studied the succession system and interviewed experts to develop reform proposals.⁹ Accordingly, the Clinic advances recommendations with respect to six areas: (1) contingency planning in the executive branch for presidential succession, (2) the presidential line of succession, (3) simultaneous incapacities of the President and Vice President and sole incapacities of the Vice President, (4) Congress's responsibility to resolve disputes over the President's capacity under Section 4 of the Twenty-Fifth Amendment, (5) health disclosures of presidential candidates, and (6) political party rules for replacing and removing presidential candidates.

1. See *infra* Part I.A.

2. See, e.g., *Past Reform Recommendations on Presidential Succession*, FORDHAM L. ARCHIVE SCHOLARSHIP & HIST. (2017), http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1005&context=twentyfifth_amendment_reports [<https://perma.cc/44MK-DWZ8>].

3. See generally *Twenty-Fifth Amendment Archive*, FORDHAM L. ARCHIVE SCHOLARSHIP & HIST. (2017), http://ir.lawnet.fordham.edu/twentyfifth_amendment_archive/ [<https://perma.cc/8F7A-FEEW>].

4. See generally John D. Feerick, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, 32 FORDHAM L. REV. 73 (1963) (discussing the issues of presidential succession).

5. See generally John D. Feerick, *The Proposed Twenty-Fifth Amendment to the Constitution*, 34 FORDHAM L. REV. 173 (1965); John D. Feerick, *The Vice-Presidency and the Problems of Presidential Succession and Inability*, 32 FORDHAM L. REV. 457 (1964).

6. *Symposium on the Vice Presidency: American Bar Association Special Committee on Election Reform*, 45 FORDHAM L. REV. 707 (1977).

7. See generally Symposium, *The Adequacy of the Presidential Succession System in the 21st Century: Filling the Gaps and Clarifying the Ambiguities in Constitutional and Extraconstitutional Arrangements*, 79 FORDHAM L. REV. 775 (2010) (discussing the history of presidential succession and the ambiguities that surround it).

8. Fordham Univ. Sch. of Law's Clinic on Presidential Succession, Report, *Ensuring the Stability of Presidential Succession in the Modern Era*, 81 FORDHAM L. REV. 1 (2012) [hereinafter First Clinic Report] (explaining the history of presidential succession in the United States and providing recommendations for improvement).

9. This Clinic focused on some of the same topics as the first Clinic but it also explored new issues. This Clinic reached the same conclusions as the first on some issues, while it differed on others.

This Report begins with an overview of the presidential succession system, particularly the Twenty-Fifth Amendment provisions. The remaining Parts describe the Clinic's recommendations.

The first Part of the Clinic recommendations discusses executive branch contingency planning and outlines two steps the White House can take to prepare for presidential incapacities. First, the Clinic recommends that the President determine in advance situations where the Vice President should act as President under the Twenty-Fifth Amendment's voluntary transfer provision at Section 3. Such a "prospective declaration of inability" would allow for transfers of power during emergencies when the Cabinet is not easily reachable to invoke Section 4, the Amendment's other inability provision. Second, given that some Presidents have suffered psychological ailments, the Clinic recommends that the White House add a mental health professional to the unit of doctors and nurses who care for the President.

The next Part describes the Clinic's recommendations for improving the line of succession. These recommendations address concerns about the successors' qualifications and other vulnerabilities. The Clinic's recommendations include removing legislators and lower-ranking Cabinet members as well as adding some officials chosen by the President and confirmed by Congress.

Next, the Report addresses the absence of procedures for vice presidential incapacities and "dual incapacities" of the President and Vice President. These gaps could prevent orderly transfers of power. The Twenty-Fifth Amendment's inability provisions are unusable when the Vice President is incapacitated. In a "dual inability" situation, there is no formal way for the next person in the line of succession to take power. The Clinic recommends statutes that mirror the Twenty-Fifth Amendment's inability provisions to address these gaps.

The following Part considers how Congress would carry out its responsibility to resolve a dispute over whether the President is unable. Section 4 of the Twenty-Fifth Amendment gives Congress twenty-one days to "decide" whether the President is unable if the President contests an inability determination by the Vice President acting with the Cabinet or another body. The Clinic recommends the creation of a joint committee of both Houses of Congress. This Part also anticipates legal disputes that may arise in such a scenario.

The final two Parts focus on succession and inability issues during presidential campaigns. Some candidates have been less than forthcoming with the public about their health histories. To encourage more transparency, the Clinic recommends that a commission develop guidelines for what candidates should disclose about their health. Last, the Report considers the political parties' procedures for replacing presidential candidates. The parties' current replacement rules lack detail and have unclear provisions for situations where candidates become unable. The Clinic recommends making the vice presidential nominee the designated successor to the nomination in

the final weeks of the campaign and creating a provision for candidate inabilities.

I. OVERVIEW OF THE PRESIDENTIAL SUCCESSION SYSTEM

The presidential succession system comprises constitutional and statutory provisions as well as procedures created by the executive branch. Article II, Section 1, Clause 6 of the Constitution makes the Vice President the first successor to the presidency and authorizes Congress to establish procedures for presidential succession.¹⁰ Congress has in turn passed three laws to establish lines of succession.¹¹

The Twelfth Amendment provides the procedure for electing the President and Vice President, modifying the original Electoral College system in Article II.¹² The Twentieth Amendment provides for succession when the President-Elect has died or failed to qualify before the inauguration.¹³ The Twenty-Fifth Amendment addresses presidential succession and disability as well as a vice presidential vacancy.¹⁴

A. *The Twenty-Fifth Amendment*

The Twenty-Fifth Amendment has four sections. Section 1 provides that the Vice President becomes President if the President dies, resigns, or is removed from office.¹⁵ There had been ambiguity about the Vice President's status upon succession that may have deterred at least one Vice President from acting as President when the President was disabled. When President James Garfield "wavered between life and death" for nearly three months in 1881 after he was shot, Vice President Chester Arthur did not assume the powers and duties of the presidency in part out of fear that doing so would permanently displace the President, regardless of whether he recovered.¹⁶ Section 1 clarifies this ambiguity by stating the only contingencies where the Vice President becomes President. The Amendment's inability provisions in Sections 3 and 4 make clear that the Vice President merely acts as President when the President is disabled. Section 1 was used in 1974 when Vice

10. See U.S. CONST. art. II, § 1, cl. 6; see also *infra* Appendix A.

11. See *infra* Part III.A; see also *infra* Appendix C.

12. U.S. CONST. amend. XII; see also *id.* art. II, § 1, cl. 3.

13. *Id.* amend. XX.

14. *Id.* amend. XXV; see also *infra* Appendix B.

15. U.S. CONST. amend. XXV, § 1.

16. See JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* 10–11 (3d ed. 2014) [hereinafter FEERICK, TWENTY-FIFTH AMENDMENT]; see also Joel K. Goldstein, *Vice-Presidential Behavior in Disability Crisis: The Case of Thomas R. Marshall*, POL. & LIFE SCI., Fall 2014, at 37, 46–47 (stating that this ambiguity may have reduced the likelihood of Vice President Thomas Marshall acting as President following President Woodrow Wilson's stroke in 1919). The ambiguity over the Vice President's status was highlighted by the controversy surrounding Vice President John Tyler's claim that he became President—not Acting President—upon President William Henry Harrison's death in 1841. See JOHN D. FEERICK, *FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION* 89–98 (1965) [hereinafter FEERICK, FROM FAILING HANDS].

President Gerald R. Ford succeeded to the presidency upon President Richard Nixon's resignation.¹⁷

Section 2 allows the President to fill a vacancy in the vice presidency subject to approval from majorities of both houses of Congress.¹⁸ Prior to the Twenty-Fifth Amendment's ratification, the country was without a Vice President on many different occasions, the length of these vacancies totaling over thirty-seven years.¹⁹ These examples illustrate the need for this provision. Additionally, the Twenty-Fifth Amendment's presidential inability procedures, which do not work without a Vice President, created another reason to curtail vacancies. Section 2 provided stability during the Watergate era, allowing the nominations of Gerald Ford after Vice President Spiro Agnew's resignation in 1973 and Nelson Rockefeller after Ford's succession to the presidency in 1974.²⁰

Section 3 allows the President to temporarily transfer presidential powers and duties to the Vice President by submitting a written declaration to the Speaker of the House and Senate President pro tempore that he is "unable" to discharge those powers and duties.²¹ The President can resume his powers and duties by submitting a written declaration to the same officials. Presidents Ronald Reagan and George W. Bush have invoked Section 3 before undergoing medical procedures under general anesthesia.²² White House officials have also considered invocations of Section 3 before

17. FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 165.

18. U.S. CONST. amend. XXV, § 2.

19. *See* FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 314.

20. *See* Joel K. Goldstein, *Taking from the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 FORDHAM L. REV. 959, 972 (2010). President Nixon may have been more hesitant to resign had Gerald Ford not been Vice President. Without a Vice President, Nixon's resignation could have led to a change in party control of the White House because Democratic Speaker of the House Carl Albert would have been the successor. *See id.*

21. U.S. CONST. amend. XXV, § 3.

22. FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 196–98, 202–03.

Presidents Jimmy Carter,²³ Ronald Reagan,²⁴ George H.W. Bush,²⁵ Bill Clinton,²⁶ and Barack Obama²⁷ underwent medical procedures.

Section 4 allows for the President's temporary removal if he is unable or unwilling to invoke Section 3.²⁸ The Vice President becomes Acting President when he and either a majority of the Cabinet²⁹ or "such other body as Congress may by law provide"³⁰ submit a declaration to the Speaker of the House and Senate President pro tempore stating that the President is "unable to discharge the powers and duties of his office."³¹ If the President declares to the Speaker and President pro tempore that he is able, he returns to the powers and duties of the presidency, unless the officials who initiated his removal submit another declaration within four days reasserting that the President is unable. In that case, Congress has twenty-one days to "decide the issue."³² Unless two-thirds of both houses of Congress vote that the

23. The White House drafted documents for invoking Section 3 when it appeared that President Carter might have hemorrhoid surgery under general anesthesia. See Robert J. Lipshutz & Office of the White House Counsel, *Documents from Carter's Contemplated Use of Section 3*, FORDHAM L. ARCHIVE SCHOLARSHIP & HIST. (1978), http://ir.lawnet.fordham.edu/twentyfifth_amendment_executive_materials/4/ [https://perma.cc/HG5Y-AFBA].

24. Before President Reagan underwent surgery for skin cancer, the White House Counsel's Office drafted a declaration for President Reagan to invoke Section 3, but the surgery did not ultimately require general anesthesia. See ABA Division for Public Services, *The 25th Amendment, Vice Presidential Selection and Remaining Issues in Presidential Succession*, YOUTUBE (May 18, 2017), <https://www.youtube.com/watch?v=T-5k17y7RpE> [https://perma.cc/6EB6-GHCJ] (sharing comments of former White House Counsel Arthur B. Culvahouse Jr. at timestamp 20:15).

25. When President Bush developed an irregular heartbeat, the White House considered invoking Section 3 if he needed to undergo a procedure to return his heartbeat to normal. See FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 200–01.

26. The Senior White House Physician was prepared to recommend invocation of Section 3 if the knee surgery that President Clinton underwent in 1997 required general anesthesia. See E. Connie Mariano, *In Sickness and in Health: Medical Care for the President of the United States*, in MANAGING CRISIS: PRESIDENTIAL DISABILITY AND THE 25TH AMENDMENT 83, 93 (Robert E. Gilbert ed., 2000).

27. The White House contemplated invoking Section 3 before President Obama underwent a colonoscopy in 2010. See *Fresh Air*, NPR (Apr. 18, 2017), <http://www.npr.org/programs/fresh-air/2017/04/18/524534726/fresh-air-for-april-18-2017> [https://perma.cc/3T4R-AA97] (interviewing former White House Deputy Chief of Staff Alyssa Mastromonaco at timestamp 14:00); see also Press Release, The White House, Release of the President's Medical Exam (Feb. 28, 2010), <https://obamawhitehouse.archives.gov/the-press-office/release-presidents-medical-exam> [https://perma.cc/7Q5A-9ZB8].

28. See *infra* Part I.B.2.

29. The Twenty-Fifth Amendment refers to the Cabinet as the "principal officers of the executive departments." U.S. CONST. amend. XXV. The legislative history indicates that acting department heads can participate in declaring the President unable. See FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 117–18.

30. Congress has never created another body to participate in the Section 4 process, but, in 2017, several lawmakers proposed legislation to do so. See H.R. 1987, 115th Cong. (2017); see also H.R. 2093, 115th Cong. (2017).

31. U.S. CONST. amend. XXV.

32. *Id.* amend. XXV, § 4.

President is unable, the President returns to power.³³ Section 4 is the only provision of the Twenty-Fifth Amendment that has never been invoked.

B. Defining Inability in the Twenty-Fifth Amendment

The Twenty-Fifth Amendment's framers purposely avoided a specific definition of inability.³⁴ They intended the Amendment's text to be flexible "to cover all cases in which some condition or circumstance prevents the President from discharging his powers and duties."³⁵ While instances of physical or mental illness are clearly covered,³⁶ it extends to "any imaginable circumstance[]" in which the President "is unable to perform the powers and duties of that office."³⁷ For example, the President's inability to reliably communicate with the White House could qualify.³⁸ The next two Parts discuss the various situations in which Sections 3 and 4 of the Twenty-Fifth Amendment could be invoked.

1. Inability in Section 3

Invocation of Section 3 might be appropriate in certain circumstances when invocation of Section 4 would not be appropriate.³⁹ That the President determines when to invoke Section 3 might allow for a broad interpretation of "unable," while Section 4, which does not involve the President in the determination, might cover a narrower set of circumstances.⁴⁰ The President's broad discretion finds further support in Section 3's structure, such as its lack of a review provision like the one in Section 4.⁴¹

The framers of the Amendment envisioned that the President would use Section 3 when ill or undergoing surgery⁴² but did not intend to confine its invocations to those contingencies.⁴³ The limits of Section 3 were explored during the Watergate era when members of Congress were among those to

33. *Id.* amend. XXV, § 4.

34. See Richard H. Poff, *Presidential Inability and the Twenty-Fifth Amendment*, STUDENT L.J., Dec. 1965, at 15, 17. Representative Poff, a key drafter of the Amendment, noted that attempting to define inability could have resulted in a "rigidity which, in application, might sometimes be unrealistic." *Id.*

35. FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 112.

36. See *id.* at 60.

37. See KENNETH R. CRISPELL & CARLOS F. GOMEZ, HIDDEN ILLNESS IN THE WHITE HOUSE 209–10 (1988).

38. See *Presidential Inability: Hearings on H.R. 836 et al. Before the H. Comm. on the Judiciary*, 89th Cong. 240 (1965) [hereinafter *1965 House Hearings*] (statement of Herbert Brownell, former Att'y Gen.).

39. Joel K. Goldstein, *The Vice Presidency and the Twenty-Fifth Amendment: The Power of Reciprocal Relationships*, in MANAGING CRISIS, *supra* note 26, at 165, 195–96.

40. See Adam R.F. Gustafson, *Presidential Inability and Subjective Meaning*, 27 YALE L. & POL'Y REV. 459, 461–62 (2009).

41. See *id.* at 472–73. *But see* FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 113 ("Section 3 does not provide a mechanism for a President to step aside temporarily without justification, thereby neglecting his duties.").

42. See FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 113.

43. See Gustafson, *supra* note 40, at 480–81.

suggest that President Nixon might use the provision to step aside temporarily.⁴⁴ In practice, however, Section 3 has been used for brief surgical procedures, as the Amendment's framers predicted.

2. Inability in Section 4

Senator Birch Bayh, the Twenty-Fifth Amendment's principal sponsor in the Senate, said Section 4 was for situations where the President is "unable to make or communicate his decisions as to his own competency."⁴⁵ Representative Richard Poff, a manager of the Amendment in the House, said Section 4 inability included physical impairments that prevented the President from declaring himself unable and psychological impairments that prevented the President from "mak[ing] any rational decision, including particularly the decision to stand aside."⁴⁶ Notably, the circumstances under which an inability arises could be relevant to using Section 4; a fleeting inability, such as a brief surgical procedure, would not merit the use of Section 4 absent an immediate need for exercise of presidential powers.⁴⁷ Perhaps in response to the ambiguity of inability under the Twenty-Fifth Amendment, some doctors, including a former White House physician, have developed criteria to assist inability determinations.⁴⁸

II. EXECUTIVE BRANCH CONTINGENCY PLANNING

The Twenty-Fifth Amendment's provisions must be supplemented by contingency planning in the White House. The military and presidential administrations over the past half-century have planned extensively for ensuring continuity of government and providing the President exceptional healthcare.⁴⁹ The Clinic's recommendations focus on two of the many aspects of this planning. First, the Clinic recommends that the contingency

44. See FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 161; see also John D. Feerick, *The Way of the 25th*, N.Y. TIMES (Dec. 13, 1973), <http://www.nytimes.com/1973/12/13/archives/the-way-of-the-25th.html> [<https://perma.cc/YNY9-U6NQ>].

45. 111 CONG. REC. 3282 (1965).

46. See FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 117.

47. See *id.* at 116–17 (quoting Senator Bayh as saying, "[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").

48. See HERBERT L. ABRAMS, THE PRESIDENT HAS BEEN SHOT: CONFUSION, DISABILITY, AND THE 25TH AMENDMENT IN THE AFTERMATH OF THE ATTEMPTED ASSASSINATION OF RONALD REAGAN 221–27 (1992); PRESIDENTIAL DISABILITY 276–82 (James F. Toole & Robert J. Joynt eds., 2001); Lawrence C. Mohr, *Medical Consideration in the Determination of Presidential Disability*, in MANAGING CRISIS, *supra* note 26, at 97, 99.

49. See generally GARRETT M. GRAFF, RAVEN ROCK: THE STORY OF THE U.S. GOVERNMENT'S SECRET PLAN TO SAVE ITSELF—WHILE THE REST OF US DIE (2017) (exploring the government's planning since World War II for surviving catastrophic attacks); Mariano, *supra* note 26, at 83–95; *Presidential Succession*, C-SPAN (July 2, 2009), <https://www.c-span.org/video/?287421-1/presidential-succession> [<https://perma.cc/Q25W-DFE3>] (recording the remarks of former Assistant to the President for Homeland Security and Counterterrorism Frances F. Townsend on the steps taken by President George W. Bush's administration for the continuity of government); Interview with John O. Brennan, Dir., Cent. Intelligence Agency, in N.Y.C., N.Y. (Nov. 2, 2016).

planning for uses of the Twenty-Fifth Amendment should provide for emergencies where there is no time to coordinate with the Vice President and Cabinet to invoke Section 4. The President should create a prospective declaration of inability to allow for quick transfers of power in these situations. Second, the White House should ensure that the President has adequate access to mental healthcare. Ideally, the White House Medical Unit should add a mental health professional to achieve this goal.

A. Prospective Declarations

Before the Twenty-Fifth Amendment provided legal mechanisms for transferring power during presidential incapacities, Presidents created arrangements that allowed their Vice Presidents—or the Speaker of the House, in one of President Johnson’s arrangements—to discharge the powers and duties of the presidency if they ever became disabled.⁵⁰ These “letter agreements,” which President Dwight D. Eisenhower first implemented,⁵¹ authorized the Vice President to unilaterally declare the President unable. For example, the letter agreement between President Eisenhower and Vice President Richard Nixon only required Nixon to engage in “such consultation as seems to him appropriate under the circumstances” before declaring the President unable and proceeding to act as President.⁵²

The agreements, while exercises in responsible and creative contingency planning, lacked a firm legal basis.⁵³ The Twenty-Fifth Amendment provided a major improvement by explicitly authorizing certain officials to declare the President unable.⁵⁴ However, by requiring that the Vice President work with the Cabinet, the Twenty-Fifth Amendment gave the Vice President significantly less discretion than the letter agreements.

Section 4’s expanded procedural requirements could be an issue in a narrow set of emergency circumstances where power must be transferred immediately. To account for such contingencies, Presidents and their Vice Presidents should develop arrangements similar to those in the letter agreements but that are consistent with the Twenty-Fifth Amendment. The Clinic believes that Section 3’s broad grant of authority to the President for determining incapacities allows the President to create a prospective declaration of inability giving the Vice President authority to initiate a transfer of power in certain predetermined circumstances.⁵⁵

50. FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 53–54; *see also* Arthur Krock, *The Johnson-Humphrey Agreement Mystery*, N.Y. TIMES, Jan. 28, 1965, at 28.

51. *See* Jeffrey Frank, *What If a President Loses Control?*, NEW YORKER (Jan. 5, 2017), <https://www.newyorker.com/news/daily-comment/what-if-a-president-loses-control> [<https://perma.cc/7N8U-8GHG>].

52. FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 53.

53. *See id.* at 54. Perhaps the only legal argument in support of the letters was based on the contingent grant-of-power theory. *See infra* Part IV.B.2.

54. *See* U.S. CONST. amend. XXV, § 4.

55. The first Presidential Succession Clinic proposed that the President, Vice President, and any official who acted as President create prospective declarations. This recommendation was intended as a remedy for the absence of procedures for declaring (1) the President unable

1. The Need for Prospective Declarations

Prospective declarations of inability are needed for situations where presidential action must be taken immediately but the President is unable and the Section 4 decision-makers are not easily reachable to participate in declaring the President unable. The assassination attempt on President Ronald Reagan in 1981 and the events of September 11, 2001, illustrate some of the challenges that may arise during a crisis when the President is unable for medical or other reasons, such as communication failures.

On March 30, 1981, President Reagan was shot after giving a speech⁵⁶ and was placed under general anesthesia for surgery shortly thereafter.⁵⁷ Officials resisted invoking the Twenty-Fifth Amendment due to political considerations and concern that it would alarm the public.⁵⁸ But its use might not have even been possible because Vice President George H.W. Bush, an indispensable participant, was flying aboard Air Force Two without reliable communications.⁵⁹

In the White House Situation Room, Secretary of State Alexander Haig declared to several officials that “constitutionally” he was in charge until Bush arrived back at the White House.⁶⁰ Haig was the highest-ranking member of the Cabinet, but the Speaker of the House was the next person in the line of succession after the Vice President.⁶¹ He eventually repeated his claim to the press after the Deputy Press Secretary was unable to say who was in charge at the White House.⁶²

The uncertainty over who was discharging presidential powers and duties became even more significant when those in the Situation Room learned that two Soviet submarines were patrolling “unusually close to the United States,” reducing their nuclear missile range by two minutes.⁶³ The nuclear football had already been brought into the Situation Room,⁶⁴ but there was confusion over who, if anyone, had authority to launch nuclear missiles. Secretary of

when there is not an able Vice President, (2) the Vice President unable, and (3) an Acting President unable. See First Clinic Report, *supra* note 8, at 31–34. We focus on presidential prospective declarations as a part of planning for emergencies and further explore the legal issues that their use presents.

56. See ABRAMS, *supra* note 48, at 48–54.

57. See *id.* at 62–63.

58. See *id.* at 94; DEL QUENTIN WILBER, RAWHIDE DOWN: THE NEAR ASSASSINATION OF RONALD REAGAN 164 (2011). Additionally, many officials were either not aware of the Twenty-Fifth Amendment or did not have a detailed understanding of it. White House Counsel Fred Fielding remembers seeing Cabinet members’ “eyes glaze[] over” when he mentioned the Amendment. See Fred F. Fielding, *An Eyewitness Account of Executive “Inability,”* 79 FORDHAM L. REV. 823, 827 (2010).

59. ABRAMS, *supra* note 48, at 83–90. The line of communication with Air Force Two was neither secure nor strong enough for verbal communication. See WILBER, *supra* note 58, at 132.

60. WILBER, *supra* note 58, at 167 (quoting Secretary of State Haig as stating, “[s]o the helm is right here . . . [a]nd that means right here in this chair for now, constitutionally, until the Vice President gets here”).

61. See 3 U.S.C. § 19 (2012).

62. WILBER, *supra* note 58, at 174–75.

63. *Id.* at 175.

64. *Id.* at 161. The football contains plans for launching nuclear missiles. *Id.* at 12.

Defense Casper Weinberger asserted that he had command authority in Bush's absence, but Haig disagreed, arguing that they had sufficient ability to communicate with Bush.⁶⁵ However, since the Twenty-Fifth Amendment had not been invoked and there was ambiguity about the devolution of the command authorities, it was unclear if Bush had the authority.⁶⁶

Twenty years later, on September 11, 2001, technological limitations aboard Air Force One impaired President George W. Bush's ability to communicate with key officials as the government scrambled to respond to the terrorist attacks.⁶⁷ Bush recalled that he was able to instruct Vice President Cheney, who was at the White House, to authorize the military to shoot down hijacked airliners.⁶⁸ But other communications were limited; he was not able to reach some senior officials, including the Defense Secretary, and his line to the White House "kept cutting off."⁶⁹ Additionally, he relied on spotty local television signals as primary sources of information about the attacks.⁷⁰ Bush later said the "woeful communications technology on Air Force One" was one of his "greatest frustrations on September 11."⁷¹

Several Cabinet members were also traveling on 9/11. Secretary of State Colin Powell was traveling back to the United States from Peru and did not have reliable communications for nearly the entire flight.⁷² Treasury Secretary Paul O'Neill was in Japan and Attorney General John Ashcroft, who was travelling domestically, was blocked from landing in Washington, D.C., by air traffic control.⁷³

Unlike with the Reagan assassination attempt, the need to transfer presidential power was less clear on September 11. But both crises illustrate the challenges that exist when the President is incapacitated or hard to reach during emergencies. Profoundly consequential decisions might be impeded or made by individuals who are not clearly authorized to do so.

65. *Id.* at 177.

66. *Id.* at 177 ("We can get the [V]ice [P]resident any time we want.").

66. See Kiron K. Skinner, *Governing During a Time of Crisis: The Reagan Presidency*, in *WHEN LIFE STRIKES THE PRESIDENT: SCANDAL, DEATH, AND ILLNESS IN THE WHITE HOUSE* 257, 272–75 (Jeffrey A. Engel & Thomas J. Knock eds., 2017).

67. See Garrett M. Graff, 'We're the Only Plane in the Sky,' *POLITICO* (Sept. 9, 2016), <http://www.politico.com/magazine/story/2016/09/were-the-only-plane-in-the-sky-214230> [<https://perma.cc/VA8C-YJC4>].

68. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *THE 9/11 COMMISSION REPORT* 40–41 (2004).

69. *Id.* at 40.

70. See GEORGE W. BUSH, *DECISION POINTS* 130 (2011); GRAFF, *supra* note 49, at 352.

71. BUSH, *supra* note 70, at 130.

72. GRAFF, *supra* note 49, at 352.

73. William M. Arkin & Robert Windrem, *Secrets of 9/11: New Details of Chaos, Nukes Emerge*, *NBC NEWS* (Sept. 11, 2016), <http://www.nbcnews.com/storyline/9-11-anniversary/secrets-9-11-new-details-chaos-nukes-emerge-n645711> [<https://perma.cc/T9UX-YD87>].

2. Prospective Declarations as Part of White House Contingency Planning

Prospective declarations would fit within the larger plans for uses of the Twenty-Fifth Amendment, which historically have involved predrafted letters and agreements between the President and Vice President. This planning has become increasingly extensive over the fifty years since the Twenty-Fifth Amendment's ratification. The Reagan assassination attempt may have been an impetus for expanding the planning. About six years earlier, the White House Counsel's Office produced a memorandum for President Ford outlining gaps and ambiguities that executive action could address,⁷⁴ but the memorandum's recommendations were not implemented.⁷⁵ The memorandum indicated that the only previous planning for uses of the Amendment consisted of a "verbal agreement" between Vice President Ford and President Nixon.⁷⁶

In the early days of the Reagan administration, White House Counsel Fred Fielding drafted letters for invoking Sections 3 and 4.⁷⁷ Although not used after the assassination attempt, the letters have become a key aspect of Twenty-Fifth Amendment contingency planning. The letters are kept in various places, including the White House Counsel's office, presidential emergency facilities, Air Force One and Two, and inside the nuclear football, which travels with the President and Vice President.⁷⁸

In the first months of President George H.W. Bush's term, he called a meeting with his wife, Vice President Dan Quayle, the White House Physician, the Chief of Staff, the White House Counsel, and several others to discuss how and when the Twenty-Fifth Amendment should be invoked.⁷⁹ The Bush administration ultimately implemented a mostly secret plan that was later adopted by the Clinton administration.⁸⁰

74. Memorandum from Bobbie Greene Kilberg, White House Assoc. Counsel, to the President Regarding the 25th Amendment (Aug. 21, 1975), http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1000&context=twentyfifth_amendment_executive_materials [<https://perma.cc/M6EU-GJXB>].

75. FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 340.

76. *See* Memorandum from Bobbie Greene Kilberg to President Ford, *supra* note 74, at 4.

77. Fielding, *supra* note 58, at 828.

78. *Id.* at 828–29; Interview with Dr. Connie Mariano, former Dir., White House Med. Unit, in N.Y.C., N.Y. (Apr. 25, 2017) (stating that the letters were carried in the nuclear football during her tenure in the White House Medical Unit between 1992 and 2001); Robert Windrem & William M. Arkin, *Donald Trump Is Getting the Nuclear Football*, NBC NEWS (Jan. 19, 2017), <http://www.nbcnews.com/news/us-news/donald-trump-getting-nuclear-football-n709006> [<https://perma.cc/26W8-YDWF>] (noting that the Vice President and Secretary of Defense "get their own 'footballs'").

79. FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 200. A year earlier, the Miller Center's Commission on Presidential Disability and the Twenty-Fifth Amendment had recommended a similar meeting. *See* MILLER CTR. COMM'N NO. 4, REPORT OF THE COMMISSION ON PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT 5 (1988). In 1995, the Working Group on Presidential Disability echoed the Miller Commission, recommending that "[a] formal contingency plan for the implementation of the Amendment should be in place before the inauguration of every president." *See* PRESIDENTIAL DISABILITY, *supra* note 48, at 529.

80. *See* FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 200–02.

An aspect of the plan involved “secret letters of understanding” between the President and Vice President “indicating their intentions for transfer of power in case of illness.”⁸¹ Whether the same plan was adopted by the administrations of Presidents George W. Bush and Barack Obama is unclear, but it is known that both had comprehensive contingency plans.⁸² One significant aspect of the Bush administration’s contingency planning involved a resignation letter presigned by Vice President Dick Cheney, who instructed his counsel to give the letter to President Bush to decide whether to submit it if Cheney became disabled.⁸³

3. How Prospective Declarations Would Work

If a prospective declaration of inability is not part of the Twenty-Fifth Amendment contingency plans, the White House should consider including it. A prospective declaration would encompass situations where the President is unable to communicate his inability, including as a result of unconsciousness, kidnapping, technological failure, or cyberattack.

The President should execute the prospective declaration pursuant to Section 3 of the Twenty-Fifth Amendment because the Amendment provides the only legal means for transferring presidential powers and duties. To make the declaration effective under Section 3, the President must sign it. He should do so at the start of his term. The declaration would be similar to the declarations that President George W. Bush used to invoke Section 3⁸⁴ but would list in advance the situations requiring its use. The Vice President’s Office should hold copies of the declaration for transmission to the Speaker of the House and Senate President pro tempore on behalf of the President if a situation detailed in the letter occurs. The President might also consider giving copies of the letter to other parties, such as the Chief of Staff and White House Counsel.

The White House should inform the public if the President creates a prospective declaration. The best way to announce the arrangement would be for the President and Vice President to publicly describe how the

81. Gustafson, *supra* note 40, at 477.

82. See ABA Division for Public Services, *supra* note 24 (providing comments of former White House Counsel Robert Bauer and discussing Twenty-Fifth Amendment planning during the Obama administration at timestamp 24:45); *Presidential Succession*, *supra* note 49; *The Adequacy of the Presidential Succession System in the 21st Century, Part 2*, FORDHAM L. ARCHIVE SCHOLARSHIP & HIST. (Apr. 16, 2010), http://ir.lawnet.fordham.edu/twentyfifth_amendment_photos/4/ [<https://perma.cc/4LBQ-RB2V>] (providing the comments of former Senator Birch Bayh and describing a conversation with a top advisor to President Obama regarding the plan for uses of the Twenty-Fifth Amendment at timestamp 1:19:00).

83. DICK CHENEY WITH LIZ CHENEY, *IN MY TIME: A PERSONAL AND POLITICAL MEMOIR* 319–22 (2011).

84. See Discharge Letter from President George W. Bush to Congressional Leaders (July 21, 2007), <http://www.presidency.ucsb.edu/ws/index.php?pid=75568> [<https://perma.cc/K4Q7-VG9N>]; Discharge Letter from President George W. Bush to Congressional Leaders (June 29, 2002), http://www.presidency.ucsb.edu/acting_presidents.php [<https://perma.cc/3435-9Q33>].

prospective declaration works. Awareness of the declaration would encourage the public to view uses of it as legitimate.⁸⁵

4. Legal Basis for Prospective Declarations

Prospective declarations of inability pursuant to Section 3 are consistent with the Twenty-Fifth Amendment's provisions and purposes. The Amendment is predicated on the need to "always [have] someone authorized to exercise presidential powers and duties."⁸⁶ John Feerick, who assisted in the Amendment's drafting, said its "goal [is] providing a framework for succession and inability without unduly binding the hands of those officials who may have to confront those incidents."⁸⁷ Prospective declarations leverage the Amendment's flexibility to serve its purpose of promoting continuity.

During the congressional hearings on the amendment in 1965, Attorney General Nicholas Katzenbach opined that prospective declarations under the proposed section 3 were consistent with the text of the amendment and that they would essentially continue the "letter agreement[s]" between the President and Vice President.⁸⁸ He also indicated that interpreting the amendment to bar arrangements like the letter agreements might discourage the President and Vice President from "work[ing] out a system of continuity."⁸⁹ John Feerick has also supported prospective declarations, asserting that they "can survive constitutional scrutiny and are consistent with the legislative history of the Amendment."⁹⁰

Although the Clinic agrees with this assessment, there are noteworthy arguments that prospective declarations are not compatible with the Twenty-Fifth Amendment. The declarations strain the language of Section 3 in two ways, as Adam R.F. Gustafson has observed.⁹¹ First, the Amendment uses the present tense, stating that the President's declaration of inability should state that "he *is* unable to discharge the powers" of the office.⁹² Present tense language could imply that the President must declare his disability when it happens, not prospectively.⁹³ However, the temporal component of the text can be resolved by evaluating the declaration as it is transmitted to Congress, not as it was signed—meaning the President is not declared incapacitated

85. The Miller Commission and the Working Group on Presidential Disability emphasized the importance of public awareness of the Twenty-Fifth Amendment and plans for its use. See MILLER COMM'N NO. 4, *supra* note 79, at 2; PRESIDENTIAL DISABILITY, *supra* note 48, at 535.

86. Goldstein, *supra* note 20, at 982.

87. FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 293.

88. 1965 House Hearings, *supra* note 38, at 98 (statement of Nicholas deB. Katzenbach, Att'y Gen.).

89. See *id.* at 96.

90. John D. Feerick, *Presidential Inability: Filling in the Gaps*, POL. & LIFE SCI., Fall 2014, at 11, 24.

91. See Gustafson, *supra* note 40, at 479.

92. U.S. CONST. amend. XXV, § 3 (emphasis added).

93. See Gustafson, *supra* note 40, at 479.

until the declaration is transmitted to the Speaker and President *pro tempore*.⁹⁴

Second, the text states that the President is to transmit the letter, creating some difficulty with a third party, even the Vice President, submitting a letter on his behalf.⁹⁵ However, the President can arguably use a designated proxy to submit the letter on his behalf as he is unlikely to personally submit the declaration under any circumstance.⁹⁶

The Miller Commission on Presidential Disability and the Twenty-Fifth Amendment recommended against using prospective declarations because, the Commission concluded, “Section 4 provides the exclusive means for determining a presidential inability once the President loses the capacity to make that determination for himself.”⁹⁷ An invocation of Section 3 through a prospective declaration would require the Vice President “at least to confirm that the President’s current condition fits within the description of inability provided in the President’s prospective declaration.”⁹⁸ The Vice President’s exercise of this discretion comes close to unilaterally declaring a presidential disability, something the Twenty-Fifth Amendment does not explicitly authorize the Vice President to do.

But, as the Miller Commission acknowledged, prospective declarations are not necessarily unconstitutional.⁹⁹ The Clinic submits that they are consistent with the Twenty-Fifth Amendment’s purpose of ensuring executive branch continuity. To ensure that there is always someone capable of legitimately exercising presidential powers, the executive branch must be empowered to engage in comprehensive contingency planning for a wide range of exigencies.¹⁰⁰ Prospective declarations provide the only means for transferring power under certain emergency circumstances.

Furthermore, prospective declarations find support in the President’s broad latitude to determine how Section 3 is used. As discussed, the President can declare himself unable in a wide range of circumstances that extends beyond

94. *See id.* at 479 n.85 (stating “the tense of the verb ‘be’ is not, considered alone, dispositive” (quoting *Costello v. INS*, 376 U.S. 120, 125 (1964))).

95. *See id.* at 477–78.

96. *See, e.g.*, Scott Conroy, *Polyps Found in Bush Colonoscopy*, CBS NEWS (July 21, 2007, 9:18 AM), <https://www.cbsnews.com/news/polyps-found-in-bush-colonoscopy/> [<https://perma.cc/EA34-83ES>] (noting that the letters invoking Section 3 were sent via facsimile).

97. MILLER COMM’N NO. 4, *supra* note 79, at 7.

98. Gustafson, *supra* note 40, at 478.

99. MILLER COMM’N NO. 4, *supra* note 79, at 7 (“The Commission regards the constitutionality of such agreements as an open question since there is no definitive authority on the point.”).

100. President George H.W. Bush’s contingency plans exemplified this approach by planning “for implementing the provisions of the Twenty-Fifth Amendment under every conceivable circumstance . . . so that [his] approval as to how to deal with a situation could be gotten before the situation actually presented itself.” FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 230; *see also* Mohr, *supra* note 48, at 104 (“I am confident in stating that the authors of the Twenty-Fifth Amendment wanted to ensure that there is appropriate opportunity for both judgment and flexibility in implementing the provisions of the Amendment in any given situation.”).

the narrower set of circumstances in which Section 4 is appropriate.¹⁰¹ Additionally, the President has flexibility to determine the manner in which Section 3 is invoked. Although Section 3's text suggests that invocation occurs when the President's inability declaration is signed or transmitted, at least some of the Amendment's framers intended Section 3 to allow the President "to name the hour when the Vice President is to begin as Acting President."¹⁰² This is the approach President Reagan took when he invoked Section 3 in 1985; his inability declaration stated that power would be transferred when he went under anesthesia for surgery.¹⁰³ The President also is likely able to specify the period of time during which the Vice President will act as President.¹⁰⁴

Finally, there is an inherent protection against abuse built into the prospective declaration system. Because the transfer of power occurs under Section 3, the President can simply reclaim power at any time without challenge.¹⁰⁵ Abuse of prospective declarations is unlikely due to the close working relationships between recent Presidents and Vice Presidents¹⁰⁶ and the prospect of negative political consequences for a usurping Vice President. Accordingly, prospective declarations provide efficient transfer of power and continuity of government in the event of an emergency with minor risk of abuse.

B. Providing for Mental Healthcare in the White House

Mental illness might be cause for invoking the Twenty-Fifth Amendment. More than half of Americans will develop some form of mental illness during their lives, even if that illness is short term.¹⁰⁷ Sometimes even physical illnesses will trigger psychological distress.¹⁰⁸ Presidents have not been immune from this reality. One study estimated that nearly a third of the nation's first thirty-seven Presidents suffered some form of mental illness while in office.¹⁰⁹

101. See *supra* Part I.B.1.

102. See FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 113.

103. See Discharge Letter from President Ronald Reagan to Congressional Leaders (July 13, 1985), <http://www.presidency.ucsb.edu/ws/index.php?pid=38883> [<https://perma.cc/3QP9-U9JA>].

104. See FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 113.

105. See Gustafson, *supra* note 40, at 478.

106. See JOEL K. GOLDSTEIN, THE WHITE HOUSE VICE PRESIDENCY: THE PATH TO SIGNIFICANCE, MONDALE TO BIDEN 4 (2016).

107. Benedict Carey, *Most Will Be Mentally Ill at Some Point, Study Says*, N.Y. TIMES (June 7, 2005), <http://www.nytimes.com/2005/06/07/health/most-will-be-mentally-ill-at-some-point-study-says.html> [<https://perma.cc/6NT4-TAN4>].

108. See ROBERT E. GILBERT, THE MORTAL PRESIDENCY: ILLNESS AND ANGUISH IN THE WHITE HOUSE 255 (1998) (discussing the possible impact of President Reagan's cancer surgery on his decision-making abilities). President Dwight D. Eisenhower became depressed after having a heart attack in 1955. See Robert E. Gilbert, *Eisenhower's 1955 Heart Attack: Medical Treatment, Political Effects, and the "Behind the Scenes" Leadership Style*, POL. & LIFE SCI., June 2008, at 2, 3–4. President Chester A. Arthur suffered depression as an effect of Bright's disease. See FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 10.

109. See GILBERT, *supra* note 108, at 255.

A President suffering an acute episode of mental illness, such as clinical depression, may use Section 3. Invocation of Section 4 might be appropriate where a President experienced mental illness or cognitive decline without realizing it or where a President recognized his mental illness but refused to step aside.¹¹⁰ Even if the President suffers a mental health episode that is not serious enough to merit use of the Twenty-Fifth Amendment, his ability to carry out his duties could be impaired.¹¹¹

Given the possible impact of mental illness on the presidency, the White House Medical Unit should add a mental health professional to assess whether the President is experiencing mental illness or impairment, and, where possible, to provide treatment.

1. Mental Illnesses and Impairments in Presidents

The history of mental illness in the White House provides a compelling case for the addition of a mental health professional. President Calvin Coolidge is among the Presidents who seem to have suffered mental illness. His time in office provides a particularly dramatic lesson on the dangers of untreated mental illness.

President Coolidge's son passed away suddenly in 1924, which created ripples throughout Coolidge's presidency.¹¹² The once decisive and active President withdrew from his responsibilities after his son's death. He stopped engaging with Congress, delegated near total authority to his Cabinet, displayed frighteningly little knowledge of serious issues, and slept for as long as fifteen hours a day.¹¹³ Although Coolidge was never formally diagnosed, scholars like Robert Gilbert have observed that he exhibited all of the hallmarks of major depression set out by the American Psychiatric Association.¹¹⁴

Coolidge's depression left the country without an involved President in a time when domestic and international turmoil demanded a strong leader.¹¹⁵

110. See ROSE McDERMOTT, *PRESIDENTIAL LEADERSHIP, ILLNESS AND DECISION MAKING* 33–44 (2008).

111. Alex Thompson, *The President Needs a Psychiatrist*, POLITICO (Jan. 4, 2017), <http://www.politico.com/magazine/story/2017/01/presidential-psychiatrist-mental-health-congress-214597> [https://perma.cc/EZ5Y-MWXX].

112. Jack Beatty, *President Coolidge's Burden*, ATLANTIC (Dec. 2003), <https://www.theatlantic.com/magazine/archive/2003/12/president-coolidges-burden/303175/> [https://perma.cc/C23F-QS2B].

113. Robert E. Gilbert, *Presidential Disability and the Twenty-Fifth Amendment: The Difficulties Posed By Psychological Illness*, 79 FORDHAM L. REV. 843, 863 (2010) [hereinafter Gilbert, *Difficulties Posed By Psychological Illness*]; see also Robert H. Ferrell, *Calvin Coolidge, the Man and the President*, in CALVIN COOLIDGE AND THE COOLIDGE ERA 132, 140–41 (John Earl Haynes ed., 1998). See generally Robert E. Gilbert, *The Dysfunctional Presidency of Calvin Coolidge*, 4 WHITE HOUSE STUD. 371 (2004) [hereinafter Gilbert, *The Dysfunctional Presidency*] (discussing the troubled presidency of Calvin Coolidge).

114. Robert E. Gilbert, *Calvin Coolidge's Tragic Presidency: The Political Effects of Bereavement and Depression*, 39 J. AM. STUD. 87, 93–94 (2005); see also *supra* note 113 and accompanying text.

115. Gilbert, *supra* note 114, at 100–07.

His “abandonment” of the presidency included a failure to confront the economic instability that preceded the Great Depression.¹¹⁶

Other Presidents have struggled psychologically at trying times for the nation. President Franklin Pierce lost his son in a train accident shortly before he took office, resulting in a depression that may have hindered attempts to defuse the tensions precipitating the Civil War.¹¹⁷ During the Civil War, President Abraham Lincoln fell “into deep depression” after losing his eleven-year-old son, but, having wrestled with depression for most of his life, Lincoln avoided the crippling effects experienced by Coolidge and Pierce.¹¹⁸ A century later, President Lyndon B. Johnson was so paranoid during the Vietnam War that he carried fake statistics on the war in his pocket, prompting two aides to secretly consult psychiatrists.¹¹⁹

Given the prevalence of substance abuse in the United States,¹²⁰ it is not surprising that several Presidents may have suffered from such disorders. President John F. Kennedy received regular injections from a doctor known to give patients his own cocktail of steroids and amphetamines.¹²¹ At the height of Watergate, President Richard Nixon, who was known for his low alcohol tolerance,¹²² reportedly drank so heavily that he was unable to respond to at least one international crisis.¹²³ Even without drinking, Nixon was sometimes paranoid and exhibited other signs of psychological distress.¹²⁴ Days before Nixon’s resignation, his Defense Secretary became “so worried that Nixon was unstable that he instructed the military” to disregard certain orders from the President, especially those involving nuclear weapons.¹²⁵

116. Gilbert, *Difficulties Posed By Psychological Illness*, *supra* note 113, at 864–65.

117. *Id.* at 855–60.

118. *Id.* at 869–70. See generally JOSHUA WOLF SHENK, *LINCOLN’S MELANCHOLY: HOW DEPRESSION CHALLENGED A PRESIDENT AND FUELED HIS GREATNESS* (2005) (discussing President Lincoln’s depression and his coping mechanisms).

119. Evan Osnos, *How Trump Could Get Fired*, *NEW YORKER* (May 8, 2017), <http://www.newyorker.com/magazine/2017/05/08/how-trump-could-get-fired> [<https://perma.cc/PH8R-23WR>].

120. See *Nationwide Trends*, NAT’L INST. ON DRUG ABUSE (June 2015), <https://www.drugabuse.gov/publications/drugfacts/nationwide-trends> [<https://perma.cc/M72A-43BL>].

121. See Rose McDermott, *The Politics of Presidential Medical Care: The Case of John F. Kennedy*, *POL. & LIFE SCI.*, Fall 2014, at 77, 84.

122. See WALTER ISAACSON, *KISSINGER: A BIOGRAPHY* 263 (1992).

123. See Daniel J.T. Schuker, *Burden of Decision: Judging Presidential Disability Under the Twenty-Fifth Amendment*, 30 *J.L. & POL.* 97, 107–17 (2014); see also MCDERMOTT, *supra* note 110, at 186. One of Nixon’s advisors said he was “ranting and raving—drunk in the middle of [a] crisis.” SEYMOUR M. HERSH, *THE PRICE OF POWER: KISSINGER IN THE NIXON WHITE HOUSE* 88 (1983).

124. 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*, *supra* note 66, at 233, 233–55; John A. Farrell, *The Year Nixon Fell Apart*, *POLITICO* (Mar. 26, 2017), <http://www.politico.com/magazine/story/2017/03/john-farrell-nixon-book-excerpt-214954> [<https://perma.cc/EQ3Z-CXKN>].

125. Robert D. McFadden, *James R. Schlesinger, Willful Aide to Three Presidents, Is Dead at 85*, *N.Y. TIMES* (Mar. 27, 2014), <https://www.nytimes.com/2014/03/28/us/politics/james-r-schlesinger-cold-war-hard-liner-dies-at-85.html> [<https://perma.cc/N9UX-UFPJ>].

Whether President Reagan, who was diagnosed with Alzheimer's disease after leaving office, experienced cognitive impairment during his time in office has been the subject of significant speculation. In 1987, several White House aides believed Reagan was "so depressed, inept and inattentive" that invocation of the Twenty-Fifth Amendment might be appropriate.¹²⁶ Others at the White House then have flatly rejected that Reagan was impaired,¹²⁷ and mental status examinations that Reagan took beginning in 1990 showed no signs of Alzheimer's until 1993.¹²⁸ However, a 2015 study of Reagan's public comments found evidence of cognitive decline.¹²⁹ And Reagan's son, Ron, wrote in a 2011 book that the question of whether his "father suffered from the beginning stages of Alzheimer's while in office more or less answers itself,"¹³⁰ though he later said he was referring to the disease's organic aspects.¹³¹

Following cancer surgery in 1985, Reagan may have experienced cognitive impairment that impacted decisions leading to the Iran-Contra scandal. Robert Gilbert has opined that Reagan may have prematurely resumed power after the surgery and that the aftereffects of anesthesia and the traumatic nature of cancer surgery could have diminished his faculties as key decisions leading to the scandal were made.¹³²

2. Monitoring and Treating Mental Illness in the White House

Mental health issues fall within the ambit of the White House Medical Unit (WHMU), which manages the President's healthcare.¹³³ Military medical personnel staff the WHMU, except for rare occasions when Presidents

126. Jack Nelson, *Removal of Reagan from Office Suggested to Baker: Report Said Aides Described President As Depressed, Inept in Wake of Iran-Contra Crisis*, L.A. TIMES (Sept. 15, 1988), http://articles.latimes.com/1988-09-15/news/mn-2825_1_president-reagan [https://perma.cc/JPR3-JTBD].

127. See Lawrence K. Altman, *While Known for Being Forgetful, Reagan Was Mentally Sound in Office, Doctors Say*, N.Y. TIMES (Oct. 5, 1997), <http://www.nytimes.com/1997/10/05/us/while-known-for-being-forgetful-reagan-was-mentally-sound-in-office-doctors-say.html> [https://perma.cc/WLY5-4NYW]; A.B. Culvahouse, *Bill O'Reilly's 'Killing Reagan' Revives Debunked Myth*, USA TODAY (Oct. 9, 2015, 10:01 AM), <https://www.usatoday.com/story/opinion/2015/10/09/b-culvahouse-shameful-reagan-myth-making-resurges-column/73612714/> [https://perma.cc/CJL5-SSS9].

128. Lawrence K. Altman, *When Alzheimer's Waited Outside the Oval Office*, N.Y. TIMES (Feb. 21, 2011), <http://www.nytimes.com/2011/02/22/health/views/22reagan.html> [https://perma.cc/LBJ6-YGPU].

129. See Lawrence K. Altman, *Parsing Ronald Reagan's Words for Early Signs of Alzheimer's*, N.Y. TIMES (Mar. 30, 2015), <https://www.nytimes.com/2015/03/31/health/parsing-ronald-reagans-words-for-early-signs-of-alzheimers.html> [https://perma.cc/WS2Q-2Q6N].

130. Robert E. Gilbert, *The Politics of Presidential Illness: Ronald Reagan and the Iran-Contra Scandal*, POL. & LIFE SCI., Fall 2014, 58, 69 (quoting RON REAGAN, MY FATHER AT 100: A MEMOIR 218 (2011)).

131. See Altman, *supra* note 128.

132. See Gilbert, *supra* note 130.

133. See Mariano, *supra* note 26, at 90–91.

choose private physicians to lead the unit.¹³⁴ The WHMU is also responsible for the health of White House staff, the Vice President, and the President's and Vice President's families. Whenever necessary, the WHMU consults with specialists,¹³⁵ including psychologists.¹³⁶

These consultations are not necessarily for the President's treatment. The WHMU frequently encounters mental health issues in treating staff members. For example, Dr. Connie Mariano, a retired Navy Rear Admiral who led the WHMU during the Clinton administration, recalled that staffers commonly suffered ailments like anxiety and insomnia,¹³⁷ but some even became suicidal.¹³⁸

Although it is publicly unknown whether Presidents have joined the ranks of those seeking mental health treatment through the WHMU, the unit's personnel are well positioned to recognize any behavioral issues affecting the President. White House physicians, particularly the doctor who leads the WHMU, have frequent contact with the President. The WHMU has an office in the White House, and its physicians and medics travel with the President.¹³⁹ Dr. Mariano observed that she was "one of only a small number of doctors in America who actually got to observe a patient doing his job."¹⁴⁰

The WHMU plans extensively for uses of the Twenty-Fifth Amendment including providing input on when invocation is required.¹⁴¹ Additionally, commissions on presidential inability have emphasized the importance of the President's physician having a prominent role in the White House, reasoning that it would help to ensure that information about the President's health will reach the Twenty-Fifth Amendment decision-makers.¹⁴² There are indications that administrations have been receptive to these suggestions.¹⁴³ Finally, White House physicians have indicated that they are well aware of the political nature and sensitivities of their role,¹⁴⁴ an especially important consideration when dealing with mental health issues.

134. Dr. Lawrence K. Altman, *For the White House Physician, a Sensitive Role with a Public Patient*, N.Y. TIMES (Nov. 8, 1988), <http://www.nytimes.com/1988/11/08/science/doctor-s-world-for-white-house-physician-sensitive-role-with-public-patient.html> [https://perma.cc/6UTA-2WLU].

135. Interview with Dr. Lawrence Altman, Glob. Fellow, Wilson Ctr., in N.Y.C., N.Y. (Oct. 19, 2016).

136. Interview with Dr. Connie Mariano, *supra* note 78.

137. CONNIE MARIANO, THE WHITE HOUSE DOCTOR 212–13 (2010).

138. *See id.* at 233; Jerrold M. Post, *Broken Minds, Broken Hearts, and the Twenty-Fifth Amendment: Psychiatric Disorders and Presidential Disability*, in *MANAGING CRISIS*, *supra* note 26, at 111, 114–15.

139. *See White House Doctors: The President's Shadow*, CNN (Sept. 24, 2004), <http://www.cnn.com/2004/HEALTH/09/23/wh.doctors/> [https://perma.cc/6G2F-XG4J].

140. MARIANO, *supra* note 137, at 192.

141. *See id.* at 123–25; Mariano, *supra* note 26, at 92–93.

142. *See* MILLER COMM'N NO. 4, *supra* note 79, at 2; *see also* PRESIDENTIAL DISABILITY, *supra* note 48, at 254–56.

143. *See* Mariano, *supra* note 26, at 92 (noting that the Clinton administration's plans for using the Twenty-Fifth Amendment gave the President's physician "a significant role . . . in determining medical disability and in advising the administration about the president's health").

144. *See, e.g.*, Mohr, *supra* note 48, at 107.

However, White House physicians have not always been appropriately consulted. For example, Dr. John Hutton did not evaluate President Reagan before he reassumed his powers following his 1985 surgery.¹⁴⁵ Hutton later stated it was “absurd” to allow Reagan to retake power so quickly without consultation.¹⁴⁶ When President George W. Bush used Section 3 before undergoing colonoscopies, the WHMU took an improved approach. Bush completed neurological baseline testing before and after the procedures to ensure that he was not impaired before retaking power.¹⁴⁷

Despite the lack of permanent mental health professionals at the White House, Presidents are not without emotional support. Their families and staff surely provide valuable advice and companionship. Additionally, Presidents have historically relied on religious figures for guidance and counseling, especially during times of turmoil.¹⁴⁸

President Kennedy and his wife had a long-lasting relationship with Cardinal Richard Cushing, who presided over their wedding and the funeral for their infant son, Patrick, while President Kennedy was in office.¹⁴⁹ In 1998, after President Clinton admitted to an “inappropriate relationship” with White House intern Monica Lewinsky, he assembled “a circle of two or three ministers to serve as a team of personal spiritual advisers.”¹⁵⁰ One of the ministers said they would focus on helping Clinton understand “what went wrong with him personally.”¹⁵¹ President Obama had a group of five religious leaders that he called upon at various times.¹⁵² President Donald Trump had televangelist Paula White, who he had known for fifteen years, deliver the invocation at his inauguration.¹⁵³

145. See Gilbert, *supra* note 130, at 60.

146. See *id.*

147. Interview with Dr. Connie Mariano, *supra* note 78 (summarizing statements made to her by Dr. Richard Tubb, the Physician to the President when President Bush underwent the procedures).

148. *God in America: God in the White House*, PBS, <http://www.pbs.org/godinamerica/god-in-the-white-house/> [https://perma.cc/6PSS-AL67] (last visited Nov. 19, 2017). See generally RANDALL BALMER, *GOD IN THE WHITE HOUSE: A HISTORY* (2008) (exploring how President George W. Bush’s faith interacted with his presidency).

149. Kevin Cullen, *Jackie Kennedy and Her Priests*, BOS. GLOBE (May 16, 2014), <https://www.bostonglobe.com/metro/2014/05/15/jackie-kennedy-other-favorite-priest/b5ykBQGdDTdUI3aeEiDhkJ/story.html> [https://perma.cc/6MSB-NWU3].

150. Laurie Goodstein, *Testing of a President: The Counselors; Clinton Selects Clerics to Give Him Guidance*, N.Y. TIMES (Sept. 15, 1998), <http://www.nytimes.com/1998/09/15/us/testing-president-counselors-clinton-selects-clerics-give-him-guidance.html> [https://perma.cc/29HA-A8QA].

151. *Id.*

152. Laurie Goodstein, *Without a Pastor of His Own, Obama Turns to Five*, N.Y. TIMES (Mar. 14, 2009), <http://www.nytimes.com/2009/03/15/us/politics/15pastor.html> [https://perma.cc/LH4W-RSCZ].

153. Jane C. Timm, *Who Is Paula White, Trump’s Spiritual Advisor Praying at His Inauguration?*, NBC NEWS (Jan. 19, 2017, 6:39 PM), <http://www.nbcnews.com/news/us-news/who-paula-white-trump-s-spiritual-adviser-praying-his-inauguration-n708036> [https://perma.cc/T4FB-DJ4U].

3. Discussion of Recommendations

The existing approaches to recognizing, diagnosing, and treating mental illness in the White House would be improved by the addition of a full-time mental health professional to the WHMU. If the ability to make a rational decision is central to the determination of presidential inability,¹⁵⁴ then it is critical to consider the insights of mental health professionals.¹⁵⁵ Whereas physicians are best equipped to diagnose physical illness, a psychiatrist or psychologist is best equipped to diagnose psychological impairment. A mental health professional in the WHMU is preferable to the outside mental health professionals consulted by the White House. The sensitivities surrounding the President's psychological health could discourage external consultations and a staff mental health professional might have more frequent interactions with the President.

While a mental health professional in the WHMU could provide critical insight into whether invocations of the Twenty-Fifth Amendment are appropriate, perhaps just as importantly he or she could treat the President. A transfer of power would be needlessly disruptive if treatment could address the President's malady.¹⁵⁶ And, often, untreated psychological struggles do not require invocation of the Twenty-Fifth Amendment,¹⁵⁷ but treatment could improve the President's well-being and performance.¹⁵⁸ Furthermore, a mental health professional could assist in treating White House staff members who experience psychological challenges. The White House's willingness to appoint a mental health professional could also help destigmatize mental illness in society.

Realistically, however, Presidents and their advisors would probably resist the addition of a mental health professional to the WHMU out of concern that

154. *See supra* Part I.B.2.

155. Assessment always takes social and contextual factors into consideration. Every individual is embedded in a complex set of social networks, beginning with the family of origin and continuing into adolescence and adulthood. These networks play a significant role in the development of intelligence, social judgment, and prosocial orientation. Neuropsychological evaluation can accurately assess core domains of cognitive functioning, insight, and judgment at a single time point of evaluation and over time but findings are always interpreted in light of social contexts, including race, class, ethnicity, gender, and other forms of social membership. *See* Interview with Dr. David Marcotte, Assistant Professor of Psychology, Fordham Univ., in N.Y.C., N.Y. (Nov. 11, 2016). *See generally* NEUROPSYCHOLOGY AND NEUROPSYCHIATRY OF NEURODEGENERATIVE DISORDERS (Manuel Menéndez-González & Tania Álvarez-Avellón eds., 2016) (discussing neuropsychology language, visuospatial functions, and neuropsychiatry such as the emotional or motivational spheres, and the interphases between them).

156. There are a number of empirically supported, short-term treatments that can improve symptoms of clinical disorders, but substantial change requires longer-term therapies. Side effects of psychiatric medicines remain a significant source of noncompliance with treatment. However, experienced providers with psychopharmacological skill and supportive psychotherapies can have a significant effect on symptom presentation. *See* Interview with Dr. David Marcotte, *supra* note 155.

157. In fact, scholars have argued that President Abraham Lincoln likely suffered from clinical depression but that this did not impair his ability to serve as President and may even have contributed to his strength in office. *See supra* note 118 and accompanying text.

158. Thompson, *supra* note 111.

it would raise questions about the President's mental health. There are several possible approaches to addressing such concerns. First, the White House could consider adding a mental health professional without announcing it to the public.¹⁵⁹ But, if word of the addition leaked, it may raise more suspicions than a public announcement would have. Second, the White House could describe a mental health professional as a "performance coach" or "consultant," a common practice in the business world.¹⁶⁰ Third, the sitting President could sign an executive order or Congress could pass legislation providing for the addition of a mental health professional to the WHMU at the start of the next presidential term to avoid the public interpreting the move as a reflection of the current President's mental health.

Finally, if the White House finds it infeasible to place a mental health professional in the WHMU, officials should take alternative measures to ensure that mental health issues are addressed. Those steps could include bolstering the current policy of consulting outside psychologists and psychiatrists and facilitating communication between the WHMU and the President's staff and family regarding the President's health needs.

III. THE LINE OF SUCCESSION

Planning for presidential succession and inability in the executive branch is essential, but there are significant limitations on the unilateral actions of those in the White House. As discussed in this and the following two Parts, Congress must act to bolster key aspects of the presidential succession system.

This Part addresses steps Congress should take to reform the line of presidential succession. It first discusses the history that led to the current line of succession. Next, this Part describes potential weaknesses in the line of succession's composition. The following Part outlines the Clinic's proposal to remove legislators and some lower-ranked Cabinet officials from the line of succession and add four "Standing Successors" nominated by the President and confirmed by Congress. Given the political challenges of implementing this proposal, some alternative recommendations are also discussed. This Part concludes by advancing other reform proposals relating to the line of succession, including steps to address the vulnerability to the line of succession on Inauguration Day.

159. See Interview with Robert E. Gilbert, Professor of Political Sci. Emeritus, Ne. Univ., in N.Y.C., N.Y. (Sept. 28, 2016).

160. See generally Bernard Liebowitz & John Blattner, *On Becoming a Consultant: The Transition for a Clinical Psychologist*, 67 CONSULTING PSYCHOL. J. 144 (2015) (noting that psychologists as consultants can have a large effect on political processes); Steven Berglas, *The Very Real Dangers of Executive Coaching*, HARV. BUS. REV. (June 1, 2002), <https://hbr.org/2002/06/the-very-real-dangers-of-executive-coaching> [<https://perma.cc/FQ2F-EWEP>].

A. *History and Current Line of Succession Statute*

Congress has used its constitutional authority in Article II, Section 1, Clause 6 to appoint presidential successors after the Vice President on three occasions. The first line of succession Congress created, the Presidential Succession Act of 1792, included only two officials: the Senate President pro tempore followed by the Speaker of the House.¹⁶¹ A proposal to place Cabinet members in the line of succession had been thwarted by partisan politics.¹⁶² Federalists in the Senate blocked the proposal because it would have placed Secretary of State Thomas Jefferson, a Democratic-Republican, first in the line.¹⁶³

Nearly one hundred years later, President James A. Garfield's assassination in 1881 exposed a major flaw in the Act of 1792. When Vice President Chester A. Arthur succeeded to the presidency, there was no President pro tempore or Speaker of the House, leaving the country without any presidential successors.¹⁶⁴ The line of succession was also vacant after Vice President Thomas A. Hendricks's death in 1885.¹⁶⁵ Those incidents and concerns that legislators are not constitutionally eligible successors led Congress to pass the Presidential Succession Act of 1886.¹⁶⁶ This Act removed legislators and listed only Cabinet members in the order of the creation of their respective departments.¹⁶⁷

After President Harry S. Truman succeeded to the presidency in 1945 following President Franklin D. Roosevelt's death, he called on Congress to return legislators to the line of succession.¹⁶⁸ His succession left the vice presidency vacant, making the Secretary of State the first successor to the presidency.¹⁶⁹ The prospect of the Secretary of State's succession troubled Truman because he believed that unelected officials should not become President.¹⁷⁰ He also opposed the President handpicking his successors, as happens with Cabinet succession.¹⁷¹

Congress acted on Truman's concerns, passing the Presidential Succession Act of 1947. The statute creates a line of succession that begins with the Speaker of the House of Representatives, followed by the President pro tempore of the Senate, and then the Cabinet secretaries.¹⁷² The Speaker was

161. Presidential Succession Act of 1792, ch. 8, 1 Stat. 239, 240 (repealed 1886).

162. See JAMES M. RONAN, *LIVING DANGEROUSLY* 123 (2015) ("The inherent flaws of a legislative line of succession are not surprising considering its origins [T]he idea of placing congressional leaders after the Vice President [in the line of succession] was born not out of logic, but partisanship."); see also Feerick, *supra* note 90, at 12–13.

163. See RONAN, *supra* note 162, at 123–24.

164. FEERICK, *TWENTY-FIFTH AMENDMENT*, *supra* note 16, at 38.

165. *Id.* at 40.

166. See *id.* at 40–42.

167. Presidential Succession Act of 1886, ch. 4, 24 Stat. 1, 1 (repealed 1947).

168. RONAN, *supra* note 162, at 129–30.

169. FEERICK, *TWENTY-FIFTH AMENDMENT*, *supra* note 16, at 42–43.

170. See Harry S. Truman, Special Message to the Congress on Succession to the Presidency (June 19, 1945), <http://www.presidency.ucsb.edu/ws/?pid=12201> [<https://perma.cc/87X5-8MTJ>].

171. See *id.*

172. Presidential Succession Act of 1947, 3 U.S.C. § 19(d)(1) (2012).

placed first in the line of succession largely because President Truman suggested that members of the House, who choose the Speaker, are closer to the people than Senators.¹⁷³ The Act of 1947, which Congress has updated to include Cabinet secretaries whose departments were created after 1947, is the current line of succession law.¹⁷⁴

*B. Problems with the Composition
of the Line of Succession*

This Part discusses the problems raised by the inclusion of legislators and some lower-ranked Cabinet secretaries in the line of succession.

1. Problems Posed by Legislators in the Line of Succession

a. Preparedness of Legislators

Legislators may not be well equipped to immediately assume the powers and duties of the presidency.¹⁷⁵ The Speaker of the House is among the “Gang of Eight” congressional leaders who receive classified intelligence briefings from the executive branch.¹⁷⁶ Additionally, Speakers are typically members who have had long tenures in the House and have developed significant knowledge of domestic and international policy matters. But the Speaker’s responsibilities of crafting and promoting legislation and engaging in various political activities, particularly fundraising, may often be all consuming. These responsibilities could prevent the Speaker from focusing on the wide range of international affairs and executive branch functions that would likely be relevant if the Speaker succeeded to the presidency, as his succession would probably result from a crisis, such as a major terrorist attack.

The Senate President pro tempore, who is the longest serving Senator of the majority party,¹⁷⁷ might be less qualified than the Speaker to serve as President. Like the Speaker, the President pro tempore almost necessarily

173. See FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 41.

174. See 3 U.S.C. § 19(d)(1). The Cabinet secretaries are listed in the line of succession in the following order: (1) Secretary of State, (2) Secretary of Treasury, (3) Secretary of Defense, (4) Attorney General, (5) Secretary of the Interior, (5) Secretary of Agriculture, (6) Secretary of Commerce, (7) Secretary of Labor, (8) Secretary of Health and Human Services, (9) Secretary of Housing and Urban Development, (10) Secretary of Transportation, (11) Secretary of Energy, (12) Secretary of Education, (13) Secretary of Veterans Affairs, and (14) Secretary of Homeland Security. *Id.* Successors still need to meet constitutional qualifications for the Presidency. If a cabinet member were a naturalized citizen or under thirty-five, for example, he or she would not be eligible for succession. See U.S. CONST. art. II, § 1, cl. 5.

175. See John D. Feerick, *Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment*, 79 FORDHAM L. REV. 907, 945 (2011).

176. See Mark Hosenball, *FBI’s Comey Meets with Top U.S. Congressional Leaders*, REUTERS (Mar. 9, 2017), <http://www.reuters.com/article/us-usa-trump-documents-idUSKBN16G2PY> [<https://perma.cc/F6EJ-3BDL>].

177. *Glossary*, U.S. SENATE, http://www.senate.gov/reference/glossary_term/president_pro_tempore.htm [<https://perma.cc/6PYE-RMUC>] (last visited Nov. 19, 2017) (defining President pro tempore).

has developed a wealth of policy knowledge, but the President pro tempore is not part of the “Gang of Eight,” which leaves him less informed on significant national security matters. Additionally, the President pro tempore, while a distinguished legislator, is typically in the twilight of his career. For example, the current President pro tempore, Orrin Hatch, is eighty-three years old and has been considering retirement.¹⁷⁸ From the Twenty-Fifth Amendment’s ratification in 1967 until 2015, the President pro tempore has, on average, been seventy-seven and a half years old at the start of his term and more than eighty-three years old at the end of his term.¹⁷⁹ Twelve Senators have held the position during this period.¹⁸⁰

b. Perverse Incentives

There are a number of perverse incentives that may influence legislators in scenarios in which their succession to the presidency is possible. In some cases, their status as successors could motivate them to improperly support the President’s impeachment¹⁸¹ or temporary removal under Section 4 of the Twenty-Fifth Amendment.¹⁸² The risk of legislators abusing their impeachment powers may have increased in the modern era because the close partnerships between recent Presidents and Vice Presidents make it more likely that both would be implicated in the same scandals, allowing legislators to attempt to remove them at the same time.¹⁸³ While such a coup is unlikely,¹⁸⁴ the incentive will remain so long as legislators remain part of the line of succession.

Conversely, and more likely, a legislator may be reluctant to temporarily act as President because he or she would have to resign from legislative office. The Constitution’s Incompatibility Clause and the line of succession statute require legislators to resign from Congress before assuming the presidency.¹⁸⁵ In cases of temporary disability or incapacitation, the Speaker or President pro tempore may be unwilling to resign to be the Acting

178. See Rebecca Savransky, *Hatch: I May Retire If Romney Runs to Replace Me*, HILL (Mar. 29, 2017, 8:43 AM), <http://thehill.com/homenews/senate/326263-hatch-i-may-retire-if-romney-runs-to-replace-me> [<https://perma.cc/Z9R3-8CA3>].

179. RONAN, *supra* note 162, at 127.

180. *Id.*

181. See Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 122 (1995) (“The structure of the Constitution simply does not permit participants in the impeachment process to have such a direct, immediate, personal stake in the outcome.”).

182. See *id.* at 127–28.

183. See Whet Smith & Mark J. Rozell, *American Presidential Succession Is a Ticking Time Bomb*, HILL (Aug. 1, 2017, 4:00 PM), <http://thehill.com/blogs/pundits-blog/the-administration/344824-american-presidential-succession-is-a-ticking-time-bomb> [<https://perma.cc/HNA3-T5JS>].

184. This would not be unprecedented. During President Andrew Johnson’s impeachment in 1868, President pro tempore Benjamin Wade, who would have become President upon Johnson’s removal, had already selected his new Cabinet when he voted to remove Johnson. *Id.* at 123.

185. U.S. CONST. art. I, § 6, cl. 2 (“[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”); 3 U.S.C. § 19(a)–(b) (2012).

President for a short time. This leads to the troubling potential of successors refusing the presidency in times of crisis, creating further unpredictability during a time when stability is important.

c. Party Continuity

With legislators in the line of succession, there is a possibility for a destabilizing change in party control of the White House if there is neither an able President nor Vice President.¹⁸⁶ Beginning with the Nixon administration in 1969 “and continuing through the end of the Obama administration, every President except Jimmy Carter” has spent at least some of his term with Congress controlled by the opposing political party.¹⁸⁷ Between 1969 and 2016, the President and Speaker have been of different parties for thirty-four of the forty-seven years, more than 70 percent of the time.¹⁸⁸ Accordingly, under this succession statute, voters might elect a President of one party but end up with a President from the other party.

d. Democratic Legitimacy

Some argue that having legislators as successors promotes democratic values because legislators are elected.¹⁸⁹ As discussed, President Truman feared that a line of succession of only Cabinet secretaries allowed the President to undemocratically nominate his “immediate successor in the event of [his] own death or inability to act.”¹⁹⁰ But Cabinet members are not without democratic legitimacy; the President, who is nationally elected, unlike legislators, appoints them. The President’s national election makes him the most politically representative figure of the national constituency.¹⁹¹ Additionally, Cabinet members must be confirmed by the Senate,¹⁹² which allows input from the people through their Senators. In contrast, local constituencies choose the Speaker and President pro tempore. The House selects the Speaker,¹⁹³ but the President pro tempore automatically receives the position based on seniority within the party.¹⁹⁴ Furthermore, President Truman only advocated for including legislators with the assumption that a special election would occur shortly after a legislator’s succession in the

186. See CONTINUITY OF GOV'T COMM'N, PRESERVING OUR INSTITUTIONS: THE CONTINUITY OF THE PRESIDENCY 39 (2009).

187. See RONAN, *supra* note 162, at 128.

188. *Id.*

189. See First Clinic Report, *supra* note 8, at 45.

190. See Truman, *supra* note 170.

191. Amar & Amar, *supra* note 181, at 130 (citing Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 58–70 (1995))

192. U.S. CONST. art. II, § 2, cl. 2.

193. *Id.* art. I, § 2, cl. 5.

194. *Glossary*, *supra* note 177.

event of death, resignation, or removal of the President,¹⁹⁵ but the current statute does not provide for a special election.¹⁹⁶

e. Questionable Constitutionality

The Clinic did not focus its analysis of the line of succession on the constitutional eligibility of legislators because others have considered the issue in detail.¹⁹⁷ However, there are compelling arguments that legislators are not among the “Officer[s]” whom Congress is authorized to appoint as successors.¹⁹⁸ On the one hand, as the first Clinic summarized, “Congressional leaders and scholars have interpreted the term ‘Officer’ to mean ‘Officer of the United States,’ which refers only to executive branch officers nominated by the President and confirmed by the Senate.”¹⁹⁹ On the other hand, Professor Joel K. Goldstein has argued that evidence that the Constitution bars legislators from being successors is inconclusive.²⁰⁰ Given these opposing arguments, it is clear that legislators’ constitutional status in the line of succession is at least questionable, which is another mark against their inclusion. Officials whose succession would not be unambiguously legitimate should not be part of the line of succession.

f. The Bumping Provision

The line of succession’s “bumping” provision prevents a Cabinet member from acting as President if there is an able Speaker or President pro tempore. If one of those officials is selected or becomes able after suffering an inability, a Cabinet member acting as President must step aside to allow the Speaker or President pro tempore to act as President.²⁰¹

The bumping provision is flawed on constitutional and practical grounds. It may be unconstitutional because it calls for multiple successors in certain situations despite language in the Constitution’s Succession Clause that seems to contemplate only one successor.²⁰² The practical problems are threefold. First, multiple successors over a short period could sow further instability during a crisis.²⁰³ Second, the provision could allow legislators effectively to elect the President by choosing a new Speaker or President pro tempore.²⁰⁴ Third, if the President’s party did not control the House and

195. Truman, *supra* note 170 (“No matter who succeeds to the Presidency after the death of the elected President and Vice President, it is my opinion he should not serve any longer than until the next Congressional election or until a special election called for the purpose of electing a new President and Vice President.”).

196. See 3 U.S.C. § 19 (2012).

197. See, e.g., First Clinic Report, *supra* note 8, at 36–40.

198. *Id.* at 37.

199. *Id.*

200. See Goldstein, *supra* note 20, at 1019–22.

201. See 3 U.S.C. § 19(d)(2).

202. See First Clinic Report, *supra* note 8, at 42.

203. FEERICK, FROM FAILING HANDS, *supra* note 16, at 268–69 (noting that the bumping procedure could result in several Presidents within a short period of time).

204. Amar & Amar, *supra* note 181, at 135 (citing William F. Brown & Americo R. Cinquegrana, *The Realities of Presidential Succession: “The Emperor Has No Clones,”* 75

Senate, either chamber could initiate a shift in party control by selecting a Speaker or President pro tempore.

2. Qualifications of Cabinet Members in the Line of Succession

There are a number of qualities that the Clinic believes make an official well suited to assume the presidency: awareness of executive branch activities, familiarity with administrative activities, knowledge of foreign affairs, a working relationship with the President and the rest of the Cabinet, legitimacy in the eyes of the public, and an ability to command worldwide respect. While this is not an exhaustive list, it is fair to expect successors to satisfy these qualifications to some degree. While Cabinet secretaries are undoubtedly qualified for their specific posts, the Clinic's study suggests that some may lack necessary qualifications to assume the presidency.

After studying the secretaries of the last several administrations, it is clear that looking at resumes of officials who have held Cabinet positions provides limited insights into which Cabinet secretaries are suited for the line of succession. The backgrounds of the individuals who have held certain Cabinet posts vary widely, with some, but not others, holding clearly sufficient qualifications to succeed to the presidency. For example, President Obama's first Secretary of Commerce, Gary Locke, had held several positions that likely equipped him to serve as a President if the need arose. He had served in the Washington House of Representatives, as King County Executive, and as Governor of Washington.²⁰⁵ In contrast, the next official President Obama nominated to the post, John Bryson, did not have similar experience in elected office. He helped found the Natural Resources Defense Council, held leadership positions in California's water and utility agencies, and served as director of several major corporations.²⁰⁶ While he was inarguably qualified to be Secretary of Commerce, Secretary Bryson had no governing experience.

Because of the difficulty predicting Cabinet officials' qualifications based on their predecessors' backgrounds, the Clinic focused on evaluating the expertise of each department.²⁰⁷ The current line of succession statute's approach of ordering Cabinet secretaries by when their departments were created enhances predictability, but it is not necessarily the best order for effective governance. For example, the system places the Secretary of

GEO. L.J. 1389, 1437–40, 1448–50 (1987) (arguing that the political gamesmanship that could have occurred after President Reagan's assassination attempt supports the idea that the bumping provision should be reformed)).

205. See *Secretary Gary Locke*, U.S. DEP'T COM., <http://2010-2014.commerce.gov/about-commerce/commerce-leadership/secretary-gary-locke.html> [https://perma.cc/T9J8-G3BW] (last visited Nov. 19, 2017).

206. See *Secretary John Bryson*, U.S. DEP'T COM., <http://2010-2014.commerce.gov/about-commerce/commerce-leadership/secretary-john-bryson.html> [https://perma.cc/TBC5-F2WS] (last visited Nov. 19, 2017).

207. Telephone Interview with John Fortier, former Dir., Continuity of Gov't Comm'n (Nov. 9, 2016) (suggesting a focus on the Cabinet departments' expertise).

Homeland Security last, far behind the Secretary of Agriculture.²⁰⁸ This current order means that in the event of a catastrophic attack on Washington, D.C., the Secretary of Agriculture is more likely to succeed to the presidency than the Secretary of Homeland Security, despite the latter's expertise in combating security threats.

To evaluate the expertise of each department, the Clinic emphasized four areas of expertise: foreign relations, economics, military, and security. These areas were selected considering that succession beyond the Vice President is unlikely absent a catastrophic event. In addition to specializing in issues that would be relevant in a crisis, the leaders of the departments that focus on these areas receive regular security briefings, which lower ranking Cabinet members are not provided.²⁰⁹ Frances Townsend, a former White House Homeland Security Advisor, stressed to the Clinic that security briefings are far more important than events like Cabinet meetings for preparing department heads for succession.²¹⁰ Additionally, the Clinic considered how frequently various department heads interact with the President, finding that Cabinet secretaries whose departments specialize in foreign relations, economics, military, and security met more frequently with the President.

Based on these considerations, the Clinic concludes that the heads of the Departments of State,²¹¹ Defense,²¹² Justice,²¹³ Treasury,²¹⁴ and Homeland Security²¹⁵ are best equipped to succeed to the presidency in a crisis.

3. Geographic Vulnerability

Further, the current line of succession does not adequately provide for the possibility of a catastrophic attack in the Washington, D.C., area, where

208. 3 U.S.C. § 19(d)(1) (2012) (stating that the Secretary of Agriculture is sixth in the line of succession while the Secretary of Homeland Security is last at fifteenth).

209. CONTINUITY OF GOV'T COMM'N, *supra* note 186, at 45.

210. Interview with Frances F. Townsend, former Assistant to the President for Homeland Sec. & Counterterrorism, in N.Y.C., N.Y. (Oct. 26, 2016).

211. See *What We Do*, U.S. DEP'T ST., <https://www.state.gov/whatwedo/> [<https://perma.cc/7KZ2-G936>] (last visited Nov. 19, 2017) (stating that "Arms Control & International Security" and "Economics, Energy & Environment" are among the State Department's areas of expertise).

212. See U.S. DEP'T OF DEF., <https://www.defense.gov/> [<https://perma.cc/F8QV-7P6F>] (last visited Nov. 19, 2017) ("The mission of the Department of Defense is to provide the military forces needed to deter war and to protect the security of our country.").

213. See *About DOJ*, U.S. DEP'T JUST., <https://www.justice.gov/about> [<https://perma.cc/KB2X-7Y4F>] (last visited Nov. 19, 2017) (stating the department's mission "[t]o enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic").

214. See *Role of Treasury*, U.S. DEP'T TREASURY, <https://www.treasury.gov/about/role-of-treasury/> [<https://perma.cc/N5AF-6S5A>] (last visited Nov. 19, 2017) (stating the department's mission to "maintain a strong economy . . . , strengthen national security by combating threats and protecting the integrity of the financial system, and manage the U.S. Government's finances and resources effectively").

215. See *About DHS*, U.S. DEP'T HOMELAND SECURITY, <https://www.dhs.gov/about-dhs> [<https://perma.cc/6LGT-G8CA>] (last visited Nov. 19, 2017) ("The Department of Homeland Security has a vital mission: to secure the nation from the many threats we face.").

legislators and Cabinet members in the line of succession are frequently located.²¹⁶ For example, a nuclear or biological attack when Congress is in session would threaten to leave the country without any clear successors to the presidency.

The danger posed by concentrating successors in the Washington, D.C., area is addressed by the lines of succession for several executive branch agencies including at least two of the top four Cabinet departments.²¹⁷ The Secretary of State's successors include numerous ambassadors²¹⁸ and the Attorney General's successors include U.S. Attorneys in Virginia, Illinois, and Missouri.²¹⁹

C. *Recommended Composition of the Line of Succession*

The Clinic recommends removing legislators and several Cabinet members from the line of succession and adding four officials, or "Standing Successors," outside of Washington, D.C. The line of succession should be populated as follows: (1) Secretary of State, (2) Secretary of Defense, (3) Attorney General, (4) Secretary of Homeland Security, (5) Secretary of the Treasury, (6) Standing Successor 1, (7) Standing Successor 2, (8) Standing Successor 3, and (9) Standing Successor 4.²²⁰

1. Standing Successors

To address the geographic vulnerability problem and to lengthen the proposed line of succession, the Clinic recommends the creation of an Office of Standing Successors. Four individuals located outside of Washington, D.C., would be nominated by the President and confirmed by the Senate to properly qualify as eligible "Officers" under the Succession Clause.²²¹ These officials should be placed at the end of the line of succession.

The recommendation for Standing Successors was initially proposed by the Continuity of Government Commission, which suggested creating four or five new federal offices to which the President would appoint figures to be confirmed by the Senate.²²² The Clinic largely agrees with the Commission's recommendation but recommends the creation of only one new office, instead of one for each Standing Successor, for simplicity and efficiency.

The Clinic also envisions a wider range of officials who could be appointed as Standing Successors than the Commission recommended. The Commission suggested that the President appoint "former high government

216. See CONTINUITY OF GOV'T COMM'N, *supra* note 186, at 39.

217. As discussed in Part III.E.1, successors in the executive departments might also be part of the presidential line of succession, but the statute does not explicitly include them.

218. See Exec. Order No. 13,251, 3 C.F.R. §§ 1841–1842 (2001).

219. See Exec. Order No. 13,775, 82 Fed. Reg. 10,697 (Feb. 14, 2017).

220. The first Presidential Succession Clinic also recommended removing legislators from the line of succession but did not propose removing any Cabinet secretaries. See First Clinic Report, *supra* note 8, at 46.

221. See *supra* Part III.B.1.e.

222. See CONTINUITY OF GOV'T COMM'N, *supra* note 186, at 45.

officials” such as “former presidents, former secretaries of state, former members of Congress, [or even] sitting governors.”²²³ Past Presidents, former Secretaries of State, and former members of Congress would make excellent Standing Successors. However, the Clinic believes that this list should be expanded to include other individuals with public service experience and expertise in the areas of foreign affairs, economics, military, or security. Examples include past Vice Presidents and former Cabinet members, particularly former heads of the Defense, Justice, Treasury, and Homeland Security departments.

The Twenty-Second Amendment’s two term limit for Presidents does not prevent past Presidents from being part of the line of succession. The Amendment states “no person shall be *elected* to the office of the President more than twice.”²²⁴ Because succession does not involve a past President being elected to another term, it would not violate the Constitution. Although some might argue that including former two-term Presidents violates the spirit of the Amendment, the Clinic contends that in a time of crisis where many other successors are not available, expertise and stability in the White House is critical.²²⁵

The Clinic does not recommend sitting governors as Standing Successors to avoid possible conflicts of interest or violations of dual-office-holding laws in certain states.²²⁶

The President’s discretion to appoint Standing Successors would be limited by the constitutional presidential eligibility requirements²²⁷ and possibly limited by Congressional requirements imposed pursuant to Congress’s authority under the Succession Clause to designate presidential successors.²²⁸

The Clinic recommends that Standing Successors follow the Cabinet members’ line of succession to the presidency, as secretaries’ work in the executive branch—particularly frequent security briefings—would likely better prepare them for succession. However, to ensure that the Standing Successors are aware of critical information, they should attend periodic security briefings.²²⁹

223. *See id.*

224. U.S. CONST. amend. XXII (emphasis added).

225. Interview with Akhil Reed Amar, Professor of Law, Yale Univ., in N.Y.C., N.Y. (Oct. 5, 2016).

226. *See Dual Office Holding: Restrictions on Legislators*, NAT’L CONF. ST. LEGISLATURES (Oct. 5, 2016), <http://www.ncsl.org/research/ethics/restrictions-on-holding-concurrent-office.aspx> [https://perma.cc/NAS4-445B].

227. *See* U.S. CONST. art. II, § 1, cl. 5.

228. *See id.* art. II, § 1, cl. 6.

229. The Continuity of Government Commission recommended that the White House include appointed successors “in regular (at least monthly) national security briefings.” CONTINUITY OF GOV’T COMM’N, *supra* note 186, at 45; *see also* Interview with Frances F. Townsend, *supra* note 186 (suggesting that appointed successors periodically attend meetings of the National Security Council or Homeland Security Council); *cf.* Interview with John O. Brennan, *supra* note 49 (stating that successors should receive training to prepare for their roles).

2. Alternatives to Removing Legislators

The Clinic is convinced that the drawbacks of including legislators in the line of succession weigh heavily against any benefits of their inclusion. However, the political reality is that members of Congress might resist removing their own leaders from the line of succession. If Congress declines to remove legislators, the Clinic recommends three alternative reforms.

a. Remove Legislators from the Line of Succession in Cases of Temporary Disability or Removal from Office

If legislators are not removed from the line of succession, Congress should only designate them as successors in cases where the President dies or resigns not where he is disabled or removed from office.²³⁰ Preventing legislators from succeeding during disabilities protects legislators from being forced to resign to act as President temporarily. Similarly, preventing succession after the President has been removed through the impeachment process would avoid the conflict of interest inherent in the Speaker or President pro tempore taking action that could result in his own succession to the presidency.

b. Reorder Legislators to the End of the Line of Succession

Congress might also consider moving legislators to the end of the line of succession. This change would make their succession less likely, reducing the probability that a succession event would change party control of the White House.

c. Remove the Bumping Provision

Congress should eliminate the bumping provision to prevent multiple Presidents in a short period of time and increase the public legitimacy of successors during a crisis.

D. Other Line of Succession Reforms

In addition to changing some of the officials in the line of succession, there are several other steps that Congress should take to address vulnerabilities related to the line of succession.

1. Statutory Ambiguity About Acting Secretaries

The current statute is unclear as to whether acting Cabinet secretaries are in the line of succession.²³¹ Acting secretaries are the officials who lead

230. The first Presidential Succession Clinic also advanced this alternative proposal. *See* First Clinic Report, *supra* note 8, at 46–47.

231. *See* CONTINUITY OF GOV'T COMM'N, *supra* note 186, at 40–41.

executive branch departments in the absence of officials confirmed by the Senate to head the agencies. Comparison of the language of the 1947 Act and the 1886 Act suggests that acting secretaries are included in the current line of succession.

The 1886 Act explicitly excluded acting secretaries by enumerating the list of Cabinet secretaries who were included in the line of succession and stating that the list only applied to officials confirmed to “the offices therein named.”²³² The current statute—the 1947 Act—is not as clear. It provides, in relevant part, that “the officer of the United States who is highest on the following list [of Cabinet secretaries], and who is not under disability to discharge the powers and duties of the office of President shall act as President.”²³³ The statute states that the list of Cabinet successors includes only “officers appointed, by and with the advice and consent of the Senate.”²³⁴ Many officials who serve as acting secretaries receive Senate confirmations for deputy-level posts. There is no language in the 1947 Act limiting succession to Cabinet secretaries confirmed for those positions. However, it is also possible that the exclusion of this language was not purposeful as there is no discussion of acting secretaries in the 1947 Act’s legislative history.²³⁵

This lack of clarity might result in chaos in extraordinary circumstances. It permits the possibility of an acting secretary in a higher-listed department becoming Acting President ahead of a lower-listed, confirmed Cabinet secretary. For example, it could be unclear whether an Acting Secretary of State would succeed before the Secretary of Defense. Ambiguity about successors’ legitimacy is problematic in itself, but a further issue is that acting secretaries are not ideal successors. They are often more obscure than their displaced superiors and may be from the opposing party.²³⁶ While the inclusion of acting secretaries expands the line of succession, it amplifies the Clinic’s concerns about the qualifications and legitimacy of the individuals who could assume the presidency. Addressing issues involving acting secretaries in the line of succession has become more urgent in recent years because the time that it takes for the Senate to confirm Cabinet secretaries has steadily increased,²³⁷ increasing acting secretaries’ tenures.

Accordingly, Congress should at least clarify the ambiguity about whether acting secretaries are in the line of succession. The Clinic recommends that Congress enact a new statute mirroring the language of the Presidential

232. Presidential Succession Act of 1886, ch. 4, 24 Stat. 1, 1 (repealed 1947).

233. 3 U.S.C. § 19(d)(1) (2012).

234. *Id.* § 19(e).

235. See First Clinic Report, *supra* note 8, at 43 (discussing the Act’s legislative history).

236. Olga Pierce, *Who Runs Departments Before Heads Are Confirmed?*, PROPUBLICA (Jan. 22, 2009, 4:13 PM), <https://www.propublica.org/article/who-runs-departments-before-heads-are-confirmed-090122> [<https://perma.cc/6JCN-7TPQ>].

237. See John W. Schoen, *No President Has Ever Waited This Long to Get a Cabinet Approved*, CNBC (Feb. 24, 2017), <https://www.cnbc.com/2017/02/24/trumps-cabinet-waiting-for-confirmation.html> [<https://perma.cc/8CPE-W34V>].

Succession Act of 1886 to remove acting secretaries from the line of succession.²³⁸

2. Inauguration Day Vulnerability

A particular point of vulnerability for the line of succession comes on Inauguration Day, when most of the outgoing Cabinet secretaries have resigned and the incoming secretaries have not yet been confirmed.²³⁹ The line of succession is nearly empty as most of the remaining successors—the Speaker of the House, President pro tempore, and incoming and outgoing Presidents and Vice Presidents—gather within feet of one another for the inauguration ceremony. An attack or some other catastrophic event at the inauguration ceremony could leave the country without a clear successor to the presidency.

Before President Obama's first inauguration, a credible threat of attack on the ceremony led officials to prepare for the worst.²⁴⁰ President Bush's and President Obama's respective national security advisors met in the White House Situation Room on the morning of the inauguration to discuss the threat.²⁴¹ President Obama was even given a statement to read in place of his inaugural address if an attack occurred.²⁴²

On Inauguration Day, both the Speaker of the House and President pro tempore are in place, having assumed their positions when Congress convenes seventeen days prior on January 3.²⁴³ While the outgoing Cabinet members' terms do not technically end with the outgoing President's term at noon on Inauguration Day, typically most, if not all, have resigned at that point. Their resignations leave acting secretaries in charge of the departments, and, as discussed, the current statute leaves acting secretaries' eligibility as successors unclear.²⁴⁴

Until a President-Elect's Cabinet members are confirmed, they are not in the line of succession. By the time of the inauguration, the Senate will have held hearings for some of the nominees but will not have confirmed any of

238. The first Presidential Succession Clinic recommended that Congress clarify the status of Acting secretaries and, if it decided to explicitly include acting Secretaries, place them at the end of the line of succession. *See* First Clinic Report, *supra* note 8, at 47.

239. *See* CONTINUITY OF GOV'T COMM'N, *supra* note 186, at 41; John Fortier, *President Michael Armacost?: The Continuity of Government After September 11*, BROOKINGS INSTITUTION (Sept. 1, 2003), <https://www.brookings.edu/articles/president-michael-armacost-the-continuity-of-government-after-september-11/> [<https://perma.cc/X2G8-UFNZ>].

240. *See* Peter Baker, *Obama's War over Terror*, N.Y. TIMES MAG. (Jan. 4, 2010), <http://www.nytimes.com/2010/01/17/magazine/17Terror-t.html> [<https://perma.cc/4MXB-Y34S>].

241. Interview with John O. Brennan, *supra* note 49 (stating that he attended the meeting and briefed President-Elect Obama the night before the inauguration about the threat).

242. *See* Michael D. Shear, *Obama Had Statement to Read If Terror Halted Inauguration*, N.Y. TIMES (Feb. 10, 2015, 10:38 AM), <https://www.nytimes.com/politics/first-draft/2015/02/10/obama-had-statement-to-read-if-terror-halted-inauguration/> [<https://perma.cc/9JHM-ERB8>].

243. *See* U.S. CONST. amend XX, § 1.

244. *See supra* Part III.C.1.

them.²⁴⁵ Many of the picks will typically be ready for immediate votes on the Senate floor as soon as the new President takes office and formally nominates them. The process *can* be done quickly but will nonetheless take at least several hours and potentially a few days.²⁴⁶

One approach to addressing this succession gap is delaying the outgoing Cabinet members' resignations until after the inauguration or having the Speaker of the House or President pro tempore stay away from the ceremony. This approach was followed for the 2017 inauguration when outgoing Homeland Security Secretary Jeh Johnson stayed at his post and President pro tempore Orrin Hatch did not attend the ceremony.²⁴⁷ But this solution is problematic when the incoming President and the successors are from different political parties because succession could cause a disruptive shift in party control.

A better solution is coordination between the incoming and outgoing administrations to allow for the confirmation of some incoming Cabinet secretaries before the inauguration. In advancing this recommendation, the Clinic concurs with the Continuity of Government Commission, which recommended that the outgoing President nominate and the Senate confirm some of the incoming Cabinet secretaries.²⁴⁸

At least four of the President-Elect's chosen Cabinet members should be submitted for nomination to the Senate prior to Inauguration Day. Ideally, these nominees would then be confirmed on the day before or the morning of the inauguration. It would be preferable for the Senate to confirm as many of these nominees as possible in the time before the inauguration. Preconfirmed Cabinet secretaries would lengthen the line of succession and reduce the likelihood of an outgoing Cabinet secretary or acting secretary succeeding to the presidency.²⁴⁹

The possibility of partisan conflict impeding a swift preinauguration confirmation process cannot be ignored. For practical reasons, the President-Elect should therefore put forth his least controversial nominees. The President-Elect should prioritize the expeditious confirmation of nominees for the positions of Secretary of State, Secretary of the Treasury, Secretary of Defense, Attorney General, and Secretary of Homeland Security. Additionally, at least one of the newly confirmed Cabinet members should

245. CONTINUITY OF GOV'T COMM'N, *supra* note 186, at 42.

246. *See id.* ("In 1989, the Senate did not meet to consider [the new cabinet] nominations until six days after the inauguration.")

247. *See* Jordan Fabian, *Jeh Johnson Is Designated Survivor for Inauguration*, HILL (Jan. 20, 2017, 12:07 PM), <http://thehill.com/homenews/administration/315274-jeh-johnson-is-designated-survivor-for-inauguration> [<https://perma.cc/DXV3-DSFF>]; Press Release, Office of Senator Orrin Hatch, At the Request of President Trump, Hatch Serves as Designated Survivor During Inauguration (Jan. 20, 2017), <https://www.hatch.senate.gov/public/index.cfm/2017/1/at-the-request-of-president-trump-hatch-serves-as-designated-survivor-during-inauguration> [<https://perma.cc/BCE6-USTA>].

248. *See* CONTINUITY OF GOV'T COMM'N, *supra* note 186, at 49. The first Presidential Succession Clinic also endorsed this recommendation. *See* First Clinic Report, *supra* note 8, at 60–61.

249. *See* First Clinic Report, *supra* note 8, at 60–61.

not attend the inauguration and be outside of Washington, D.C., at the time of the ceremony.

3. Preparing for Succession

The White House should plan for scenarios where the statutory line of succession is reached, particularly by ensuring that the successors are prepared. Planning for succession beyond the vice presidency is already in place. The Central Locator System, an executive branch office created during the Cold War, tracks successors to the presidency twenty-four hours a day.²⁵⁰ The system is only one part of extensive plans for continuity of government.²⁵¹

However, moments such as Secretary of State Haig's inaccurate statement about his position in the line of succession following the Reagan assassination attempt underscore the importance of preparing successors for their roles.²⁵² A similar lack of preparedness seemed evident on 9/11. After Speaker of the House Dennis Hastert was evacuated from Washington, D.C., he was unable to communicate with the White House.²⁵³ Eighty-three-year-old Senate President pro tempore Robert Byrd stood outside the Capitol talking with reporters before simply going home²⁵⁴ and Vice President Cheney and Defense Secretary Donald Rumsfeld refused to move to secure locations.²⁵⁵ Comprehensive planning with awareness and cooperation of successors is critical to avoiding chaos during crises.

IV. DUAL AND VICE PRESIDENTIAL INABILITY

The Clinic's proposed reforms to the line of succession would help to ensure that there are always successors who are prepared to lead the country. Still, a separate set of reforms is needed to allow those successors to act as President in certain situations. If the President and Vice President are disabled simultaneously, there is no legal method to trigger their succession because an unable Vice President cannot participate with the Cabinet to invoke the Twenty-Fifth Amendment. Similarly, if the Vice President is disabled, the President cannot use Section 3 to transfer his powers and duties

250. See GRAFF, *supra* note 49, at xvii–xviii; see also OFFICE OF EMERGENCY PREPAREDNESS, EXEC. OFFICE OF THE PRESIDENT, COMMUNICATIONS HANDBOOK FOR CENTRAL LOCATOR SYSTEM (1973), <https://www.archives.gov/files/declassification/iscap/pdf/2010-081-umissdoc30.pdf> [<https://perma.cc/6HFH-M246>] (explaining the Central Locator System).

251. See, e.g., Directive on National Continuity Policy, 1 PUB. PAPERS 547, 547 (May 9, 2007) (calling for a “comprehensive and integrated national continuity program” including coordination between executive and legislative branches on succession planning); Interview with John O. Brennan, *supra* note 49 (stating that tremendous resources have been dedicated to continuity-of-government planning).

252. See *supra* Part II.A.I.; see also Richard V. Allen, *When Reagan Was Shot, Who Was “In Control” at the White House?*, WASH. POST (Mar. 25, 2011), https://www.washingtonpost.com/AFJlrfYB_story.html [<https://perma.cc/9TA9-Y7BE>].

253. See Arkin & Windrem, *supra* note 73.

254. See GRAFF, *supra* note 49, at 338.

255. See Arkin & Windrem, *supra* note 73.

to the next person in the line of succession.²⁵⁶ This problem is worsened by the absence of procedures for declaring the Vice President unable.

The prospect of “dual inabilities” of the President and Vice President lurked behind two of the four presidential assassinations. Vice President Andrew Johnson was targeted as part of the Lincoln assassination plot in 1865.²⁵⁷ When President Kennedy was assassinated in 1963, Vice President Lyndon Johnson was “in an open convertible” two cars behind the Kennedys.²⁵⁸ Beyond these historical illustrations, the danger of a dual inability is evident from the fact that all Presidents and Vice Presidents are frequently in close proximity to one another, including when they are working in the West Wing.²⁵⁹

Additionally, many Vice Presidents have suffered debilitating health problems. One analysis found that “20 of the 47 individuals who have served as vice president have suffered from apparent incapacity or experienced a ‘near miss’ that could have resulted in their incapacity.”²⁶⁰ And seven Vice Presidents have died in office.²⁶¹

The Clinic recommends that Congress pass legislation with procedures for declaring (1) a dual inability of the President and the Vice President, including where there is no Vice President and (2) a sole inability of the Vice President. These procedures should be modeled on the Twenty-Fifth Amendment’s inability procedures.

This Part first describes the Clinic’s proposed dual inability statute. It then discusses the Clinic’s proposed vice presidential inability statute.²⁶²

A. Proposed Statute for Dual Inability

The Clinic recommends the following statute, modeled after Section 4 of the Twenty-Fifth Amendment, to provide for scenarios in which both the President and the Vice President are unable.²⁶³

256. Congress considered including provisions for dual and vice presidential inability in the Twenty-Fifth Amendment. However, those provisions were excluded in light of concerns that adding complexity to the Amendment would decrease its chances of ratification. *See* Feerick, *supra* note 175, at 909; *see also* Letter from John D. Feerick to Rep. Richard Poff, FORDHAM L. ARCHIVE SCHOLARSHIP & HIST. (Feb. 7, 1965), http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1031&context=twentyfifth_amendment_correspondence [<https://perma.cc/EZ25-49DS>] (suggesting a provision to cover simultaneous inabilities).

257. FEERICK, FROM FAILING HANDS, *supra* note 16, at 109–10.

258. *Id.* at 4–5.

259. *See The Vice President’s Residence & Office*, WHITE HOUSE, <https://www.whitehouse.gov/1600/vp-residence> [<https://perma.cc/L4Q3-W8PH>] (last visited Nov. 19, 2017).

260. Roy E. Brownell II, *Vice Presidential Inability: Historical Episodes That Highlight a Significant Constitutional Problem*, 46 PRESIDENTIAL STUD. Q. 434, 452 (2016).

261. FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 31. No Vice Presidents have died in office since 1912. *Id.* at 313–14.

262. The Clinic believes that the statute designed to fill the gaps posed by a dual disability scenario and the statute designed to fill the gaps of a vice presidential inability could be implemented individually or as one consolidated statute.

263. The first Presidential Succession Clinic also proposed a statute modeled after the Twenty-Fifth Amendment to address dual inabilities. *See* First Clinic Report, *supra* note 8, at

Definition of Statutory Successor—

For purposes of this statute, a “Statutory Successor” shall be defined as the highest-ranking official in the line of succession after the Vice President, pursuant to 3 U.S.C. § 19.

Dual Inability of a President and a Vice President—

Whenever the Statutory Successor 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 majority and minority leaders of both Houses of Congress their written declaration that the President and the Vice President are both unable to discharge the powers and duties of their offices, the Statutory Successor shall immediately assume the powers and duties of the presidency as Acting President.

Thereafter, when the President transmits to the majority and minority leaders of both Houses of Congress a written declaration that his inability does not exist, the President shall resume the powers and duties of his office. Alternatively, when the Vice President transmits to the majority and minority leaders of both Houses of Congress a written declaration that his inability does not exist, the Vice President shall immediately assume the powers and duties of the office as Acting President. However, following either a declaration by President or Vice President, if the Statutory Successor and a majority of the principal officers of the executive departments or of such other body as Congress may by law provide, transmit within four days to the majority and minority leaders of both houses their written declaration that both the President and the Vice President are unable to discharge the powers and duties of their offices, 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 and the Vice President are unable to discharge the powers and duties of their offices, the Statutory Successor shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Presidential Inability with a Vacancy in the Office of the Vice President—

Whenever there is no Vice President, and the Statutory Successor 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 majority and minority leaders of both Houses of Congress their written declaration that the President is unable to discharge the powers and duties of his office, the Statutory Successor shall immediately assume the powers and duties of the office as Acting President.

27–31. We add to that recommendation by proposing statutory language for these contingencies. In Roy Brownell’s article in this issue, he outlines an approach for policy-makers to follow if a dual inability occurs in the absence of statutory procedures for handling it. See generally Roy E. Brownell II, *What to Do If Simultaneous Presidential and Vice Presidential Inability Struck Today*, 86 FORDHAM L. REV. 1027 (2017).

Thereafter, when the President transmits to the majority and minority leaders of both Houses of Congress a written declaration that his inability does not exist, the President shall resume the powers and duties of his office unless the Statutory Successor and a majority of the Cabinet or of such other body as Congress may by law provide, transmit within four days to the majority and minority leadership of both houses 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 Statutory Successor shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

The proposed statute follows the framework of Section 4 of the Twenty-Fifth Amendment to cover three dual inability scenarios: (1) dual inability of both the President and the Vice President; (2) a presidential inability when there is no Vice President; and (3) a situation in which the Vice President becomes disabled while serving as Acting President. The third contingency is a dual inability scenario because, under the Twenty-Fifth Amendment, the President would remain President as the Vice President is serving as Acting President.

The proposed statute has two key provisions. First, it provides that the Statutory Successor, the highest official in the statutory line of succession, shall declare when a dual inability exists before serving as Acting President in consultation with the Cabinet or another body appointed by Congress. Although the Speaker of the House is the first official in the line of succession, the proposed statute does not explicitly designate the Speaker to participate in a dual inability declaration. It is likely that the Speaker would carry out that function, but the phrase “Statutory Successor” provides for a scenario where the Speaker is unable to participate. In such a scenario, the next eligible successor to the presidency would be the Statutory Successor.

Second, the proposed statute provides that the President or Vice President can declare an end to their incapacities. However, if the Statutory Successor and a majority of the Cabinet disagree, Congress will “decide the issue” within twenty-one days. This provision protects against usurpations of presidential power while providing a check on disabled Presidents and Vice Presidents who do not recognize that they are incapacitated.

The statute follows a slightly different notification procedure than Section 4 of the Twenty-Fifth Amendment. Instead of notifying the Speaker of the House and Senate President pro tempore of the dual inability and transfer of power,²⁶⁴ the Statutory Successor and Cabinet notify the majority and minority leaders of both houses of Congress. Because the Speaker of the

264. U.S. CONST. amend. XXV, § 4.

House and President pro tempore are the first two officials in the line of succession,²⁶⁵ one would likely fill the role of the Statutory Successor in a dual disability scenario. It would make little sense for the Statutory Successor to send notification to himself.

*B. Constitutional and Practical Justification
for Dual Inability Statute*

Congress has constitutional authority to enact the Clinic's proposed statute, and the procedure that the statute provides has a firm practical basis.

1. Constitutional Basis

The Succession Clause and the Necessary and Proper Clause support Congress's authority to create procedures for determining dual incapacities.

a. The Succession Clause

The Succession Clause is the principal constitutional source of congressional authority to enact legislation relating to presidential succession. In addition to designating the Vice President as the first successor to the presidency, the Clause provides that 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."²⁶⁶ Although the Clause does not explicitly authorize Congress to establish procedures to declare a dual incapacity, that power is arguably implicit in the power to designate a successor in the event of a dual incapacity.²⁶⁷

Congress broadly exercised this power in the three acts dealing with the line of presidential succession.²⁶⁸ In all three statutes, Congress went beyond the textual mandate to declare an official to act as President in the event of a dual vacancy or incapacity. The Presidential Succession Act of 1792, for example, provided for a special election to fill dual vacancies that occurred more than a year before the expiration of the President's term.²⁶⁹ The Presidential Succession Act of 1886 implemented protocols for dealing with incapacities when Congress was not in session. It provided that a successor should issue a proclamation calling Congress to convene for an extraordinary session.²⁷⁰ Finally, the Presidential Succession Act of 1947 addressed separation of powers concerns by imposing a resignation requirement on any legislator who becomes Acting President.²⁷¹

265. 3 U.S.C. § 19(a)–(b) (2012).

266. U.S. CONST. art. II, § 1, cl. 6.

267. See Goldstein, *supra* note 20, at 1033.

268. See Feerick, *supra* note 90, at 20.

269. RONAN, *supra* note 162, at 8.

270. *Id.* at 24; RUTH C. SILVA, PRESIDENTIAL SUCCESSION 120–21 (1951).

271. RONAN, *supra* note 162, at 34.

b. The Necessary and Proper Clause

The interaction between the Succession Clause and the Necessary and Proper Clause provides additional support for Congress's authority to create procedures for determining a dual inability.²⁷² The Necessary and Proper Clause empowers Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or any Department or Officer thereof."²⁷³ The Clause has been interpreted as granting Congress broad discretion to enact laws in furtherance of other provisions in the Constitution.²⁷⁴

In *McCulloch v. Maryland*,²⁷⁵ the U.S. Supreme Court described the power granted to Congress by the Necessary and Proper Clause as contingent on means that are "plainly adapted to [their] end."²⁷⁶ Laws enacted under the Clause's authority must be incidental or implied by another provision in the Constitution.²⁷⁷ Unless otherwise inconsistent with the letter and spirit of the Constitution, any law that is appropriate to carry into effect any of the powers of the federal government is valid under the Necessary and Proper Clause.²⁷⁸ The power to provide a way to declare a dual inability is arguably implied from the Succession Clause.

2. Practical Basis: The Contingent Grant-of-Power Theory
and the Twenty-Fifth Amendment

Prior to the Twenty-Fifth Amendment's ratification, legal scholars debated who had the authority to determine whether a presidential inability existed,²⁷⁹ with some believing that the Vice President had the power to make this determination.²⁸⁰ This view relied, in part, on the contingent grant-of-power theory, which holds that implied in the power to act under certain contingencies is the power to declare when such contingencies exist.²⁸¹

272. See First Clinic Report, *supra* note 8, at 29.

273. U.S. CONST. art. I, § 8, cl. 18.

274. See William Baude, *Sharing the Necessary and Proper Clause*, 128 HARV. L. REV. 39, 42–43 (2014). Scholars have interpreted the Necessary and Proper Clause as vesting in Congress the sole authority to affirm any ancillary powers of other branches that are not provided in Articles II or III or necessarily implied by the nature of the duties of those departments. See, e.g., William Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of "The Sweeping Clause,"* 36 OHIO ST. L.J. 788, 807 (1975).

275. 17 U.S. 316 (1819).

276. *Id.* at 421.

277. *Id.*

278. *Id.* ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.")

279. See Participation of the Vice President in the Affairs of the Exec. Branch, 1 Op. O.L.C. Supp. 214, 214 (1961).

280. See *id.*; SILVA, *supra* note 270, at 101; Herbert Brownell Jr., *Presidential Disability: The Need for a Constitutional Amendment*, 68 YALE L.J. 189, 197 (1958).

281. See Presidential Inability, 42 Op. Att'y Gen. 69, 89 (1961); FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 323–33; Feerick, *supra* note 175, at 913–14.

Section 4 of the Twenty-Fifth Amendment is rooted in the contingent grant-of-power theory. Because the Vice President has the power to act as President in the case of inability, he is a judge of that inability. However, Congress imposed an additional restraint by requiring the Vice President to coordinate with the Cabinet or another body to make the inability determination.²⁸² The restraint serves many purposes, including encouraging the Vice President to take appropriate action by providing him with additional political support²⁸³ and preventing attempts to usurp presidential power.

The Clinic's proposed statute reflects the rationale behind Section 4 by extending the contingent grant of power to the next highest official in the line of succession. It incorporates a check on that official by requiring the participation of the Cabinet or a congressionally created body.

C. Proposed Statute for Vice Presidential Inability

The Clinic's proposed vice presidential inability statute mirrors Sections 3 and 4 of the Twenty-Fifth Amendment, providing mechanisms for both a voluntary and involuntary declaration of vice presidential inability.²⁸⁴ The proposed statute provides as follows:

Definition of Statutory Successor

For purposes of this statute, a "Statutory Successor" shall be defined as the highest-ranking official in the line of succession after the Vice President, pursuant to 3 U.S.C. § 19.

Voluntary Declaration of Inability; Office of Vice President

Whenever the Vice President transmits to the President and to the majority and minority leaders of both Houses of Congress his written declaration that he is unable to discharge the powers and duties of his office, and until the Vice President transmits to them a written declaration to the contrary, the powers and duties of his office pursuant to Sections Three and Four of the Twenty-Fifth Amendment shall be discharged by the Statutory Successor.

Involuntary Declaration of Inability; Office of Vice President

Whenever the 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 majority and minority leaders of both Houses of Congress their written declaration that the Vice President is unable to discharge the powers and duties of his office, the Vice President shall immediately cease to discharge the powers and duties of his office, and until the Vice President transmits to them a written declaration to the contrary, such powers and duties of his office under

282. See U.S. CONST. amend. XXV, § 4.

283. Goldstein, *supra* note 20, at 989.

284. The first Presidential Succession Clinic declined to recommend a statute to address vice presidential inability out of concern that there was not a sufficient constitutional basis for such a statute. See First Clinic Report, *supra* note 8, at 34–35.

Sections Three and Four of the Twenty-Fifth Amendment shall be discharged by the Statutory Successor.

Thereafter, when the Vice President transmits to the majority and minority leaders of both Houses of Congress his written declaration that no inability exists, the Vice President shall resume the powers and duties of his office unless the 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 within four days to the majority and minority leaders of both Houses of Congress their written declaration that the Vice 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 Vice President is unable to discharge the powers and duties of his office, the powers and duties of his office under Section Three and Four of the Twenty-Fifth Amendment shall be discharged by the Statutory Successor; otherwise, the Vice President shall resume the powers and duties of his office.

The proposed statute's voluntary declaration provision is modeled after Section 3 of the Twenty-Fifth Amendment and could be used in a similar manner to temporarily transfer the Vice President's powers and duties powers and duties under the Twenty-Fifth Amendment. However, brief transfers of power for routine surgical procedures, such as President George W. Bush's uses of Section 3,²⁸⁵ may not be necessary or wise absent a need for the Statutory Successor to act as President.

The involuntary inability declaration provision is nearly identical to Section 4, except that the President takes the Vice President's role in the Twenty-Fifth Amendment process. While granting the President the power to determine vice presidential inability raises concerns that he might abuse his authority over the Cabinet to influence their decision, the Clinic believes that public accountability and the secondary check of Congress will provide sufficient balance, just as in Section 4.

When power is transferred under the proposed statute, the Statutory Successor assumes the Vice President's powers and duties under Sections 3 and 4: the power to serve as Acting President after a voluntary declaration of inability by the President and the power to participate in declaring a presidential inability. The Statutory Successor's discharge of these responsibilities would, in essence, allow for the use of the Twenty-Fifth Amendment's inability provisions, which require an able Vice President. The Clinic does not believe that the Statutory Successor should exercise any of the Vice President's other responsibilities.

The Statutory Successor would likely be either the Speaker of the House or the Senate President pro tempore, the top two officials in the current line of succession. Both are required by the Incompatibility Clause and the line-

285. See FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 202–03.

of-succession statute to resign their positions to act as President.²⁸⁶ They would not be required to resign from Congress to participate in the proposed statute's process of declaring the President unable. The Incompatibility Clause prohibits legislators from holding an "Office,"²⁸⁷ but participating in the inability process does not involve holding any such "Office." If the inability process resulted in a determination that the President was unable, the Statutory Successor, if he or she were a member of Congress, would have to resign to act as President.

1. Constitutional Basis

The constitutional authority for this proposed legislation is based on the Succession Clause the principle that a continually functioning executive branch must be maintained, and the Necessary and Proper Clause.

a. The Succession Clause

The Succession Clause supports Congress's authority to create procedures for declaring vice presidential incapacities. The Clause states, in relevant part, "Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, *both of the President and Vice President.*"²⁸⁸ The Clinic submits that the phrase "both of the President and Vice President" includes authority for Congress to act in the case of inability of the President and Vice President—individually—because it would be impossible to declare a dual inability without declaring each individual disabled.

Furthermore, Congress's authority under the Succession Clause to "provide" for dual incapacities arguably includes the power to prevent dual incapacities from occurring. As discussed, if the Vice President is disabled, there is no other official empowered to participate with the Cabinet to declare the President disabled.²⁸⁹ Without the ability to transfer the Vice President's duties under the Twenty-Fifth Amendment, any type of presidential inability could paralyze the executive branch.

b. Executive Continuity Principle

That the framers envisioned the presidency to be a continually functioning part of the government provides a compelling structural argument for Congress's authority to pass a vice presidential incapacity statute.²⁹⁰ The

286. U.S. CONST. art. I, § 6, cl. 2; 3 U.S.C. § 19(a)–(b) (2012).

287. See U.S. CONST. art. I, § 6, cl. 2.

288. *Id.* art. II, §. 1, cl. 6 (emphasis added).

289. See Brownell, *supra* note 260, at 436.

290. Brian C. Kalt, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779, 793 n.87 (1996) ("Constitutional structuralists . . . look at text and context, stressing the ways in which various provisions (explicit and implicit) interrelate. Instead of treating the Constitution as a series of disjointed, unrelated clauses, they treat it as a whole, looking to the structure of constitutional government, stressing its internal consistency and recurring themes.").

continuous nature of the presidency is clear from the lack of any recess or adjournment provisions, such as those pertaining to Congress.²⁹¹ Additionally, the Constitution includes three distinct measures for ensuring executive continuity in the Constitution: the Succession Clause, the vice presidency, and the Twenty-Fifth Amendment.

The Succession Clause provides Congress with the legislative power to ensure that there is always an able President.²⁹² The provision facilitates a transition to a successor in the absence of a capable President. The language “the same shall devolve” immediately vests the powers and duties of the presidency in the successor.²⁹³ In contrast, vacancies in the legislative and judicial branches are filled through more elaborate, slow-moving processes, such as special elections for congressional vacancies and presidential nomination and congressional confirmation for judges.²⁹⁴ The executive branch is also unique in that the President is the only official with a constitutionally designated successor, the Vice President.²⁹⁵

The Twenty-Fifth Amendment furthered the Constitution’s emphasis on continuity of the executive branch by providing procedures designed to ensure that there is always someone able to discharge the powers and duties of the presidency.²⁹⁶

Continuity of the executive branch is a structural principle that is inherent in the Constitution, and the advancement of this principle supports congressional action to provide for vice presidential inability. The Vice President serves two roles that are critical to ensuring continuity of the executive branch: he is the first successor to the presidency and indispensable to the Twenty-Fifth Amendment’s inability procedures. Accordingly, Congress has the authority to pass a statute to ensure that there is someone to carry out these functions, which may become essential to maintaining executive branch continuity.

c. Necessary and Proper Clause

The Necessary and Proper Clause supports the enactment of a vice presidential inability statute. Such a statute furthers Congress’s power under the Succession Clause because declaring the Vice President unable could be essential to allowing the next person in the statutory line of succession to act as President.²⁹⁷ Additionally, addressing vice presidential inability is important to ensuring that the Twenty-Fifth Amendment’s provisions can function in practice, as an able Vice President is essential to Sections 3 and

291. Interview with Akhil Reed Amar, *supra* note 225.

292. U.S. CONST. art. II, § 1, cl. 6.

293. *Id.*

294. *See id.* art. II, § 2; *id.* amend. XVII.

295. *See id.* art. II, § 1, cl. 6. The Constitution requires the Senate to choose a President *pro tempore* “in the Absence of the Vice President, or when he shall exercise the Office of President of the United States,” but does not designate a specific official to succeed to the position. *Id.* art. I, § 3, cl. 5.

296. *See id.* amend. XXV.

297. *See* First Clinic Report, *supra* note 8, at 34–35.

4. Finally, as with a dual-inability statute, a vice presidential inability statute furthers the general constitutional imperative to maintain the functioning of the federal government.

2. Precedential Authority

Congress has previously implemented mechanisms for fulfilling constitutional duties in the absence of an express constitutional mandate. For example, there is no provision in the Constitution that specifically grants Congress investigatory powers or contempt powers.²⁹⁸ Yet the Supreme Court has consistently held that these powers are inherently necessary to effectuate Congress's duty to legislate.²⁹⁹ To pass laws, Congress must gather and analyze information.³⁰⁰ Thus, Congress must have the power to conduct investigations.³⁰¹ Similarly, any request for information to a third party would be an empty request without the power to enforce compliance.³⁰²

It is similarly appropriate for the most democratically representative branch of government to provide procedures that fill gaps necessary to effectuate the spirit of the Constitution. The enactment of a statute to fill a vacancy in another branch of government is consistent with this notion. For example, the statute entitled "Vacancy in the office of the Chief Justice; disability"³⁰³ allows the most senior Associate Justice to occupy the position of Chief Justice if the Chief Justice is unable to perform his duties.³⁰⁴ While there is no explicit grant of such power in the Constitution, the statute is an appropriate means of ensuring continuity within the judicial branch. A statute providing for vice presidential inability would similarly promote continuity within the executive branch.

3. Alternatives

The Clinic considered various alternatives to address vice presidential inability, including prospective declarations of inability, impeachment, and a range of parties other than the Cabinet and President who could possibly determine a Vice President's inability.

298. ALISSA M. DOLAN & TODD GARVEY, CONG. RESEARCH SERV., RL34114, CONGRESS'S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: A SKETCH 2 (2014).

299. *See id.* at 2 n.11 ("In short, there can be no question that Congress has a right—derived from its Article I legislative function—to issue and enforce subpoenas, and a corresponding right to the information that is the subject of such subpoenas. Several Supreme Court decisions have confirmed that fact." (quoting *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 84 (D.D.C. 2008))).

300. *Id.* at 2.

301. *Id.*

302. *Id.*

303. 28 U.S.C. § 3 (2012).

304. *Id.*

*a. Prospective Declarations
of Inability and Resignation*

Prospective declarations of inability, like those the Clinic recommends the President create,³⁰⁵ and letter agreements, like those between Presidents and Vice Presidents before the Twenty-Fifth Amendment,³⁰⁶ would be difficult to use to address vice presidential inability.³⁰⁷ While prospective declarations addressing a President's inability are consistent with Section 3 of the Twenty-Fifth Amendment, there is no clear constitutional authority for prospective letters drafted by the Vice President. At most, such declarations are informal mechanisms that lack the force of law. Letter agreements would also have a tenuous legal basis. When Presidents used the agreements to authorize their Vice Presidents to declare them unable, the Vice Presidents arguably had the authority to make such declarations under the contingent grant-of-power theory.³⁰⁸ There is no similarly situated individual in a vice presidential inability scenario.

Prospective resignation letters, like those drafted by Vice President Dick Cheney, may encounter legal and practical difficulties.³⁰⁹ Cheney's arrangement gave his counsel and President Bush the authority to determine whether to submit the presigned resignation letter.³¹⁰ The statute that describes the procedure for vice presidential resignations does not require the Vice President or any specified person to submit the Vice President's resignation letter.³¹¹ But it would be unreasonable to interpret that unaddressed detail as allowing the Vice President to designate the authority to determine when to trigger his resignation. The statute allows someone to carry out the ministerial task of delivering the Vice President's letter at the Vice President's instruction; a grant of discretion to determine whether prospective resignation letter arrangements should be executed, however, may require explicit statutory or constitutional authorization, which does not currently exist.³¹²

b. Impeachment

Impeachment is not an appropriate response to vice presidential or dual incapacities.³¹³ The Constitution envisions impeachment as the remedy for serious misconduct by the President, Vice President, other executive branch officials, and federal judges, and its use to address inability may prove

305. See *supra* Part II.A.

306. FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 31–32.

307. Interview with Roy E. Brownell II, Washington, D.C., Attorney, in N.Y.C., N.Y. (Oct. 24, 2016); see FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 79.

308. See Feerick, *supra* note 175, at 914.

309. Interview with Roy E. Brownell II, *supra* note 307.

310. See, e.g., FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 203–04.

311. See 3 U.S.C. § 20 (2012) (“The only evidence of . . . a resignation of the office of . . . Vice President, shall be an instrument in writing, declaring the same, and subscribed by the person . . . resigning, . . . and delivered into the office of the Secretary of State.”).

312. Interview with Roy E. Brownell II, *supra* note 307.

313. See First Clinic Report, *supra* note 8, at 35.

challenging.³¹⁴ Two judges who appeared to be alcoholics have been impeached (and one removed),³¹⁵ but at least one of those impeachments was still tied to misconduct, not necessarily to alcoholism in and of itself.³¹⁶ Impeachment should be based on intentional conduct, not physical or mental disabilities.

c. Alternative Parties

The Clinic considered whether individuals other than Cabinet members should participate with the President in declaring the Vice President disabled.

i. Senate

The Vice President's constitutional relationship with the Senate, as President of that chamber,³¹⁷ led the Clinic to consider involving Senators in the disability process. Unlike Cabinet members, Senators do not serve at the pleasure of the President, so they might be more likely to exercise independent judgment if they worked with the President to declare the Vice President unable.

However, Senators could politicize and prolong the process. Their involvement would also raise separation of powers concerns. Concerns about the President placing undue influence are addressed through the proposed statute's provision for the Vice President to appeal to Congress.

ii. Vice President's Staff

The Vice President's staff could bring firsthand knowledge of the Vice President's condition to the process that the Cabinet does not have. But staff members lack the public accountability of Cabinet members, whom the Senate confirms.³¹⁸ Cabinet members are also better known to the public. Accordingly, a determination by the Cabinet is likely to carry more legitimacy.

314. See U.S. CONST. art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."); Interview with Roy E. Brownell II, *supra* note 307 (stating that inability may fall outside of the parameters of the power to impeach). See generally Charles L. Black Jr., *The Impeachable Offense*, LAWFARE (July 20, 2017, 2:00 PM), <https://lawfareblog.com/impeachable-offense> [<https://perma.cc/L5RD-JLWJ>].

315. Interview with Roy E. Brownell II, *supra* note 307; see also *Impeachments of Federal Judges*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/impeachments-federal-judges> [<https://perma.cc/9N4E-ZMC2>] (last visited Nov. 19, 2017) (stating that Judges John Pickering and Mark W. Delahay were impeached, in part, for "intoxication").

316. See WM. HOLMES BROWN ET AL., HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE 593 (2003) (stating that Judge Pickering was also impeached for "errors in a trial" and for "using profane language").

317. U.S. CONST. art. I, § 3, cl. 4.

318. See *id.* art. II, § 2, cl. 2.

V. CONGRESS'S ROLE UNDER SECTION 4
OF THE TWENTY-FIFTH AMENDMENT

While dual and vice presidential inability are “gaps” left unaddressed by the Twenty-Fifth Amendment, the Clinic also addressed gaps within the Amendment itself, particularly Section 4. The Amendment’s framers envisioned that Section 4 would cover “the most difficult cases of inability—when the President cannot or does not declare his own inability.”³¹⁹ If the President disputes a declaration by the Vice President and a majority of the Cabinet that he is unable, Section 4 tasks Congress with “decid[ing] the issue” within twenty-one days.³²⁰ The Clinic recommends a joint committee procedure that will govern any congressional action under Section 4.

The Amendment’s legislative history indicates that Congress has the discretion to create its own procedures for a Section 4 scenario.³²¹ Attorney General Nicholas Katzenbach testified to the Senate that Congress should address these procedural issues “at a time when [a Section 4 dispute is] not before it, providing in advance for this problem and providing for the most expeditious procedure.”³²²

Despite this suggestion, Congress has not yet created such procedures, likely because Section 4 has never been invoked. If a Section 4 dispute were before Congress, however, it could not afford to take up much, if any, of its twenty-one days debating the procedure it would follow.³²³ Given the high stakes,³²⁴ Congress should provide a Section 4 procedure as soon as possible—before such a dispute occurs.

The Clinic’s proposal for a Section 4 procedure is not merely academic. Disagreements in the executive branch over presidential disability have occurred.³²⁵ For example, after a stroke incapacitated President Woodrow

319. FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 115.

320. U.S. CONST. amend. XXV, § 4.

321. See S. REP. NO. 89-66, at 3–4 (1965) (“[T]he proceedings in the Congress prescribed in section [4] would be pursued under rules prescribed, or to be prescribed, by the Congress itself.”); see also *id.* at 24.

322. *Presidential Inability and Vacancies in the Office of Vice President: Hearing on S.J. Res. 1 et al. Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 89th Cong. 22 (1965) [hereinafter *1965 Senate Hearing*].

323. The risk of failing to plan for invocations of the Amendment is illustrated by the first implementation of Section 2’s vice presidential nomination process in the wake of Vice President Spiro Agnew’s 1973 resignation. Debate erupted in the Senate over how it would consider Gerald Ford’s nomination, leading one Senator to lament, “we have proven to the country that we are the kind of body that, in many of their minds, they think we are.” FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 141.

324. Conjuring the challenges of a Section 4 dispute, Richard E. Neustadt stated, “Think of Capitol Hill in those three weeks, to say nothing of after; the factions, the hearings, and the rival medical teams could create a circus for the media. Think of the Executive Office of the President, with its rival staffs working against one another.” Richard E. Neustadt, *The Twenty-Fifth Amendment and Its Achilles Heel*, 30 WAKE FOREST L. REV. 427, 432 (1995).

325. See FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 4–24 (discussing Presidents who suffered disabilities). There are also examples of executive disability on the state level. See FEERICK, FROM FAILING HANDS, *supra* note 16, at 286–91. For example, when Louisiana Governor Earl K. Long displayed signs of mental illness in 1959, his wife, cousin, and doctor committed him to a Texas psychiatric hospital. He was later brought to a Louisiana

Wilson for the final year and a half of his term, Wilson, his wife, and closest associates concealed his condition and rejected suggestions that he should step aside. Wilson even fired Secretary of State Robert Lansing, who had suggested that the Vice President should act as President and convened Cabinet meetings to conduct government business.³²⁶

This Part first discusses guiding principles that the Clinic considered in drafting its proposal. It then outlines the recommended procedure and justifications for it. This Part concludes with an exploration of legal issues that could arise during a Section 4 dispute.

A. Guiding Principles

There are five principles that a congressional procedure implementing Section 4 should satisfy. An ideal procedure will maximize informed deliberations with efficiency, democratic legitimacy, fairness to the President, and constitutional morality. These principles are distilled from the text of the Twenty-Fifth Amendment itself and its legislative history.

1. Informed Deliberations

Congress's mandate to "decide" a disagreement between the President and the Vice President suggests that any congressional procedure under Section 4 must utilize Congress's core attribute: making collective decisions through reasoned deliberation. Moreover, the Amendment's legislative history makes clear that members of Congress would vote on the issue only after informed debate and an opportunity to persuade each other.³²⁷ Any procedure should preserve the opportunity for members of Congress to meaningfully participate in the process and ensure they can access the best information available to aid in their deliberation.

2. Urgency and Efficiency

A competing consideration is the need for efficiency required by the circumstances and, in particular, Section 4's twenty-one-day time frame. Even before the twenty-one-day limit was added, Senator Birch Bayh testified that "the purpose and intent of [the congressional review provision] is for Congress to decide the issue as quickly as possible."³²⁸ The urgency informed some members' reluctance to assign the decision to Congress at all,

hospital but secured his release by replacing the superintendent of hospitals with a political ally. *See id.* at 289–91.

326. FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 15–16.

327. *See, e.g., 1965 House Hearings, supra* note 38, at 46 (statement of Sen. Birch Bayh) (warning that a time limit for Congress to make a decision could lead to an undesirable situation where "a decision [is made] without any debate whatsoever"); *1965 Senate Hearing, supra* note 322, at 21 (statement of Sen. Roman Hruska); *see also infra* Part V.B.2 (discussing the filibuster, which implies awareness of congressional debate).

328. *1965 House Hearings, supra* note 38, at 42 (statement of Sen. Birch Bayh).

as the process of taking testimony and debating is “cumbersome.”³²⁹ Consequently, the process should avoid procedural mechanisms that risk unnecessary delay.

3. Democratic and Procedural Legitimacy

The Amendment’s legislative history also prioritizes the legitimacy of a disability determination in the eyes of the public. The Amendment’s framers made Congress the arbiter of a dispute over the President’s capacity to instill confidence in the outcome by lending the people a voice through their representatives.³³⁰ Any congressional procedure should aspire to a fair and reasonable determination of the President’s disability that engenders public confidence.

4. Fairness to the President

In crafting Section 4, Congress acknowledged that the President, carrying the electoral mandate of the people, deserves “every advantage in any action or contemplated action.”³³¹ Congress expressed this deference by allowing the President to challenge involuntary removal, establishing a two-thirds vote requirement in each house to remove the President from the powers and duties of the office, and providing for the President’s automatic resumption of powers and duties if Congress does not decide the issue in twenty-one days.³³² Consequently, any congressional proceeding under Section 4 should ensure a fair process for the President and respect his or her democratic legitimacy.

5. “Constitutional Morality” and Deterring Partisanship

Finally, Section 4’s success depends on every stakeholder working for the best interests of the country with “a sense of ‘constitutional morality,’” free from partisanship and self-interest.³³³ The Clinic acknowledges that even those congressional actions that carry a heightened expectation for

329. See, e.g., *1965 Senate Hearing*, *supra* note 322, at 21–23 (statement of Sen. Roman Hruska) (warning that time would not be served by having Congress in the picture of a presidential disability because of the inherent delay of congressional debate).

330. See *1965 House Hearings*, *supra* note 38, at 47 (statement of Sen. Birch Bayh) (“[T]he powers which have been given to the President by all the people [should not] be taken away from him without the representatives of the people having a voice.”); 111 CONG. REC. 7943 (1965) (statement of Rep. McCulloch) (stating that “the elected representative[s] of the people . . . share the greatest trust of the people”).

331. See *Presidential Inability and Vacancies in the Office of Vice President: Hearings on S.J. Res. 13 et al. Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 88th Cong. 4–5 (1964) (statement of Sen. Birch Bayh) [hereinafter *1964 Senate Hearings*]; 111 CONG. REC. 7938 (1965) (statement of Rep. Celler) (“The [Amendment] shall . . . be in favor of the President because he is the elected representative of the people, the first officer of the land, and he shall be favored without doubt.”).

332. See Goldstein, *supra* note 20, at 987–89, 988 n.159.

333. See S. REP. NO. 89-66, at 13 (1965).

nonpartisanship are increasingly susceptible to partisan brinksmanship.³³⁴ As the 1965 Senate Judiciary Committee Report on presidential inability noted, however, “[n]o . . . procedural solution will provide a complete answer if [it is derived from] hypothetical cases in which most of the parties are rogues”³³⁵ Any Section 4 process should minimize the possibility of political mischief but presume that even the best efforts to deter partisanship will ultimately rely upon faith in government leaders.³³⁶

*B. Recommendation for a Congressional
Procedure Under Section 4*

In light of these guiding principles, the House of Representatives and the Senate should pass a concurrent resolution and amend their standing rules to allow for the establishment of a joint committee to evaluate presidential disability pursuant to Section 4.

1. Format of the Proceedings

a. Proposal for a Joint Committee

Following a declaration to Congress by the Vice President and a majority of the Cabinet (“or by such other body as Congress may by law provide”) that the President is unable to discharge his duties pursuant to Section 4, Congress shall immediately establish a joint select committee (the “Joint Committee”) to determine the President’s ability to discharge the powers and duties of his office. The Joint Committee shall operate as a cohesive unit with a unified staff and a single budget,³³⁷ review the necessary documentation, and conduct the necessary hearings to determine whether the President is unable.

The Joint Committee shall consist of twelve members: six members from the Senate Rules Committee and six members from the House Judiciary Committee’s Subcommittee on the Constitution and Civil Justice.³³⁸ The Joint Committee shall consist of six Republicans and six Democrats. The

334. See Telephone Interview with M. Douglass Bellis, Senior Counsel, Office of the Legislative Counsel, U.S. House of Representatives (Apr. 11, 2017) (observing that even purportedly “solemn” congressional actions are shaped by political pressures).

335. See S. REP. NO. 89-66, 13; see also *1965 Senate Hearing*, *supra* note 322, at 64 (statement of Herbert Brownell, former Att’y Gen.) (arguing that the risk of filibuster in a Section 4 scenario was “unrealistic” because presidential disability “would be a national crisis” in which Congress “always rise[s] to [its] best heights”).

336. Moreover, the partisan lines in this instance are likely unclear, as a Section 4 scenario only arises when a politician of the President’s own party—the Vice President—and Cabinet officials of the President’s own choosing initiate the process in the first place.

337. The Joint Committee will also have access to the appropriate resources, including physicians and medical experts, to assist it in making a determination.

338. The Clinic recommends that the members of both Committees and their staff receive special training on their responsibilities in the event that they are appointed to the Joint Committee. Staff members should also conduct periodic meetings aimed at refining the congressional response to a Section 4 dispute.

members from the House Judiciary's Subcommittee shall be chosen by the Speaker and Minority Leader of the House, and the members from the Senate Rules Committee shall be chosen by the Senate Majority and Minority Leaders in consultation with the Chairmen and ranking members of the respective committees.³³⁹ The Joint Committee shall have two cochairs, one from the Senate and one from the House, each from a different party. Additionally, Senators or Representatives not participating in the inquiry shall have the opportunity to submit questions to the Joint Committee before and during its proceedings.

Upon completing its inquiry, the Joint Committee shall vote on whether the President is able to discharge his powers and duties. Irrespective of the vote, the Joint Committee shall report its determination, accompanied by a report of the committee's findings and recommendations, to both houses of Congress for debate and a final vote.

b. Justifications for a Bipartisan Joint Committee Established from the Senate Rules and House Judiciary Committees

The proposed Joint Committee is supported by precedent and practical considerations.

i. Joint Committee

Although Congress typically operates via committees working independently in each house of Congress, there is clear historical precedent for a joint committee of this kind. Following the attack on Pearl Harbor, for example, Congress investigated the incident by establishing a ten-member joint committee composed of three Democrats and two Republicans from each house of Congress.³⁴⁰ A joint congressional action was also utilized during the investigation of the Iran-Contra affair,³⁴¹ where special select committees were established in the Senate and the House to investigate the scandal, and both committees "agreed to combine their investigations and hearings."³⁴²

Joint congressional action also draws from previous recommendations for congressional procedures under Section 2 of the Twenty-Fifth Amendment, which requires confirmation of the President's nominee from both houses of Congress to fill a vacancy in the vice presidency.³⁴³ When Congress was tasked with considering Gerald Ford's nomination in 1973, a strong minority of the Senate Rules and Judiciary Committees supported creating a joint

339. To incorporate the House Rules and Senate Judiciary Committees as much as possible, the Clinic advises that the majority and minority leaders in each House appoint the Chairmen and ranking members of each committee to the Joint Committee.

340. See generally *Joint Committee on the Investigation of the Pearl Harbor Attack*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/investigations/Pearl_Harbor.htm [https://perma.cc/2W8L-PZS2] (last visited Nov. 19, 2017).

341. LEE H. HAMILTON ET AL., REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN/CONTRA AFFAIR 683–84 (1987).

342. *Id.* at 684.

343. U.S. CONST. amend. XXV, § 2.

committee.³⁴⁴ Similarly, in 1975, the American Bar Association's Special Committee on Election Reform (the "ABA Committee") recommended that future Section 2 confirmation proceedings consist of joint hearings conducted by the Senate Rules and House Judiciary Committees.³⁴⁵ To support its recommendation, the ABA Committee cited the redundant process by which the House and Senate committees conducted hearings, independent of each other, to confirm Vice Presidents Gerald Ford and Nelson D. Rockefeller.³⁴⁶

Historical precedent aside, the proposed Joint Committee best conforms to the guiding principles set forth above. First, the Joint Committee would satisfy Congress's intent that it "decide the issue as quickly as possible"³⁴⁷ by avoiding duplicative hearings in each House of Congress.³⁴⁸ Second, the Joint Committee would enhance the legitimacy of the process: departing from routine, a single committee process sends a message to the public that Congress is aware of the gravity of the situation.³⁴⁹ Third, hearings before the Joint Committee would maintain fairness to the President by reducing the burden on him to argue his case twice. Fourth, the Joint Committee's unified record would enhance the deliberative process by ensuring that each House of Congress is making decisions based on a common set of facts.

ii. Bipartisan Members from the Senate Rules and House Judiciary Committees

Practical considerations also support the conclusion that Joint Committee members should be drawn from the Senate Rules and House Judiciary Committees, since those Committees have jurisdiction over matters of

344. See FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 139–40. The idea acknowledged the House members' concerns that they would be overshadowed by the Senate. *Id.*

345. *Examination of the First Implementation of Section Two of the Twenty-Fifth Amendment: Hearing on S.J. Res. 26 Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 94th Cong. 142–43 (1975) (statement of the American Bar Association) [hereinafter *1975 Senate Hearing*].

346. See *id.* at 143 (noting that the Senate Rules and House Judiciary Committees "each drew on [the same] investigatory arms of the government and covered much of the same ground," resulting in a fifty-five-day absence of a Vice President before Congress confirmed Gerald Ford under Section 2); *id.* at 144 (statement of John D. Feerick) ("[H]ad a single joint hearing been in effect at the time of the Rockefeller nomination, it might have [proceeded] with more expedition.").

347. See *1965 House Hearings*, *supra* note 38, at 42 (statement of Sen. Birch Bayh).

348. See *1975 Senate Hearing*, *supra* note 345, at 143–44 (statement American Bar Association) ("A joint inquiry . . . would eliminate duplication of effort . . . [and] increase the effectiveness of the inquiry, since the resources of both Houses would be combined, coordinated and utilized to best advantage." (emphasis added)).

349. See FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 140 (outlining the argument that joint hearings under Section 2 would "lift the nomination 'out of normal legislative procedures' and put 'it on a higher plane of constitutional prerogative'" (quoting 119 CONG. REC. 33,793 (1973) (statement of Sen. Humphrey)); *id.* at 141 (noting Senator Joseph Biden's concern that "we must impress upon the American people that we do not think [a Section 2 proceeding] is business as usual").

presidential succession.³⁵⁰ Allowing legislators and staff members with expertise in this area would make the process more efficient and effective.³⁵¹

There is also precedent for bipartisan committees. For example, the Senate Select Committee on Ethics is divided evenly between the parties.³⁵² Additionally, a bipartisan committee increases legitimacy by guarding against the appearance and effect of political motives. Finally, even if the gravity of the situation alone cannot do this, public scrutiny will likely minimize any gridlock that could arise from the evenly divided committee.

iii. Noncommittee Members Submitting Questions to the Joint Committee

Allowing other members of Congress to submit questions for the Joint Committee to ask witnesses, at the cochairs' discretion, has a close analogue in the Rules of Procedure and Practice in the Senate When Sitting on Impeachment.³⁵³ The ability to submit questions to the cochairs would likely help satisfy concerns that the procedure is shutting noncommittee members out of the fact-finding process.³⁵⁴

2. Expedited Procedures for the Committee's Work and for Consideration in Both Houses

Given Section 4's twenty-one-day time frame, the Joint Committee should conduct its inquiry as quickly as possible to provide the full Congress enough time to evaluate its findings. Therefore, the Joint Committee shall be established in the first two days of the twenty-one-day period. The Joint Committee should also complete its inquiry and vote within the first sixteen days, allowing the full Congress five days to debate and vote. During this five-day period, Senators shall be prohibited from filibustering and all other attempts to delay a vote shall be discouraged.

350. *About the Committee*, HOUSE REPRESENTATIVES JUDICIARY COMM., <https://judiciary.house.gov/about-the-committee/> [<https://perma.cc/7WXT-8AYM>] (last visited Nov. 19, 2017); *About the Committee*, U.S. SENATE COMM. ON RULES & ADMIN., <http://www.rules.senate.gov/public/index.cfm?p=PurposeJurisdiction> [<https://perma.cc/RQ2Y-SSC7>] (last visited Nov. 19, 2017); see also ROBERT KATZMANN, JUDGING STATUTES 12 (2014) (emphasizing the need for Congress "to develop procedures so that its members would develop specialized competence and experience").

351. See KATZMANN, *supra* note 350, at 14 ("The committee system . . . channel[s] the pursuit of the individual interest to the good of Congress itself.").

352. See *Committee Members*, U.S. SENATE SELECT COMM. ON ETHICS, <http://www.ethics.senate.gov/public/index.cfm/committee-members> [<https://perma.cc/AA56-57BH>] (last visited Nov. 19, 2017). This tradition also finds support in the Joint Select Committee on Deficit Reduction. See 2 U.S.C. § 900 note sec. 401(b)(4) (2012) (Joint Select Committee on Deficit Reduction) (establishing a twelve-member committee with six members from each party to recommend a budget for congressional approval).

353. See S. DOC. NO. 113-1, at 227 (2014) ("If a Senator wishes a question to be put to a witness . . . it shall be reduced to writing, and put by the Presiding Officer.").

354. See Interview with Roy E. Brownell II, *supra* note 307 (outlining potential practical and policy concerns that members of Congress might raise regarding the Clinic's proposal).

Removing the filibuster finds strong support in the legislative history³⁵⁵ and its guiding principles. Senators have long utilized the tradition of unlimited debate to thwart legislation or the confirmation of nominees.³⁵⁶ Precluding this delay tactic helps to ensure that a determination on the President's competence is completed within twenty-one days. It also enhances the legitimacy of the process by blocking an avenue for political gamesmanship.

Precedent for such expedited rules can be found in the Budget Control Act of 2011, which mandated that recommendations of the bipartisan Joint Select Committee on Deficit Reduction receive expedited votes.³⁵⁷ The Act removed the opportunity for objection or filibuster and restricted the total debate on the floors of each house.³⁵⁸

3. Subpoena Powers

The Joint Committee shall have broad authority to request any and all documents and testimony it deems necessary. A cochairman may issue a subpoena with either the concurrence of the other cochairman or the support of a majority of the Joint Committee. If an individual refuses to comply with a subpoena, the Joint Committee may find that individual in contempt of Congress.³⁵⁹

The Amendment's framers likely contemplated congressional authority to compel testimony and the production of documents.³⁶⁰ At the very least, they anticipated the need to hear from the President, the Vice President, the Cabinet, medical experts, and those aides "[who] can compare how the

355. The time limit might imply a ban on filibuster. *See 1965 House Hearings, supra* note 38, at 236 (statement of Rep. Richard Poff) (observing that the proposal for a time limit on congressional deliberations was motivated by a fear that "a filibuster might develop in the other body[,] which might not be altogether pure in its motivation"); *see also* 111 CONG. REC. 3276 (1965) (statement of Sen. Pastore).

356. *See* Emmet J. Bondurant, *The Senate Filibuster: The Politics of Obstruction*, 48 HARV. J. ON LEGIS. 467, 477–79 (2011) (surveying the bipartisan "flood" of filibusters over the past twenty years that has imposed an effective supermajority requirement for the passage of legislation and the confirmation of presidential appointees).

357. *See* Budget Control Act of 2011, 2 U.S.C. § 900 note sec. 402(c)(3) (2012) (Expedited Consideration of Joint Committee Recommendations).

358. *See id.*

359. Ideally, Congress and the White House would work to avoid subpoenas because proceedings to enforce subpoenas, such as declaring subpoenaed individuals in contempt of Congress, might be infeasible in the twenty-one-day time frame. However, congressional subpoenas may become necessary. *See* Telephone Interview with Bernard Nussbaum, former White House Counsel to President Bill Clinton (Sept. 15, 2016) (suggesting that the lack of cooperation in a Section 4 proceeding could give rise to an impeachable offense).

360. *See 1965 House Hearings, supra* note 38, at 46 (statement of Sen. Birch Bayh) (emphasizing the importance of "the opportunity to call on medical witnesses [and] to consult with the members of Cabinet and the Vice President who had made this important decision"); *see also* 111 CONG. REC. 3279 (1965) (statement of Sen. Ervin). The standing rules of both the House and the Senate provide that their committees may exercise subpoena authority. *See* RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, H.R. DOC. NO. 113–181, r. XI, at 571–78 (2015); STANDING RULES OF THE SENATE, S. DOC. NO. 113–18, r. XXVI, at 31 (2013).

President is acting now with how he acted yesterday or a month ago.”³⁶¹ Similarly, there was likely an assumption that Congress would have access to documents like the President’s medical records³⁶² and any other information that the Vice President and Cabinet relied upon to make their determination.³⁶³

The rule aims to ensure that Congress will have access to the information it needs to conduct informed deliberations, especially in situations where a disabled President refuses to testify or provide records.³⁶⁴ It also enhances efficiency if the President tries to “run out” the twenty-one days by stonewalling.

4. Due Process to the President

The President shall be given fair and adequate notice of Section 4 congressional proceedings and shall have the opportunity to testify before the Joint Committee. The President shall also have the opportunity to submit the results of his own medical examination and to recommend witnesses to the committee who can then be called upon for a hearing at the discretion of the cochairs.

As discussed in further detail below, the guarantees of fair notice, opportunity to be heard, and the opportunity to recommend witnesses satisfy procedural fairness. Moreover, those guarantees respect the President’s constitutional legitimacy and improve public confidence in the integrity of the proceeding without impairing the efficiency of the process. These guarantees also enhance Congress’s deliberation by affording the President adequate time to prepare his argument.

5. Information and Publicity

Generally, the documents and hearings before the Joint Committee shall be open to the public. However, the Joint Committee may determine by a majority vote that documents or hearings shall be kept behind closed doors.

A Section 4 scenario would likely lend itself to open hearings given the intense public interest in this issue. Brownell, for example, envisioned that

361. *1965 Senate Hearing*, *supra* note 322, at 29 (statement of Sen. Birch Bayh); *see also 1965 House Hearings*, *supra* note 38, at 251 (statement of Herbert Brownell, former Att’y Gen.); *id.* at 143 (statement of Rep. Byron Rogers) (discussing the possibility of questioning the President’s doctor and inquiring into his or her medical history). Accordingly, the staff members most likely to be subpoenaed are those who interact with the President on a daily basis. While this list would include prominent figures like the Chief of Staff, guests of the Clinic have raised several lesser-known possibilities. *See, e.g.*, Interview with John O. Brennan, *supra* note 49 (discussing the White House photographer); Interview with Dr. Connie Mariano, *supra* note 78 (discussing presidential valets); Interview with Frances F. Townsend, *supra* note 210 (discussing White House gardeners and housekeepers).

362. *See 1965 House Hearings*, *supra* note 38, at 46 (statement of Sen. Birch Bayh).

363. Indeed, Congress intended that the Vice President and Cabinet would invoke Section 4 “only after adequate consultation with medical experts who were intricately familiar with the President’s . . . condition.” S. REP. NO. 89-66, at 13 (1965).

364. *See supra* note 361 and accompanying text (discussing the possibility of the executive branch resisting inquiries into the President’s mental health).

“there would be hourly bulletins from the medical [professionals], and statements would be made in the press, television, radio [such that] the problem would be present in the minds of everybody in the United States.”³⁶⁵

Moreover, transparency is essential to the process’s legitimacy—it ensures that the public knows just as much as their representatives about the President’s health before those representatives make an ultimate determination. It also guards against any perception of a “star chamber”³⁶⁶ proceeding and preempts allegations of back-room deals.³⁶⁷

Just as significantly, public scrutiny will likely incentivize more informed deliberations and a fairer process for the President. Members of Congress will feel greater pressure to deliberate objectively and to treat an allegedly ailing President with respect when they know that their constituents are watching.³⁶⁸

National security concerns raised by a dispute over the President’s fitness might weigh in favor of closed proceedings.³⁶⁹ Dragging the President through such an intrusive procedure could erode the President’s ability to project an image of strength and stability at home and abroad, even after the disability ends.³⁷⁰ An interest in closed proceedings under Section 4 is also furthered by the privacy concerns implicated by an inquiry into a President’s health.³⁷¹ However, granting the Joint Committee discretion to close any

365. *1965 House Hearings*, *supra* note 38, at 247 (statement of Herbert Brownell, former Att’y Gen.). During the same hearings, Senator Bayh maintained that “[t]here is going to be public debate [with respect to the President’s disability] no matter to which body you give the final power of decision,” citing the “great deal of congressional debate” that “was done in the open” concerning the alleged disability of President Wilson as precedent. *Id.* at 93. Similarly, Representative Basil Whitener of North Carolina envisioned a proceeding where “Congress could . . . invite [the President] over here to speak to the Congress and appeal. It could be televised and the people of the Nation could look at it, and if the man was competent, . . . it would not only be apparent to Members of the Congress but would be apparent to the Nation.” *Id.* at 147.

366. *See id.* at 148 (statement of Rep. Basil Whitener).

367. *See id.* at 189 (statement of Rep. Charles Mathias Jr.) (acknowledging the danger of removing the President from his powers and duties without public accountability).

368. *See id.* at 147 (statement of Rep. Basil Whitener) (“There would be very few Members of Congress, no matter how politically motivated they were, who would stand up and say the [President] was . . . unable to carry on his work if the millions of people . . . who looked on him on television as he spoke to the Congress decided he was all right.”).

369. *See* Interview with John O. Brennan, *supra* note 49.

370. *See* Robert E. Gilbert, *Coping with Presidential Disability: The Proposal for a Standing Medical Commission*, POL. & LIFE SCI., Mar. 2003, at 2, 10–11 (emphasizing the significance of “aura” and “image” to presidential power); *see also 1965 House Hearings*, *supra* note 38, at 92–93 (statement of Rep. Charles Mathias Jr.) (warning that any congressional procedure to resolve a dispute over presidential disability could be very demoralizing and damaging to the public opinion of the presidency); *id.* at 163 (statement of Marion Folsom, Chairman, Committee for Improvement of Management in Government, Committee of Economic Development).

371. *See, e.g.,* Neustadt, *supra* note 324, at 430 (noting that Section 4 raises the issue of whether “a doctor h[as] a duty to breach the confidentiality of the physician-patient relationship in favor of the public’s right to know”); *see also* Interview with Frances F. Townsend, *supra* note 210.

proceedings addresses concerns regarding national security, presidential privacy, and the President's public image.

C. Legal Issues

Several legal issues could arise if Congress were to implement the proposed procedure. A court may need to decide (1) whether a President is protected by executive and attorney-client privileges, (2) whether a challenge by the President to the recommended procedure would be justiciable, and (3) whether the President could have a meritorious due process challenge if Congress decides he is unable to discharge the powers and duties of his office.

1. Privileges

There are at least two legal issues that a court may need to decide regarding the Joint Committee's access to evidence: (1) whether the White House could successfully assert executive privilege over its staff and documents against a Congressional subpoena and (2) whether attorney-client privilege prevents Congress from accessing documents and receiving testimony from executive branch attorneys working with the President.

a. *Overriding Executive Privilege Against Subpoenas for Documents and Testimony Related to the President's Ability to Serve*

It is arguably against the President's interests to refuse congressional demands for documents and testimony, as Congress and the public may view such resistance as evidence of the inability.³⁷² Nonetheless, the President may assert executive privilege, and a court may have to decide the scope of Congress's subpoena power in a Section 4 proceeding.

Although federal courts have recognized a strong presumption of executive privilege, a court is likely to find that any claims of privilege will yield to the specific need for Congress to fulfill its constitutional duty to determine the President's capacity.³⁷³ Federal courts have shown a willingness to override executive privilege when there is a strong showing of specific need for information by a coequal branch of government executing a core function. For example, in *United States v. Nixon*,³⁷⁴ the Supreme Court rejected the President's claims of privilege over tape recordings of White House conversations when they were subpoenaed by a special prosecutor for use in a criminal trial.³⁷⁵ The Court held that "[t]he

372. See, e.g., *1965 House Hearings*, *supra* note 38, at 144 (statement of Rep. Willard Curtin) ("[T]he refusal of the President could be in such manner as to very well indicate . . . that he is mentally incapacitated.").

373. See Telephone Interview with Bernard Nussbaum, *supra* note 359 (observing that the public interest in determining a president's inability would likely overcome executive privilege).

374. 418 U.S. 683 (1974).

375. See *id.* at 713.

generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.”³⁷⁶

By contrast, in *Senate Select Committee on Presidential Campaign Activities v. Nixon*,³⁷⁷ the D.C. Circuit ruled that subpoenas of the tapes issued by a special committee of the Senate did not override claims of executive privilege.³⁷⁸ The court concluded that the subpoenaed materials were “too attenuated” to Congress’s legislative or oversight functions to override the presumption of executive privilege.³⁷⁹ This was especially the case because the tapes were already in the possession of the House Judiciary Committee as part of its impeachment proceedings.

*b. Maintaining Attorney-Client Privilege
for Records and Testimony by White House Attorneys*

Congress may seek information from White House attorneys in a Section 4 scenario. The Supreme Court has generally recognized a broad privilege for attorney-client relationships.³⁸⁰ However, members of Congress have argued that attorney-client privilege should not apply in the context of Congressional proceedings.³⁸¹

Federal courts have rarely addressed this issue and in the few instances where they have, they have reached different conclusions. In cases relating to the criminal and congressional investigations into the “Whitewater Controversy,” the Eighth and D.C. Circuits both came down on the side of disclosure.³⁸² In *In re Grand Jury Subpoena Duces Tecum*,³⁸³ a divided Eighth Circuit panel held that the independent counsel could obtain attorney notes prepared by White House attorneys in connection with the investigation.³⁸⁴ The majority emphasized that “the strong public interest in honest government and in exposing wrongdoing by public officials would be

376. *Id.*

377. 498 F.2d 725 (D.C. Cir. 1974).

378. *Id.* at 733.

379. *Id.*

380. *See generally* Swidler & Berlin v. United States, 524 U.S. 399 (1998) (protecting attorney-client privileges for a deceased client); *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (recognizing the public policy interests for an attorney-client relationship with corporate clients).

381. *See, e.g.*, Bradley J. Bondi, *No Secrets Allowed: Congress’s Treatment and Mistreatment of the Attorney-Client Privilege and the Work-Product Protection in Congressional Investigations and Contempt Proceedings*, 25 J.L. & POL. 145, 178 (2009) (stating that several members of Congress have argued that the privilege does not apply to particular congressional activity).

382. *In re Lindsey*, 158 F.3d 1263, 1276 (D.C. Cir. 1998) (per curiam); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 921 (8th Cir. 1997).

383. 112 F.3d 910 (8th Cir. 1997).

384. *Id.* at 921. One additional question that a court may consider is whether a Section 4 determination would rise to the same level of public interest as a criminal investigation to warrant an override of an assertion of privilege.

ill-served by recognition of a governmental attorney-client privilege applicable in criminal proceedings.”³⁸⁵

However, a dissenting opinion insisted that “[t]he President’s justifiable need for confidentiality is . . . ever present no matter what other governmental interests are asserted by a prosecutor.”³⁸⁶ The dissent emphasized the importance of the White House receiving effective legal counsel³⁸⁷ and advocated balancing “the governmental privilege asserted by the White House against the competing governmental interest asserted by the [independent counsel], the ultimate goal being to promote the ‘public interest.’”³⁸⁸

In *In re Lindsey*,³⁸⁹ the D.C. Circuit granted the independent counsel’s request to compel grand jury testimony from a Deputy White House Counsel.³⁹⁰ The court held that “it would be contrary to tradition, common understanding, and our governmental system for the attorney-client privilege to attach to White House Counsel in the same manner as private counsel.”³⁹¹

By contrast, in *In re Grand Jury Investigation*,³⁹² the Second Circuit held that a governor could assert attorney-client privilege over communications with government attorneys in connection with a criminal investigation.³⁹³ The court reasoned that

the traditional rationale for the privilege applies with special force in the government context. It is crucial that government officials, who are expected to uphold and execute the law and who may face criminal prosecution for failing to do so, be encouraged to seek out and receive fully informed legal advice.³⁹⁴

Based on the sparse precedent, a court is unlikely to override attorney-client privilege in a Section 4 proceeding absent an extremely high showing of need. Indeed, the Clinic anticipates that a Section 4 proceeding would likely increase the need to protect the President’s legal representation and consultation. Allowing Congress to access these records would likely put the President at a legal disadvantage and chill the President’s willingness to exchange information with government attorneys.

Any balancing of the public interest will depend on the factual circumstances before the court. A court will likely look to whether the President is asserting attorney-client privilege to hinder the congressional inquiry, as in *In re Lindsey*,³⁹⁵ or to protect legitimate legal advice, as in *In re Grand Jury Investigation*.³⁹⁶

385. *Id.*

386. *Id.* at 927 (Kopf, J., dissenting).

387. *Id.* at 930.

388. *Id.* (citing *United States v. Nixon*, 418 U.S. 683, 707–13 (1974)).

389. 158 F.3d 1263 (D.C. Cir. 1998) (per curiam).

390. *Id.* at 1278.

391. *Id.*

392. 399 F.3d 527 (2d Cir. 2005).

393. *Id.* at 536.

394. *Id.* at 534.

395. See *In re Lindsey*, 158 F.3d at 1263.

396. See *In re Grand Jury Investigation*, 399 F.3d at 535.

2. Justiciability: The Political Question Doctrine

If the President filed suit to challenge the process Congress followed to evaluate his capacity, a court would need to decide whether the case is justiciable. A case is justiciable when a court finds that it is capable of resolving the dispute at hand.³⁹⁷ Conversely, a case is not justiciable when it involves a request for an advisory opinion or a political question.³⁹⁸

A President's challenge of the congressional procedures under Section 4 would likely implicate the political question doctrine. In *Baker v. Carr*,³⁹⁹ the Supreme Court set forth six "formulations" to guide courts in determining whether a case involves a nonjusticiable political question.⁴⁰⁰ A case is nonjusticiable under the political question doctrine where (1) there is a "textually demonstrable constitutional commitment of the issue [at hand] to a coordinate political department"; (2) there is a "lack of judicially discoverable and manageable standards for resolving" the issue at hand; (3) a court cannot decide a case "without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) a court cannot decide a case "without expressing lack of the respect due coordinate branches of government"; (5) there is an "unusual need for unquestioning adherence to a political decision already made"; or (6) there is "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."⁴⁰¹

The Court applied the *Baker* "formulations" in *Nixon v. United States*,⁴⁰² a case involving a federal judge whom Congress had impeached and removed.⁴⁰³ The judge argued that his trial before a Senate committee, instead of the full Senate, violated the Constitution's Impeachment Trial Clause.⁴⁰⁴

The Court examined the extent to which the Impeachment Trial Clause commits the responsibility of trying impeachments to the Senate.⁴⁰⁵ Because the Clause states that "[t]he Senate shall have the sole Power to try all Impeachments"⁴⁰⁶ and outlines specific procedural requirements that the Senate must follow, the Court held that the Constitution "committed" the role of trying impeachments to the Senate alone.⁴⁰⁷ Thus, the judge's challenge to the impeachment trial procedures was a nonjusticiable political question.⁴⁰⁸

397. *Flast v. Cohen*, 392 U.S. 83, 94–95 (1968).

398. *Id.* at 95.

399. 369 U.S. 186 (1962).

400. *See id.* 217.

401. *Id.*

402. 506 U.S. 224 (1993).

403. *See id.* at 226–28.

404. *Id.* at 226.

405. *See id.* at 228–29.

406. U.S. CONST. art. I, § 3, cl. 6.

407. *See Nixon*, 506 U.S. at 228–37.

408. *See id.* at 237–38.

Applying precedent to any challenge of the proposed Joint Committee procedure, a court would likely hold that there is a “textually demonstrable constitutional commitment” in the Twenty-Fifth Amendment devolving the power to manage Section 4 disputes to Congress,⁴⁰⁹ as Section 4 states that “Congress shall decide the issue.”⁴¹⁰

One possible argument a President may make is that Section 4, in contrast to the Impeachment Trial Clause, does not explicitly say that Congress has the “sole” power to determine whether he is able to discharge the powers and duties of his office. In addition, the President may contend that the Amendment’s silence regarding judicial review counsels in favor of such review.

Yet, in context, Section 4 does not seem to contemplate any sort of judicial appellate review. The legislative history reflects Congress’s intent that a disability inquiry would be a political question not subject to judicial review.⁴¹¹ Moreover, a Section 4 dispute would likely trigger an overwhelming need for finality.⁴¹² Any appeal by the President to the judiciary would undermine the legitimacy of the Vice President’s service as Acting President.⁴¹³

3. Due Process

In the unlikely event that a court does hold a challenge to be justiciable, the Clinic analyzed whether a President may have a meritorious claim under the Due Process Clause of the Fifth Amendment. Procedural due process violations occur when the government interferes with legitimate liberty or property interests without following constitutionally sufficient procedures.⁴¹⁴ Before a court can determine whether the government has violated procedural due process, it must determine whether the government has “deprived [the plaintiff] of . . . liberty[] or property.”⁴¹⁵

a. Property Interest in the Presidency

If a President raised a due process challenge against Congress’s procedures under Section 4, he may claim that Congress deprived him of his property interest in the presidency itself. However, it is well settled that an elected

409. *See id.* at 228–29 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

410. U.S. CONST. amend. XXV, § 4.

411. *See* 111 CONG. REC. 15,588 (1965) (statement of Sen. Ervin) (“In my view [the question whether a President is capable of performing or discharging the powers of his or her office] would be a political question and for that reason the Court would not be called upon to pass upon it.”).

412. *Cf. Nixon*, 506 U.S. at 236 (noting that the “legitimacy of any successor, and hence [his or her] effectiveness, would be impaired severely, not merely while the judicial process was running its course, but during any retrial that a differently constituted Senate might conduct if its first judgment of conviction were invalidated”).

413. *See id.*

414. *See* *Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454, 460 (1989).

415. U.S. CONST. amend. V; *see also Ky. Dep’t of Corr.*, 490 U.S. at 459–60.

office is not property for purposes of the Due Process Clause.⁴¹⁶ The principle that the office of the President is entrusted to a given President by the people would likely undercut a President's claimed property interest in the presidency.

After the Supreme Court held in two cases that political offices are not property,⁴¹⁷ it evaluated whether there is a property interest in government employment more generally.⁴¹⁸ In *Board of Regents of State Colleges v. Roth*,⁴¹⁹ the Court noted that one could have a property interest in his or her employment but held that the plaintiff, an assistant professor at a state university, lacked any such property interest because "[his] appointment secured absolutely no interest in re-employment [after the end of the contractual term]."⁴²⁰ In *Cleveland Board of Education v. Loudermill*,⁴²¹ the Court held that the plaintiff, a security guard for Cleveland public schools, did have a property interest in his employment because an Ohio statute gave him a right to retain his position absent malfeasance.⁴²²

In a due process challenge, the President could argue that the Court should reassess its holdings in *Snowden* and *Taylor* in light of *Roth* and *Loudermill*. However, such an outcome is unlikely, as the Court treats elected office as categorically different from other government employment.

b. Liberty Interest in One's Reputation

The President may also contend that the recommended procedure under Section 4 deprived him of his liberty interest in his reputation. The Supreme Court has held that such an interest is protected under the Due Process Clause.⁴²³

In the D.C. Circuit,⁴²⁴ a plaintiff can establish a reputation-based due process claim in two ways.⁴²⁵ First, under the "reputation-plus" theory, a plaintiff must show that there was (1) "an adverse employment action, such as [an] involuntary loss of government employment," (2) "a stigmatizing or defamatory act by the government closely connected with that adverse

416. *Snowden v. Hughes*, 321 U.S. 1, 7 (1944) ("More than forty years ago this Court determined that an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause."); *Taylor v. Beckham*, 178 U.S. 548, 577 (1900) ("The decisions are numerous to the effect that public offices are mere agencies or trusts, and not property as such.").

417. See *supra* note 416 and accompanying text.

418. See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538–41 (1985); *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 576–79 (1972).

419. 408 U.S. 564 (1972).

420. *Id.* at 578.

421. 470 U.S. 532 (1985).

422. See *id.* at 538–39.

423. See *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) ("Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.").

424. This Part discusses case law from the D.C. Circuit and its lower court under the assumption that the President would file a challenge there.

425. See *O'Donnell v. Barry*, 148 F.3d 1126, 1140 (D.C. Cir. 1998).

action,” and (3) a subsequent negative effect on future employment prospects.⁴²⁶

Second, a plaintiff may articulate a “stigma” theory of reputational harm, which “differs from the [reputation-plus theory] in that it does not depend on official speech, but on a continuing stigma or disability arising from official action.”⁴²⁷ Under this theory, a plaintiff can show that the government’s actions exclude him from future government employment or that the actions prevent him from pursuing his chosen career.⁴²⁸

Under the reputation-plus framework, a President may be able to establish that a congressional determination of presidential inability damaged his reputation as a healthy executive. This reputational damage could in turn negatively affect a President’s future employment prospects. However, the temporary nature of the removal contemplated by Section 4 undermines the “adverse employment action” prong of the theory. Even if Congress were to determine that the President suffers from an inability, the President would nonetheless resume the powers and duties of the Office if the Vice President and Cabinet elect not to challenge a President’s subsequent declaration that he is able. The “employment action” is thus not truly “adverse.”

Similarly, under the “stigma” theory, any congressional determination of presidential inability would likely not keep the President from engaging in government work in the future. Moreover, such a decision could hardly be said to preclude the President from continuing in his chosen line of work—as an elected office with a two-term limit, the presidency is not a profession where one can expect to spend an entire career.

c. The Process That Is Due

Despite the limited prospects of a due process challenge, Congress should implement procedures under Section 4 that afford the President due process. Affording due process to a President under Section 4 bolsters its legitimacy. If it appears that a President is being disadvantaged, the public could view any Section 4 determination as erroneous or politically motivated.

Accordingly, the Joint Committee should provide the President with adequate notice and opportunity to be heard.⁴²⁹ Once the Vice President and a majority of the Cabinet trigger a Section 4 dispute through written disagreement, Congress should transmit a letter to relevant executive branch officials, including the President, to inform them of the initiation of the process. The Joint Committee should then allow the President to present his case by testifying as to his ability to discharge the powers and duties of the office and responding to the Vice President and Cabinet’s arguments.

426. *Jefferson v. Harris*, 170 F. Supp. 3d 194, 205 (D.D.C. 2016).

427. *O’Donnell*, 148 F.3d at 1140.

428. *See Kartseva v. Dep’t of State*, 37 F.3d 1524, 1527–28 (D.C. Cir. 1994).

429. *See Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950) (“[T]here can be no doubt that at a minimum [the Due Process Clause] require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.”).

VI. PRESIDENTIAL CANDIDATES' HEALTH DISCLOSURES

Planning for uses of the Twenty-Fifth Amendment is not the only step that policy-makers should take to help ensure that the country always has an able president. A clear approach to the disclosure of information about presidential candidates' health is needed to guarantee that voters have enough information to decide whether candidates are fit to serve. Improved disclosure requirements may also have the added benefit of reducing political attacks based on unfounded speculation about candidates' health.

Currently, there is no legal requirement for presidential candidates to disclose any information about their health. However, many recent candidates have disclosed some information voluntarily, though sometimes only after pressure from journalists or their opponents.⁴³⁰ There is no single accepted model for campaign health disclosure and, in the past few decades, these disclosures have trended toward providing less information.⁴³¹ This must change.

This Part reviews the history of issues relating to presidential candidates' health in modern presidential campaigns. Next, it reviews various approaches to improving the procedures for disclosing candidates' health information. Finally, it describes the Clinic's proposal to create a commission charged with creating guidelines for presidential candidates to follow when releasing health information.

A. *Health Issues in Modern Presidential Campaigns*

Over the past century, several candidates have failed to disclose serious health problems, others have seen their health become a significant focus of campaigns, and candidates' approaches to disclosing health information generally have evolved and devolved.⁴³²

1. Cover-Ups

Presidents Woodrow Wilson, Franklin D. Roosevelt, Dwight D. Eisenhower, and John F. Kennedy are among the candidates in the twentieth century who covered up serious health conditions.

President Wilson had a history of cerebrovascular disorders and strokes dating back to 1896, sixteen years before he was elected.⁴³³ A neurologist who examined him around the time of his election in 1912 opined that he was

430. See Meghan Keneally, *Notable Precedents for Presidential Candidates' Health Disclosures*, ABC NEWS (Sept. 12, 2016, 3:49 PM), <http://abcnews.go.com/Politics/notable-precedents-presidential-candidates-health-disclosures/story?id=42029842> [<https://perma.cc/28GS-B8HS>].

431. See *id.*

432. See *id.*

433. See generally EDWIN A. WEINSTEIN, *WOODROW WILSON: A MEDICAL AND PSYCHOLOGICAL BIOGRAPHY* (1981) (discussing President Wilson's health and its affect upon his presidency).

unlikely to live through his first term.⁴³⁴ Yet Wilson kept his health from the public.⁴³⁵ In October 1919, Wilson suffered a stroke that left him unable to carry out many basic presidential responsibilities for the final year and a half of his second term.⁴³⁶

When President Roosevelt ran for a fourth term in 1944, the public knew the wheelchair-bound chief executive suffered from polio.⁴³⁷ He had addressed the issue openly during his first campaign in 1931 by participating in a magazine interview about his health and submitting to an examination by three physicians.⁴³⁸ But voters in the 1944 election did not know that he had subsequently been diagnosed with congestive heart failure.⁴³⁹ His doctor had issued a note saying he was in remarkably good health⁴⁴⁰ and, when rumors about Roosevelt's health persisted, several other doctors verified that assessment.⁴⁴¹ But one of those doctors wrote a confidential memo stating that he doubted the President could survive another four years.⁴⁴² On April 12, 1945, just months into his fourth term and in the midst of World War II, Roosevelt died of a cerebral hemorrhage.⁴⁴³

Ten years after Roosevelt's death, another incumbent presidential candidate faced a serious heart condition. In September 1955, a little more than a year before the 1956 election, President Eisenhower suffered a massive heart attack.⁴⁴⁴ His medical challenges continued in June 1956 when he suffered an obstruction of his small intestine that required surgery under general anesthesia.⁴⁴⁵

Through much of 1956, Eisenhower led the press to believe that he was not running for reelection, which discouraged close scrutiny of his health.⁴⁴⁶ Eisenhower's doctors told the public on multiple occasions that Eisenhower's health was not a concern, and one said on the eve of the election that he gave

434. Arthur S. Link, *Woodrow Wilson: A Cautionary Tale*, 30 WAKE FOREST L. REV. 585, 587 (1995).

435. See Jeremy Hsu, *The Secret Medical Records of Presidential Candidates*, LIVESCIENCE (May 20, 2008, 8:00 PM), <http://www.livescience.com/2556-secret-medical-records-presidential-candidates.html> [https://perma.cc/J5VJ-HB56].

436. FEERICK, FROM FAILING HANDS, *supra* note 16, at 180; FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 14–15.

437. See generally JAMES TOBIN, THE MAN HE BECAME: HOW FDR DEFIED POLIO TO WIN THE PRESIDENCY (2013) (discussing the progression of FDR's condition and its effect on his presidency); see also Jennie Cohen, *Memo from 1944 Warned FDR Would Likely Die in Office*, HISTORY (Apr. 13, 2011), <http://www.history.com/news/memo-from-1944-warned-that-fdr-would-likely-die-in-office> [https://perma.cc/8D2C-6LLS].

438. See BEN SHAPIRO, PROJECT PRESIDENT: BAD HAIR AND BOTOX ON THE ROAD TO THE WHITE HOUSE 47 (2007).

439. See TOBIN, *supra* note 437.

440. See *id.*

441. See *id.*

442. See Cohen, *supra* note 437.

443. See Merriman Smith, *Roosevelt Dies of Stroke at Little White House*, UPI (Apr. 12, 1945), <https://www.upi.com/Archives/1945/04/12/Roosevelt-dies-of-stroke-at-Little-White-House/6802441123641/> [https://perma.cc/DT58-C99X].

444. Gilbert, *supra* note 108, at 2 n.3.

445. See FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 19–22.

446. See Gilbert, *supra* note 108, at 7–8.

“every appearance of being in excellent health.”⁴⁴⁷ Yet Eisenhower had experienced several health problems in the lead up to the election, including abdominal pain, dizziness, an irregular pulse, and elevated blood pressure.⁴⁴⁸

The day before the election, Eisenhower’s opponent, Adlai Stevenson, bluntly charged that Eisenhower would not survive another term.⁴⁴⁹ Eisenhower still won by a landslide,⁴⁵⁰ but a year later he suffered a stroke that briefly affected his ability to speak.⁴⁵¹

Eisenhower’s successor brought his own health problems to the White House. President John F. Kennedy suffered from Addison’s disease and chronic back pain, but he did not disclose either ailment.⁴⁵² In fact, he and at least one of his doctors flatly denied rumors that he suffered from Addison’s disease.⁴⁵³ While in office, Kennedy grappled with his conditions through extensive use of medications, particularly steroids and amphetamines.⁴⁵⁴ His treatment required a “tremendous allocation of time and attention,”⁴⁵⁵ and some have argued that the medications “impaired Kennedy’s subsequent health and behavior.”⁴⁵⁶

In addition to candidates who won the presidency, at least one unsuccessful candidate may have concealed significant health information. In 1992, Massachusetts Senator Paul Tsongas was a leading candidate for the Democratic nomination⁴⁵⁷ following treatment several years prior for a form of lymph-node cancer, or lymphoma.⁴⁵⁸ Tsongas’s doctors, one of whom was “an ardent personal and financial backer of the campaign,”⁴⁵⁹ told reporters that the candidate was cured in 1986 when, in fact, they had detected

447. *Id.* at 10, 14.

448. *Id.* at 14.

449. *Id.*

450. *See id.* at 14 n.15.

451. *See* FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 23.

452. *See* Robert Dallek, *The Medical Ordeals of JFK*, ATLANTIC (Fall 2013), <https://www.theatlantic.com/magazine/archive/2013/08/the-medical-ordeals-of-jfk/309469/> [<https://perma.cc/43QZ-KEWQ>].

453. In 1959, Kennedy said, “No one who has the real Addison’s disease should run for the presidency, but I do not have it.” ROBERT H. FERRELL, *ILL-ADVISED: PRESIDENTIAL HEALTH AND PUBLIC TRUST* 152 (1992).

454. *See* McDermott, *supra* note 121, at 78.

455. *Id.*

456. MCDERMOTT, *supra* note 110, at 119.

457. George J. Annas & Frances H. Miller, *The Empire of Death: How Culture and Economics Affect Informed Consent in the U.S., the U.K., and Japan*, 20 AM. J.L. & MED. 357, 385 (1994).

458. *See id.* (stating that the doctor was very confident that Tsongas was fine); *see also* Herbert L. Abrams, *The Vulnerable President and the Twenty-Fifth Amendment, with Observations on Guidelines, Health Commission, and the Role of the President’s Physician*, 30 WAKE FOREST L. REV. 453, 472 n.168 (1995).

459. Lawrence K. Altman, *Many Holes in Disclosures of Nominees’ Health*, N.Y. TIMES (Oct. 19, 2008) [hereinafter Altman, *Many Holes in Disclosures*], <http://www.nytimes.com/2008/10/20/us/politics/20health.html> [<https://perma.cc/G7Z7-8Z3A>]; Lawrence K. Altman, *Tsongas’s Health: Privacy and the Public’s Rights*, N.Y. TIMES (Jan. 17, 1993) [hereinafter Altman, *Tsongas’s Health*], <http://www.nytimes.com/1993/01/17/us/tsongas-s-health-privacy-and-the-public-s-rights.html> [<https://perma.cc/B6VM-MXGP>].

more lymphoma the following year.⁴⁶⁰ Tsongas lost in the primaries and announced several months later that his cancer had returned.⁴⁶¹ He died two days before the end of the presidential term for which he had run.⁴⁶²

2. Candidates' Health as a Campaign Issue

Candidates' health has become a prominent feature of several campaigns, often through political attacks.

The 1972 presidential election was briefly consumed by the revelation that Democratic vice presidential candidate Thomas Eagleton had been treated for depression. George McGovern had chosen Eagleton as his running mate with little information about his health history.⁴⁶³ The revelation about Eagleton's depression and his prior electroshock therapy treatment triggered enormous pressure from party leaders, campaign contributors, and even McGovern campaign staff,⁴⁶⁴ ultimately forcing Eagleton to step down after only eighteen days on the ticket.⁴⁶⁵

During the final months of the 1988 presidential campaign, rumors circulated that Democratic nominee Michael Dukakis "in the distant past . . . had suffered some kind of serious psychological breakdown."⁴⁶⁶ Dukakis largely ignored the unsubstantiated rumors until they became front-page news after President Ronald Reagan called Dukakis "an invalid."⁴⁶⁷ Although he ultimately apologized,⁴⁶⁸ Reagan's comment gave credence to the rumors. Dukakis's doctor appeared on television and released a full report stating that Dukakis was in "excellent health."⁴⁶⁹ But Dukakis

460. See Abrams, *supra* note 458, at 472 n.168.

461. See *id.*

462. See Karen De Witt, *Paul Tsongas, Who Made Presidential Bid, Dies at 55*, N.Y. TIMES (Jan. 20, 1997), <http://www.nytimes.com/1997/01/20/us/paul-tsongas-who-made-presidential-bid-dies-at-55.html> [https://perma.cc/CTA3-FYKR].

463. Joel K. Goldstein, *Depression and Public Service: The Eagleton Lessons*, MINNPOST (Jan. 12, 2010), <https://www.minnpost.com/community-voices/2010/01/depression-and-public-service-eagleton-lessons> [https://perma.cc/Y4W4-NGT3].

464. Adam Clymer, *Thomas F. Eagleton, 77, a Running Mate for 18 Days, Dies*, N.Y. TIMES (Mar. 5, 2007), <http://www.nytimes.com/2007/03/05/washington/05eagleton.html> [https://perma.cc/L3BT-2KN2].

465. *Id.* See generally JOSHUA M. GLASSER, *THE EIGHTEEN-DAY RUNNING MATE: MCGOVERN, EAGLETON, AND A CAMPAIGN IN CRISIS* (2012) (discussing Eagleton's rise and fall as a national candidate).

466. Michael S. Dukakis, *Campaigns and Disability: When an Incumbent President Questions His Potential Successor's Mental Health Status During the Campaign*, POL. & LIFE SCI., Fall 2014, at 88, 90.

467. See *Reagan on Dukakis: 'I Won't Pick on Invalid': 'Just Trying to Be Funny,' President Later Says of His Answer to Question on Medical Records*, L.A. TIMES (Aug. 3, 1988), http://articles.latimes.com/1988-08-03/news/mn-6862_1_medical-records [https://perma.cc/3QAQ-QKBU].

468. *Id.*

469. Dukakis, *supra* note 466, at 90; Andrew Rosenthal, *Dukakis Releases Medical Details to Stop Rumors on Mental Health*, N.Y. TIMES (Aug. 4, 1988), <http://www.nytimes.com/1988/08/04/us/dukakis-releases-medical-details-to-stop-rumors-on-mental-health.html> [https://perma.cc/XRR9-2567].

dropped eight points in polls that week, hurting the substantial lead he had held before the incident.⁴⁷⁰

The health of 2016 Democratic presidential nominee Hillary Clinton also received extensive attention. Throughout her candidacy, corners of the internet and media were rife with speculation that she was concealing serious health problems.⁴⁷¹ This speculation was fueled in part by a December 2012 incident in which Clinton suffered a concussion caused by a potentially life-threatening blood clot near her brain.⁴⁷²

Her opponent in the 2016 race, Donald Trump, consistently asserted that she was not physically fit to serve as President. For example, in one tweet in January 2016, he flatly claimed, “Hillary Clinton doesn’t have the strength or stamina to be president.”⁴⁷³

The focus on Clinton’s health intensified on September 11, 2016, when she fell ill at a ceremony marking the fifteenth anniversary of 9/11.⁴⁷⁴ As Clinton left the ceremony early, she appeared to fall while getting into a van.⁴⁷⁵ Her campaign initially stated that Clinton had felt “overheated” but revealed the next day that she was suffering from pneumonia.⁴⁷⁶ She had known of her condition for several days but did not disclose it for fear of opponents exploiting it.⁴⁷⁷ Later that week, Clinton’s doctor released a letter

470. Dukakis, *supra* note 466, at 91.

471. See, e.g., Robert Farley, *Fake Clinton Medical Records*, FACTCHECK.ORG (Aug. 16, 2016), <http://www.factcheck.org/2016/08/fake-clinton-medical-records> [https://perma.cc/L3XU-TJHX] (debunking documents that purported to be medical records diagnosing Clinton with complex partial seizures and dementia); Alex Swoywer, *Law Enforcement Officials, Medical Professionals: There’s Something Seriously Wrong with Hillary Clinton’s Health*, BREITBART (Jan. 6, 2016), <http://www.breitbart.com/big-government/2016/01/06/law-enforcement-officials-medical-professionals-theres-something-seriously-wrong-hillary-clintons-health/> [https://perma.cc/E65U-AT6K].

472. See Susan Donaldson James, *Hillary Clinton’s Blood Clot Could Have Been Life Threatening*, ABC NEWS (Dec. 31, 2012), <http://abcnews.go.com/Health/hillary-clinton-blood-clot-life-threatening-medical-experts/story?id=18101213> [https://perma.cc/N27T-BYHY].

473. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 2, 2016, 12:00 PM), <https://twitter.com/realDonaldTrump/status/683377290282156032> [https://perma.cc/8CYW-9YC4].

474. See Jonathan Martin & Amy Chozick, *Hillary Clinton’s Doctor Says Pneumonia Led to Abrupt Exit from 9/11 Event*, N.Y. TIMES (Sept. 11, 2016), <https://www.nytimes.com/2016/09/12/us/politics/hillary-clinton-campaign-pneumonia.html> [https://perma.cc/8YCB-R7ZR].

475. *Id.*

476. Amy Chozick & Patrick Healy, *Hillary Clinton Is Set Back by Decision to Keep Illness a Secret*, N.Y. TIMES (Sept. 12, 2016), <https://www.nytimes.com/2016/09/13/us/hillary-clinton-pneumonia.html> [https://perma.cc/AW9A-XULW]; Gabriel Debenedetti, *Clinton Abruptly Departs 9/11 Memorial Service After Feeling ‘Overheated,’* POLITICO (Sept. 11, 2016, 7:00 PM), <http://www.politico.com/story/2016/09/clinton-abruptly-departs-9-11-memorial-service-after-feeling-overheated-228005> [https://perma.cc/C4TN-LEP9].

477. See Chozick & Healy, *supra* note 476.

describing her treatment for pneumonia and concluding that she was “healthy and fit to serve as President of the United States.”⁴⁷⁸

Then-candidate Trump seized on the incident in the remaining weeks of the campaign. During one of multiple rallies where he called attention to the incident, he ridiculed Clinton for being unable to “make it [fifteen] feet to her car” and imitated Clinton falling.⁴⁷⁹ Additionally, the Trump campaign released a television ad that used video of the incident as a narrator stated, “Hillary Clinton doesn’t have the fortitude, strength, or stamina to lead in our world.”⁴⁸⁰ After the second presidential debate, Trump, without evidence, suggested Clinton had used drugs to energize herself.⁴⁸¹

3. Recent Candidate Health Disclosures

Since the 1976 presidential campaign, all major party candidates have released information about their health, although the thoroughness and truthfulness of these disclosures has varied. This modern era of candidate health disclosure was ushered in by an attitude of “post-Watergate candor.”⁴⁸² A desire to avoid “embarrassing surprises” about medical issues, such as those that led to vice presidential nominee Thomas Eagleton’s withdrawal from the 1972 race, also likely encouraged candidates to disclose more health details.⁴⁸³

Candidates’ openness about their health in the eleven campaigns between 1976 and 2016 has been shaped by various forces, particularly pressure from opposing candidates and journalists. The ages and health histories of candidates also seem to have impacted disclosures. In 1976, major party candidates Gerald Ford and Jimmy Carter released statements from their doctors about their most recent examinations.⁴⁸⁴ Ronald Reagan, the Republican nominee in 1980, took his health disclosures further by partaking in an interview with *New York Times* reporter Lawrence K. Altman, a physician. The sixty-nine-year-old candidate said he granted the interview

478. See Letter from Lisa Bardack, Chair of Internal Med., CareMount Med. (Sept. 14, 2016), https://m.hrc.onl/secretary/10-documents/05-physician-letter/HRC_physician_letter.pdf [https://perma.cc/2LC7-QS9B].

479. See Tim Hains, *Donald Trump Mocks Hillary Clinton’s Fall at 9/11 Ceremony*, REALCLEARPOLITICS (Oct. 3, 2016), https://www.realclearpolitics.com/video/2016/10/03/donald_trump_mock_hillary_clinton_fall_at_911_ceremony.html [https://perma.cc/WUJ6-BZ7P]; Gideon Resnick, *Trump Mocks Clinton for Her 9/11 Memorial ‘Medical Episode,’* DAILY BEAST (Sept. 28, 2016, 6:00 PM), <http://www.thedailybeast.com/trump-mocks-clinton-for-her-911-memorial-medical-episode> [https://perma.cc/QR5-MHC5].

480. *Donald Trump ‘Dangerous’ Campaign 2016*, WASH. POST (Oct. 11, 2016, 11:37 AM), https://www.washingtonpost.com/46c09464-8fc9-11e6-bc00-1a9756d4111b_video.html [https://perma.cc/GL2K-8SCM].

481. See Nick Corasaniti, *‘We Should Take a Drug Test’ Before Debate, Donald Trump Says*, N.Y. TIMES (Oct. 15, 2016), <https://www.nytimes.com/2016/10/16/us/politics/donald-trump-hillary-clinton-drug-test.html> [https://perma.cc/XVG6-ELX2].

482. See Lawrence K. Altman, *Presidential Health: How Much Should Be Public?*, N.Y. TIMES (Oct. 31, 1976), <http://www.nytimes.com/1976/10/31/archives/presidential-health-how-much-should-be-public.html> [https://perma.cc/5RSW-ZWCQ].

483. *Id.*

484. *Id.*

“because the question of his age had arisen” in the campaign.⁴⁸⁵ Reagan’s opponent, President Jimmy Carter, did not give an interview about his health, but the White House doctor released a report on Carter’s health and answered questions from Dr. Altman.⁴⁸⁶

In 1984, neither Ronald Reagan nor Walter Mondale gave interviews on their health, instead allowing their doctors to speak with the press.⁴⁸⁷ But a new high watermark for candidate health disclosure was reached in 1988 when both presidential candidates—Michael Dukakis and George H.W. Bush—and their respective doctors gave health-related interviews.⁴⁸⁸ Some of the interviews that Dukakis and his doctor gave were prompted by unsubstantiated rumors about his alleged depression and Reagan’s “invalid” comment.⁴⁸⁹

The 1992 campaign saw a temporary retreat from candidate interviews, as only the candidates’ doctors spoke with the press.⁴⁹⁰ Bill Clinton, the Democratic nominee, did not allow his doctors to give interviews or release detailed information until the final weeks of the campaign, after the *New York Times* charged that he had been “less forthcoming about his health than any presidential nominee of the last 20 years.”⁴⁹¹

While running for reelection in 1996, Clinton faced criticism from Republican candidate Bob Dole for allegedly failing to release adequate health information.⁴⁹² He responded with statements from White House physician Connie Mariano and other specialists attesting to Clinton’s good

485. Lawrence K. Altman, *Reagan Vows to Resign If Doctor in White House Finds Him Unfit*, N.Y. TIMES, June 11, 1980, at A1.

486. Lawrence K. Altman, *President Is “in Excellent Shape,” His Doctor Reports After Test*, N.Y. TIMES, Jan. 19, 1980, at 21.

487. See Lawrence K. Altman, *Mondale’s Health Termed Excellent by Physician*, N.Y. TIMES (Sept. 30, 1984), <http://www.nytimes.com/1984/09/30/us/mondale-s-health-termed-excellent-by-physician.html> [https://perma.cc/X2ZU-85ER].

488. See Lawrence K. Altman, *Clinton, Citing Privacy Issues, Tells Little About His Health*, N.Y. TIMES (Oct. 10, 1992), <http://www.nytimes.com/1992/10/10/us/1992-campaign-candidate-s-health-clinton-citing-privacy-issues-tells-little.html> [https://perma.cc/6Y86-N4KS].

489. See Dukakis, *supra* note 466, at 90; Rosenthal, *supra* note 469.

490. Lawrence K. Altman, *Bush’s Doctor Terms President Strong and Fit*, N.Y. TIMES (Aug. 14, 1992), <http://www.nytimes.com/1992/08/14/us/1992-campaign-candidate-s-health-bush-s-doctor-terms-president-strong-fit.html> [https://perma.cc/8JPQ-Z9QT]; Lawrence K. Altman, *Doctors Call Clinton Healthy; Campaign Offers New Details*, N.Y. TIMES (Oct. 15, 1992) [hereinafter Altman, *Doctors Call Clinton Healthy*], <http://www.nytimes.com/1992/10/15/us/1992-campaign-candidate-s-health-doctors-call-clinton-healthy-campaign-offers.html> [https://perma.cc/2MXC-K42J].

491. Altman, *Doctors Call Clinton Healthy*, *supra* note 490.

492. Lawrence K. Altman, *Responding to Dole, Clinton Releases More Health Data*, N.Y. TIMES (Sept. 15, 1996), <http://www.nytimes.com/1996/09/15/us/responding-to-dole-clinton-releases-more-health-data.html> [https://perma.cc/LHT9-T96F]; see also John M. Broder, *Questions on Health Records Dog Clinton*, L.A. TIMES (Sept. 13, 1996), http://articles.latimes.com/1996-09-13/news/mn-43551_1_medical-records [https://perma.cc/BX7T-NK4V] (stating that Dole’s “chief spokesman hinted darkly that [Clinton] was trying to conceal a medical ‘mystery’”).

health.⁴⁹³ Additionally, Clinton and Dr. Mariano gave an interview to Dr. Altman in the final weeks of the campaign.⁴⁹⁴ Dole, who was seventy-three years old, and his doctors also gave an interview.⁴⁹⁵ During the 2000 campaign, both candidates and their doctors again gave press interviews.⁴⁹⁶ In 2004, Democratic candidate John Kerry was the only candidate to discuss his health with a journalist.⁴⁹⁷

In the three campaigns since the 2004 race, candidates have mostly limited their disclosures to letters from their doctors.⁴⁹⁸ Dr. Altman noted a trend away from disclosure at the end of the 2008 campaign when he observed, “The information that has been released is a retreat from the approach that most campaigns took over the last 10 elections.”⁴⁹⁹ The physicians’ letters that have characterized most post-2004 disclosures typically summarize the candidate’s health histories, such as significant medical episodes, surgical procedures, and family health histories. To provide a picture of the candidate’s current health, the letters include the physicians’ general impressions, medications taken by the candidate, and measures like heart rate, blood pressure, and cholesterol.

The notable departures from the post-2004 trend toward physicians’ letters came from John McCain in 2008 and Donald Trump in 2016. McCain was seventy-two in 2008 and would have been the oldest President-Elect sworn in for a first term as President. McCain underwent an extensive surgery eight years earlier to remove a malignant melanoma.⁵⁰⁰ His campaign responded to heightened scrutiny of his health by allowing twenty reporters to review

493. Altman, *supra* note 492.

494. Lawrence K. Altman, *Clinton, in Detailed Interview, Calls His Health “Very Good,”* N.Y. TIMES (Oct. 14, 1996), <http://www.nytimes.com/1996/10/14/us/clinton-in-detailed-interview-calls-his-health-very-good.html> [https://perma.cc/VD3J-9WTJ].

495. Lawrence K. Altman, *Doctors Call Dole’s Health Excellent*, N.Y. TIMES (July 21, 1996), <http://www.nytimes.com/1996/07/21/us/doctors-call-dole-s-health-excellent.html> [https://perma.cc/S54J-HVEP].

496. Lawrence K. Altman, *Gore Appears in Excellent Health*, N.Y. TIMES (Oct. 25, 2000), <http://www.nytimes.com/2000/10/25/us/the-2000-campaign-the-fitness-report-gore-appears-in-excellent-health.html> [https://perma.cc/V3H3-SXKP]; Lawrence K. Altman, *Doctors Say Republican Candidates Are in Good Health*, N.Y. TIMES (Nov. 2, 2000), <http://www.nytimes.com/2000/11/02/us/2000-campaign-medical-histories-doctors-say-republican-candidates-are-good.html> [https://perma.cc/C8F3-TERY].

497. Lawrence K. Altman, *On Kerry’s Journey to Health, Stops for Shrapnel and Cancer*, N.Y. TIMES (Oct. 3, 2004), <http://www.nytimes.com/2004/10/03/politics/campaign/on-kerrys-journey-to-healthstops-for-shrapnel-and-cancer.html> [https://perma.cc/9L2V-Y7ZA].

498. During the 2008 presidential campaign, then-Senator Barack Obama’s doctor released a letter to the public. See Letter from David L. Scheiner, Hyde Park Assocs. in Med., Ltd., <http://i.cdn.turner.com/cnn/2008/images/05/29/scheiner.letter.pdf> [https://perma.cc/BGK9-45CK]. During the 2012 campaign, then-Governor Mitt Romney’s physician released the same. See Letter from Randall D. Gaz, Mass. Gen. Hosp. (Aug. 25, 2012), <https://assets.documentcloud.org/documents/438470/physicians-letter-on-mitt-romneys-health.pdf> [https://perma.cc/HLB3-7D2G].

499. Altman, *Many Holes in Disclosures*, *supra* note 459.

500. *McCain in “Excellent Health,” Doctor Says*, CNN (May 23, 2008), <http://www.cnn.com/2008/HEALTH/05/23/mccain.health.records/index.html> [https://perma.cc/94Y7-SUWL]. Surgeries in 1993, 2000, and 2003 removed three other malignant melanomas from McCain’s skin, which were less invasive and did not pose long-term concerns. *Id.*

nearly 1200 pages of his medical records, though with some significant restrictions.⁵⁰¹ The reporters, three of whom were doctors, only had three hours to review the records and were not allowed to make copies.⁵⁰² In addition to the temporary record release, several of McCain's doctors released a written health summary and answered reporters' questions on a forty-five-minute conference call.⁵⁰³ McCain did not submit to an extensive media interview on his health.⁵⁰⁴

Before the start of the 2016 primaries, Trump released a physician's letter, but it had less detail than typical letters—and far more flourish. The letter from Trump's personal doctor, Harold Bornstein, stated that Trump's physical examination yielded “only positive results.”⁵⁰⁵ It also asserted that Trump's lab test results were “astonishingly excellent” without providing any specific metrics other than Trump's prostate-specific antigen score.⁵⁰⁶ Bornstein concluded that, if elected, Trump would be “the healthiest individual ever elected to the presidency.”⁵⁰⁷ Months later, Bornstein gave two seemingly impromptu television interviews,⁵⁰⁸ stating that he wrote the letter in five minutes and that its hyperbolic claims were inspired by the way Trump speaks.⁵⁰⁹ A day before Bornstein wrote the letter, Trump had tweeted that the account of his health would show “perfection.”⁵¹⁰

Following Clinton's bout with pneumonia in September 2016, Trump released a second letter from Bornstein that contained more detail, including some specific results of laboratory tests.⁵¹¹ *New York Times* articles observed

501. See Marc Ambinder, *McCain's Health Records*, ATLANTIC (May 23, 2008), <https://www.theatlantic.com/politics/archive/2008/05/mccains-health-records/53290/> [<https://perma.cc/K5A3-N4DH>] (discussing a journalist's review of McCain's medical records).

502. See Altman, *Many Holes in Disclosures*, *supra* note 459.

503. See *id.*; Victor F. Trastek et al., Mayo Clinic, Statement of Health Status, https://static01.nyt.com/packages/pdf/politics/JSM_HealthRecords_052308.pdf [<https://perma.cc/LW52-KYAR>].

504. Altman, *Many Holes in Disclosures*, *supra* note 459.

505. *Bornstein Letters of Health for Trump*, N.Y. TIMES (Feb. 1, 2017), <https://www.nytimes.com/interactive/2017/02/01/us/politics/document-Bornstein-Letter-of-Health-for-Trump.html> [<https://perma.cc/TJ6J-GA7T>] (containing letter of health, dated December 4, 2015, from Dr. Harold N. Bornstein).

506. See *id.*

507. *Id.*

508. See *Doctor Doubles Down on Donald Trump's Health*, CNN (Sept. 1, 2016), <http://www.cnn.com/videos/politics/2016/09/01/donald-trump-doctor-griffin-pkg-tsr.cnn> [<https://perma.cc/2FM5-KDF4>]; Anna R. Schechter et al., *Trump Doctor Wrote Health Letter in Just 5 Minutes As Limo Waited*, NBC NEWS (Aug. 26, 2016, 9:47 PM), <http://www.nbcnews.com/news/us-news/trump-doctor-wrote-health-letter-just-5-minutes-limo-waited-n638526> [<https://perma.cc/4A9R-X2DG>].

509. See Schechter et al., *supra* note 508.

510. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 3, 2015, 5:08 AM), <https://twitter.com/realDonaldTrump/status/672401996826206208> [<https://perma.cc/Z3B8-KGS6>].

511. See Letter from Dr. Harold Bornstein, Lenox Hill Hosp. (Sept. 13, 2016), <https://assets.documentcloud.org/documents/3108782/Read-the-letter-from-Donald-Trump-s-doctor.pdf> [<https://perma.cc/896Z-4JPU>].

that the letter revealed that Trump was overweight and had a blood sugar level that was “‘quite close’ to being considered prediabetes.”⁵¹² Trump discussed the updated letter and answered questions about his health on Dr. Mehmet Oz’s television show.⁵¹³ After the election, Bornstein revealed that Trump was on two prescription medications that were not mentioned in his letters or Trump’s interview.⁵¹⁴

B. Past Proposals

The Clinic considered several approaches to improving candidates’ health disclosures, including legislation, political party rules, and a commission to evaluate and report on candidates’ health.

1. Legislation

Federal and state laws regulating candidates’ health disclosures would likely raise practical and legal considerations.

a. Federal Law

Some members of Congress have raised the possibility of passing laws to regulate presidential candidates’ health disclosures. In early 2017, Republican Congressman Jason Chaffetz said he was working on legislation to require presidential candidates to undergo an independent medical examination, performed by a Navy doctor, the results of which would be released to the public.⁵¹⁵ Following the return of Paul Tsongas’s cancer in 1992, Senator Bob Kerrey, who was a rival of Tsongas in the Democratic primary, said full disclosure of presidential candidates’ health information “has to become part of our election law.”⁵¹⁶ He suggested making disclosure a condition of receiving federal campaign funds and Secret Service protection.⁵¹⁷

512. Maggie Haberman, *New Doctor’s Note Describes Donald Trump’s Health as ‘Excellent,’* N.Y. TIMES (Sept. 15, 2016), <https://www.nytimes.com/2016/09/16/us/politics/donald-trump-health.html> [https://perma.cc/4SDV-UMBJ]; see also Maggie Haberman, *Donald Trump Checkup Said to Reveal He Is Overweight,* N.Y. TIMES (Sept. 14, 2016), <https://www.nytimes.com/2016/09/15/us/politics/donald-trump-health-dr-oz.html> [https://perma.cc/57GZ-KL2N].

513. See *The Dr. Oz Show* (Fox television broadcast Sept. 15, 2016), <http://www.doctoroz.com/episode/dr-oz-exclusive-one-one-donald-trump> [https://perma.cc/Z5JS-JKRB].

514. See Lawrence K. Altman, *Donald Trump’s Longtime Doctor Says President Takes Hair-Growth Drug,* N.Y. TIMES (Feb. 1, 2017), <https://www.nytimes.com/2017/02/01/us/politics/trump-prostate-drug-hair-harold-bornstein.html> [https://perma.cc/LR98-WXW].

515. See Christina Marcos, *GOP Lawmaker Considers Requiring Presidential Candidates to Undergo Medical Exam,* HILL (Feb. 17, 2017, 12:49 PM), <http://thehill.com/homenews/house/320120-chaffetz-considering-bill-requiring-presidential-candidates-to-undergo-medical> [https://perma.cc/L6UQ-7YHL]. It appears that Chaffetz, who resigned from Congress on June 30, 2017, never introduced such legislation. See *Legislation Sponsored or Cosponsored by Jason Chaffetz,* CONGRESS.GOV, <https://www.congress.gov/member/jason-chaffetz/C001076> [https://perma.cc/65B9-KVNX] (last visited Nov. 19, 2017).

516. See Altman, *Tsongas’s Health,* *supra* note 459.

517. *Id.*

Both of these proposals, however, might be difficult or unwise to enforce. Kerrey's suggested withholding of campaign funds is unlikely to be effective because most recent candidates choose not to receive federal funds. The suggestion of making Secret Service protection contingent on disclosure might not be worth the risk; disclosure should not come at the cost of decreasing candidates' safety.⁵¹⁸ Additionally, requirements that candidates disclose medical records could discourage candidates, or potential candidates, from seeking necessary medical treatment out of fear that doing so could lead to the creation of damaging records.⁵¹⁹

Chaffetz's proposed requirement that candidates undergo a medical examination might not be constitutional. Indeed, candidates who did not want to be examined might claim that such an examination was a violation of their Fourth Amendment rights.⁵²⁰

b. State Law

States may have unique leverage to enforce candidate health-disclosure laws. The Clinic is unaware of any proposed state legislation regarding candidate health, but lawmakers in several states have recently proposed legislation that would require candidates to disclose other personal information: the candidates' tax returns.⁵²¹ These proposed laws make disclosure of tax returns a requirement for ballot access and eligibility for support of presidential electors.

However, there are at least colorable arguments that such laws are unconstitutional, and these arguments could be adapted to apply to restrictions that mandate health disclosures. Vikram Amar has suggested that tax disclosure laws might burden the associational rights of candidates' supporters in violation of the First and Fourteenth Amendments and create impermissible extraconstitutional requirements for the presidency or presidential electors.⁵²²

Because a campaign is an "effective platform" for expressing political views, rules that exclude candidates might burden voters' freedom of association.⁵²³ However, not every rule that restricts ballot access is constitutionally suspect; "there must be substantial regulation of elections if

518. See *infra* Part VII.A.3 (discussing attacks and plots against presidential candidates).

519. See Hanson O'Haver, *Why Presidential Candidates Shouldn't Have to Release Their Health Records*, BROADLY (Aug. 25, 2016, 10:50 AM), https://broadly.vice.com/en_us/article/8x49p3/why-presidential-candidates-shouldnt-have-to-release-their-health-records [<https://perma.cc/HF8G-9D4Z>].

520. See U.S. CONST. amend. IV.

521. See Editorial, *An Antidote to Donald Trump's Secrecy on Taxes*, N.Y. TIMES (Dec. 12, 2016, 10:50 AM), <https://www.nytimes.com/2016/12/12/opinion/an-antidote-to-donald-trumps-secrecy-on-taxes.html> [<https://perma.cc/P2X2-B2ZQ>].

522. See Vikram David Amar, *Can and Should States Mandate Tax Return Disclosure as a Condition for Presidential Candidates to Appear on the Ballot?*, VERDICT (Dec. 30, 2016), <https://verdict.justia.com/2016/12/30/can-states-mandate-tax-return-disclosure-condition-presidential-candidates-appear-ballot> [<https://perma.cc/EBA8-6BM9>].

523. *Anderson v. Celebrezze*, 460 U.S. 780, 787–88 (1983).

they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.”⁵²⁴ Accordingly, courts balance the asserted harm of a regulation against the state’s interests in advancing the regulation.⁵²⁵

The Supreme Court has upheld rules that require candidates to demonstrate that they have substantial support, such as by gathering signatures of registered voters or by receiving the nomination of a party with a ballot line, to reduce confusion and exclude frivolous candidacies.⁵²⁶ The Court has ruled against some regulation including, in *Anderson v. Celebrezze*,⁵²⁷ a registration deadline for independent candidates that the Court held was too early.⁵²⁸

However, *Anderson* might suggest an opening for candidate-health disclosure laws, as it specifically identifies voter education as a legitimate state interest.⁵²⁹ States may legitimately attempt to foster informed and educated participation in their elections, and the goal of health disclosure requirements is to inform voters. Moreover, unlike an early filing deadline, disclosure requirements are, at least, arguably necessary to further the interest of voter education because voters typically will not learn information that has been intentionally kept secret. The ballot access restriction in *Anderson* excluded particular classes of candidates: those who did not belong to major parties.⁵³⁰ In contrast, restrictions that require health disclosures would burden all candidates without regard to their party or political group.

Candidates burdened by a state health-disclosure law or their supporters could also challenge the law on the ground that it impermissibly establishes extraconstitutional requirements for the presidency or presidential electors. Article II of the Constitution requires that the President be a “natural born citizen” who is at least thirty-five years old and a resident of the United States for fourteen years before taking office.⁵³¹ The Twenty-Second Amendment expanded on those requirements by creating a two-term limit.⁵³² Article II, Section 1 states that presidential electors cannot be members of Congress or officers of the United States.⁵³³

The Supreme Court has held that states cannot create their own requirements for election to Congress. In *U.S. Term Limits, Inc. v. Thornton*,⁵³⁴ the Court held that state laws that even “indirectly” create “additional qualifications” for election to Congress are impermissible.⁵³⁵

524. *Id.* at 788 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

525. *Id.* at 789.

526. *See* *Jenness v. Fortson*, 403 U.S. 431, 439–42 (1971).

527. 460 U.S. 780 (1983).

528. *Id.* at 796.

529. *Id.*

530. *See id.* at 793.

531. U.S. CONST. art. II, § 1.

532. *Id.* amend. XXII.

533. *Id.* art. II, § 1.

534. 514 U.S. 779 (1995).

535. *Id.* at 784, 836–38.

The Court held that the qualifications set forth in the Constitution are only subject to change through the Article V amendment process.⁵³⁶

Arguably, state health-disclosure laws could also create such extraconstitutional requirements if they prevent candidates from appearing on the ballot or if they prevent electors slated for certain candidates from being chosen. But states could argue that *U.S. Term Limits* is confined to interpreting the portions of the Constitution that provide qualifications for members of Congress and not to the provisions relating to the President or to presidential electors. The constitutional provisions relating to presidential electors are very different than the provisions establishing the qualifications for other offices. The Constitution does not establish *any* positive qualifications for presidential electors, such as the age and residency requirements established for members of Congress. Instead, the Constitution provides only specific restrictions describing people who may *not* serve as electors. Many states already require presidential electors to make a pledge that they will cast their electoral votes for the candidates for President and Vice President who received the most votes in a statewide contest.⁵³⁷ States could possibly adopt similar statutes forbidding the appointment of electors slated by a candidate who has not complied with health disclosure rules.

2. Political Party Rules

Political parties might have the authority to create health disclosure requirements for the candidates who run in their primaries. Parties are entitled to a certain degree of autonomy stemming from their associational rights under the Constitution.⁵³⁸ But, if political parties impose health disclosure requirements, candidates and their supporters might claim constitutional violations, such as some of the possible challenges to the state laws discussed above. Political parties' actions are sometimes construed as state action, which subjects them to constitutional challenges. Indeed, party rules governing primaries can implicate constitutional rights when the process of choosing general election candidates is particularly entangled with the party's primary process.

In *Smith v. Allwright*,⁵³⁹ the Supreme Court ruled that a primary that banned nonwhite voters was unconstitutional.⁵⁴⁰ The Court held that the "statutory system for the selection of party nominees for inclusion on the

536. *Id.* at 783; *see also* *Powell v. McCormack*, 395 U.S. 486, 550 (1969) (holding that the House of Representatives could not, through exercise of its constitutional power to judge the qualifications of House members, disqualify an elected member who was accused of using his position as a committee chair to divert House funds for his personal use).

537. *See* Chris White, *Our Complete List of States with Laws That Bind Votes of Presidential Electors*, LAWNEWZ (Dec. 19, 2016, 6:41 AM), <http://lawnewz.com/high-profile/our-complete-list-of-states-with-laws-that-bind-votes-of-presidential-electors/> [<https://perma.cc/A7B9-SDG4>] (citing numerous state statutes that require electors to make such pledges).

538. *See generally* *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000).

539. 321 U.S. 649 (1944).

540. *Id.* at 663–64.

general election ballot” made the party an agent of the state in its governance of the party primary process.⁵⁴¹ “When primaries become a part of the machinery for choosing officials,” the Court ruled, “the same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election.”⁵⁴² Discrimination against voters might easily be extended to discrimination against candidates. Accordingly, party rules on health disclosures could implicate constitutional rights.

Supporters of candidates prohibited from running in a primary because they did not comply with health disclosure rules might argue that the rules impaired their associational rights. The candidates might claim various forms of discrimination, especially under the Fourteenth Amendment. Disclosure rules would almost certainly impair the prospects of candidates who suffered from certain disabilities. Those candidates could claim discrimination on the basis of their disability. Additionally, because some medical conditions are gender specific, candidates could potentially make gender discrimination claims. Finally, candidates could make privacy claims under the Fourth Amendment.

As an alternative to outright bans on candidates who fail to disclose health information, political parties might use other forms of leverage to compel disclosures. In particular, the parties could ban noncompliant candidates from primary debates that the parties sponsor.⁵⁴³

3. Independent Medical Commission

Proposals for an independent commission to evaluate presidential candidates’ health have been “kicked around medical conferences and academic journals for years.”⁵⁴⁴ These proposals typically involve a commission of physicians who examine candidates and report their findings to the public.⁵⁴⁵ Similar commissions have been proposed for evaluating Presidents to assist in determining whether the Twenty-Fifth Amendment

541. *Id.* at 663.

542. *Id.* at 664.

543. *See, e.g.*, Press Release, Democratic Nat’l Comm., DNC to Sanction Six Presidential Primary Debates (May 5, 2015), <https://www.democrats.org/post/dnc-to-sanction-six-presidential-primary-debates> [<https://perma.cc/RK6U-8FEF>] (referencing criteria for candidate participation in debates).

544. Dan Diamond, *Is This the Way to Get Rid of the Ridiculous Health Conspiracies?*, POLITICO (Aug. 27, 2016), <http://www.politico.com/magazine/story/2016/08/donald-trump-hillary-clinton-health-conspiracy-theories-214194> [<https://perma.cc/X2L6-UM8B>]; *see also* Sandee LaMotte, *Do Voters Have the Right to Know Presidential Candidates’ Health Histories?*, CNN (Dec. 15, 2015, 9:02 AM), <http://www.cnn.com/2015/12/14/health/presidential-candidate-health-disclosure/index.html> [<https://perma.cc/A7PS-E7HF>].

545. *See* Diamond, *supra* note 544; *see also* Art Caplan & Jonathan D. Moreno, *We Need Unbiased Medical Exams for Presidential Candidates*, CHI. TRIB. (May 17, 2016, 1:58 PM), <http://www.chicagotribune.com/news/opinion/commentary/ct-health-medical-exam-trump-clinton-president-perspec-0518-20160517-story.html> [<https://perma.cc/NS8S-Q4E3>] (proposing independent examinations of candidates by a panel of physicians, possibly at Walter Reed National Military Medical Center).

should be invoked.⁵⁴⁶ Former President Jimmy Carter is among those who have proposed presidential health commissions.⁵⁴⁷

Under many of those proposals, Congress would create the commission to evaluate the President's health.⁵⁴⁸ Congress could create a similar commission for presidential candidates. Selection of a commission's members by the voters' elected representatives or other governmental officials, such as the Surgeon General or Secretary of Health and Human Services, might add a level of credibility to the panel.⁵⁴⁹ But a nongovernmental entity could also form a commission. Such proposals have drawn analogies to the American Bar Association's practice of rating the Supreme Court nominees and the Commission on Presidential Debates, the nonpartisan corporation that organizes presidential debates.⁵⁵⁰

Commission membership would not have to be limited to physicians. Members may also include former Presidents, who understand the challenges of the office; former journalists, particularly those with medical backgrounds; current or retired elected officials who could evaluate political implications of the commission's work; and military officials, whose training might encourage a nonpartisan approach. However, elected officials might create a perception of partisanship and the involvement of military officials could undermine the independence of the military.⁵⁵¹

Independent medical commissions are not without flaws. First, it might be difficult to secure candidates' cooperation. A commission and its sponsors could argue that participation would help candidates by preventing baseless speculation about their health, but candidates might still worry that their opponents and members of the public could use some of the commission's findings against them.⁵⁵² Requiring candidates to submit to examinations likely is not legal, regardless of whether Congress created the commission.

Second, it would be difficult to eliminate partisanship from a commission. An absence of partisanship would be critical to encouraging candidate participation and ensuring that the public viewed the commission's findings

546. See Gilbert, *supra* note 370, at 5–6.

547. See Jimmy Carter, *Presidential Disability and the Twenty-Fifth Amendment*, 272 J. AM. MED. ASS'N 1698, 1698 (1994).

548. Such a commission would be created under Section 4's "other body" provision. See U.S. CONST. amend. XXV, § 4.

549. See Herbert L. Abrams, *Can the Twenty-Fifth Amendment Deal with a Disabled President? Preventing Future White House Cover-Ups*, 29 PRESIDENTIAL STUD. Q. 115, 118 (1999) (advancing a proposal for Surgeon General or Secretary of Health and Human Services to choose commission members); Gilbert, *supra* note 370, at 5 ("Unlike each Cabinet member who has been approved for the position he or she occupied by the people's representatives in the United States Senate, a group of physicians would not be similarly sanctioned unless Senatorial consent should be mandated by law, a process that would have an immediately politicizing effect.").

550. See Diamond, *supra* note 544; *Our Mission*, COMM'N ON PRESIDENTIAL DEBATES, <http://www.debates.org/index.php?page=about-cpd> [<https://perma.cc/85FA-PLWF>] (last visited Nov. 19, 2017).

551. Telephone Interview with Henry White, Retired Navy Rear Admiral (Apr. 21, 2017).

552. See Diamond, *supra* note 544.

as credible. But it would be hard to excise partisan influences from the process. Most people, including doctors, have at least some partisan inclinations and interests. For example, physician groups like the American Medical Association are often entangled in partisan causes.⁵⁵³ A candidate's party should be irrelevant to determinations regarding the candidate's health,⁵⁵⁴ but commission members' candidate preferences could consciously or unconsciously impact their conclusions.

Finally, it may be difficult for the commission to agree on an approach to evaluating and drawing conclusions about candidates' health. Without unanimous conclusions, speculation about candidates' health could increase, the public could be left confused, and the commission approach might be undermined. Dr. Burton Lee, a former White House physician, has observed that a committee would likely produce "the lowest common denominator of medical decision-making[.]"⁵⁵⁵ and former Senator Birch Bayh has said "it is impossible to diagnose by committee."⁵⁵⁶

C. Recommendation:

A Commission to Create Disclosure Guidelines

The Clinic recommends the creation of a commission to set nonbinding guidelines for what presidential candidates should disclose about their health.⁵⁵⁷ The commission's guidelines would serve two primary purposes: informing candidates' approaches to disclosure and creating expectations that would encourage adequate disclosure.

Without uniform health disclosure standards, even candidates who aspire to be transparent might not know exactly what to release. The commission's guidelines would allow candidates to efficiently make disclosures calculated to satisfy the public's right to know and to blunt baseless health-related claims. Comments from doctors who treated Paul Tsongas, the 1992 Democratic primary candidate who had suffered from lymphoma, suggest they may have benefited from disclosure standards. They said "they were

553. *Id.*

554. See Abrams, *supra* note 549, at 117 (stating that a President's party affiliation should be irrelevant to determining inability).

555. Letter from Burton J. Lee III, former Physician to the President, to Gregory R. Schwartz, Editor, Journal of the Am. Med. Ass'n (Jan. 31, 1995), in PRESIDENTIAL DISABILITY, *supra* note 48, at 354, 355.

556. Birch Bayh, *The White House Safety Net*, N.Y. TIMES (Apr. 8, 1995), <http://www.nytimes.com/1995/04/08/opinion/the-white-house-safety-net.html> [<https://perma.cc/9JVH-Y6DV>].

557. This idea has been proposed before by someone with firsthand experience with candidate health disclosures. After confirming that his lymphoma had returned and conceding that he had "made mistakes in discussing his health" while running for the Democratic presidential nomination in 1992, Paul Tsongas called for the creation of a national commission to determine what presidential candidates should disclose about their health. See Lawrence K. Altman, *Tsongas, Battling Cancer, Admits Candor Is Needed*, N.Y. TIMES (Dec. 6, 1992), <http://www.nytimes.com/1992/12/06/weekinreview/nov-28-dec-5-american-politics-tsongas-battling-cancer-admits-candor-is-needed.html> [<https://perma.cc/S465-Q2HF>].

operating in uncharted waters because of the lack of national guidelines on what to disclose about a candidate's health."⁵⁵⁸

The guidelines could also improve disclosures of candidates who are less inclined toward transparency. The guidelines' clear expectations would improve journalists' ability to encourage candidates to disclose useful information about their health. If candidates failed to disclose some basic information, journalists would be prearmed with a "shopping list" of missing disclosures. Opposing candidates would also likely pressure candidates who did not comply with the guidelines.

Health disclosure guidelines should not be binding on candidates; the sole purpose of disclosure guidelines should be to offer guidance and set expectations. Compliance with the guidelines could only be required through laws or political party rules, but, as discussed, such requirements imposed in that manner would likely face legal challenges. Furthermore, the guidelines commission should not comment on whether candidates are complying with the guidelines or issue midcampaign rulings on applications of the guidelines. If the commission evaluated particular candidates' compliance, the risk of partisanship influencing the commission and undermining its integrity would significantly increase.

1. Who Should Serve on the Commission?

Medical doctors should constitute at least half of the commission's membership. Doctors are equipped to understand the implications of different kinds of health conditions and gauge the usefulness of particular information to judging a candidate's health.⁵⁵⁹ Both internists and practitioners from a wide variety of medical and surgical specialties should be part of the commission. Because it is not feasible to represent *every* specialty on the commission, consultation with outside experts should occur as needed.

The commission should also include knowledgeable people who have experience deciding normative questions on behalf of the community. Former politicians could be among those who serve this role. They could also provide insight into the political implications of possible disclosure guidelines. If former politicians are included, there should be an equal number from each party to prevent perceptions that the commission favors one party. Current elected officials should not serve on the commission because partisan considerations could impact their contributions. Nonmedical academics or journalists could also serve valuable roles on the commission. They could provide information about what the public expects to know about candidates' health and how the public might react to particular kinds of disclosures. Ideally, the commission members would receive

558. Altman, *Tsongas's Health*, *supra* note 459.

559. *See supra* Part VI.B.3.

compensation or at least receive reimbursement for the costs associated with their participation.

2. Who Should Create the Commission?

The commission could be formed by Congress or an independent organization, perhaps by a group of concerned voters or another private nonpartisan entity.⁵⁶⁰ Both approaches have advantages. On the one hand, congressionally created guidelines commission would possess an innate prestige, which could encourage compliance with their recommendations. On the other hand, the formation of the commission by Congress would raise the specter of partisanship.

An independently created guidelines commission would be more likely to avoid perceptions of partisanship but would face greater challenges establishing its legitimacy. It could also have trouble raising operating funds and might be less able to attract members of prominence, which could compound the legitimacy problem.

3. Meeting of the Guidelines Commission

The commission should meet and issue its guidelines at least two years before the presidential election. This requirement is meant to prevent favoritism for certain candidates or parties. If the commission members knew who the candidates were, it could impact their views.

After the guidelines are issued, the commission should not meet or conduct any other business until after the election. The commission and its members should avoid commenting on the compliance of particular candidates with the guidelines.

Following the election, the members of the commission should reconvene to consider whether they can improve the guidelines to account for medical advances and any flaws that might have been exposed in the prior election cycle. Periodic meetings of the commission for this purpose should occur—always outside of the two-year period before elections.

4. Considerations in Crafting the Guidelines

The Clinic considered how the commission might develop its guidelines and some of the issues that might arise in the process. It probably would not require much deliberation for the commission to include certain basic disclosures in the guidelines, such as blood test results. But to assist in determining the appropriate level of detail for disclosures, the commission might create a standard for the kinds of conditions that the guidelines are

560. The League of Women Voters Education Fund's sponsorship of presidential debates during several campaigns in the 1970s and 1980s provides an example of an independent group taking initiative to help inform voters. See *The League of Women Voters and Candidate Debates: A Changing Relationship*, LEAGUE WOMEN VOTERS, <http://lwv.org/content/league-women-voters-and-candidate-debates-changing-relationship> [https://perma.cc/WN3Q-5REU] (last visited Nov. 19, 2017).

aimed at uncovering. For example, one possible standard would seek medical information that would reveal a likelihood of impairment in office. “Impairment” could include actual disability, such as death or medical incapacitation. It could also include substantial diminishment of capability, such as a limitation on working hours that might result from a heart condition.

In deciding whether candidates should disclose specific medical conditions, the commission will likely consider a variety of factors. For past conditions that candidates suffered, the guidelines might be based on the likelihood of recurrence. The commission may wish to adopt special disclosure standards for some politically sensitive or poorly understood illnesses, such as HIV/AIDS and certain psychological ailments, because such disclosures could produce public reactions out of proportion with any real health risk.

The commission might also consider whether candidates should undergo tests to assess their cognitive functions.⁵⁶¹ Such testing could lend insight into whether a candidate is suffering any intellectual decline, but tests for cognitive decline typically must be administered over months and years, which could make it difficult to provide the results of such tests before an election. Additionally, candidates would almost certainly view the tests as invasive.

The commission may want to consider providing a higher standard to protect medical information of a sitting President. Such a higher standard would be inherently unfair because it would favor incumbent Presidents against their challengers but might be necessary in the interests of security.

Emerging technologies for detecting and predicting the onset of illnesses might present novel and challenging questions for the commission.⁵⁶² One of the more significant developments relates to the use of genetic testing. It is now possible to make genetic assessments in a relatively noninvasive manner,⁵⁶³ and those assessments might be capable of revealing ailments that would impair a president, such as Alzheimer’s disease.⁵⁶⁴ Some scholars have suggested genetic testing as an alternative method to disclosing

561. See Jeremy Samuel Faust, *There’s an Easy Test We Could Use to Assess Older Politicians’ Cognitive Health*, SLATE (June 9, 2017, 3:08 PM), http://www.slate.com/articles/health_and_science/medical_examiner/2017/06/speculating_over_a_politician_s_cognitive_decline_is_irresponsible_using.html [https://perma.cc/LKM5-ZB88] (stating that the “Mini-Mental State Exam” can detect early or mild dementia through administrations over the course of months and years).

562. See, e.g., Maggie Fox, *New Heart Imaging Method May Predict Heart Attacks*, NBC NEWS (July 12, 2017, 2:27 PM), <http://www.nbcnews.com/health/health-care/new-heart-imaging-method-may-predict-heart-attacks-n782271> [https://perma.cc/83G8-WGTC].

563. Rose McDermott, *Extensions on the Twenty-Fifth Amendment: The Influence of Biological Factors on the Assessments of Impairment*, 79 FORDHAM L. REV. 881, 884 (2011).

564. See Hannah Devlin, *New Alzheimer’s Test Can Predict Age When Disease Will Appear*, GUARDIAN (Mar. 22, 2017, 2:00 PM), <https://www.theguardian.com/society/2017/mar/22/new-alzheimers-test-can-predict-age-when-disease-will-appear> [https://perma.cc/YY59-AZWT].

presidential health.⁵⁶⁵ But deciding whether genetic testing should be required involves a wide array of medical, ethical, and philosophical questions. Genetic testing does not provide perfect predictions. For example, someone with a gene marker for depression is not inevitably going to be depressed.⁵⁶⁶ Even if genetic testing were perfectly accurate, it might face criticism as an excessive invasion of privacy.

VII. POLITICAL PARTY RULES FOR REPLACING PRESIDENTIAL CANDIDATES

Presidential candidates' health can impact campaigns in more immediate ways than being the focus of public disclosures. A health issue could cause a presidential candidate to leave the campaign, potentially resulting in a vacancy on a political party's ticket only weeks before an election. And health is only one of several possible reasons a candidate might drop out.

The political parties' procedures for filling presidential candidate vacancies lack detail and might encounter problems if implemented.⁵⁶⁷ This Part discusses these problems and proposes improvements. First, it highlights aspects of campaign history which indicate that vacancies are a real possibility. It then provides an overview of the current replacement rules and discusses their shortcomings. It goes on to offer the Clinic's proposed rules for replacing presidential candidates after a vacancy. This Part concludes with a discussion of whether the parties should create rules for removing their presidential nominees.

A. *History of Vacancies and Near Vacancies*

There has never been a vacancy in the presidential nominee position of a major political party before Election Day.⁵⁶⁸ But there have been two instances where a vacancy has occurred in the vice presidential nomination.⁵⁶⁹ On other occasions, scandals or assassination attempts raised the prospect of vacancies.

565. Teneille R. Brown, *Double Helix, Double Standards: Private Matters and Public People*, 11 J. HEALTH CARE L. & POL'Y 295, 371–76 (2008).

566. McDermott, *supra* note 563, at 888.

567. During Hillary Clinton's bout of pneumonia in the final weeks of the 2016 campaign, one former party chairman called for the party to develop a clearer process to select a replacement nominee. Kyle Cheney, *Former DNC Chairman Call for Clinton Contingency Plan*, POLITICO (Sept. 12, 2016, 4:02 PM), <http://www.politico.com/story/2016/09/hillary-clinton-health-replace-contingency-228037> [<https://perma.cc/H9HX-HZ32>]. Another former chairman "agreed that the party's vacancy rules should be modernized" but not until after the election. *Id.*

567. The first Clinic recommended that the political parties "examine the need for criteria and procedures to guide" the candidate replacement process. First Clinic Report, *supra* note 8, at 54–55.

568. In 1872, Horace Greeley, the presidential nominee for the Democratic and Liberal Republican parties, died weeks after Election Day. He had won sixty-six presidential electors, and the political parties instructed those electors to vote for other candidates. See First Clinic Report, *supra* note 8, at 56.

569. Although there have been only two vacancies in the vice presidential nomination, it bears noting that Benjamin Fitzpatrick promptly declined the vice presidential nomination

1. Vacancies

The first vacancy on a national ticket occurred when Vice President James S. Sherman died less than one week before the 1912 election.⁵⁷⁰ Sherman had been renominated after serving as Vice President during President William Howard Taft's first term.⁵⁷¹ He died from Bright's disease, a serious kidney disease he had developed in 1904.⁵⁷²

At the Republican convention in June 1912, the delegates gave the power to fill vacancies on the national ticket to the Republican National Committee (RNC).⁵⁷³ But Sherman's death immediately before the election gave the committee little time to act. Recognizing as much, the RNC's chairman scheduled a meeting for a week after the election to choose a replacement vice presidential candidate.⁵⁷⁴ Woodrow Wilson won the presidency while Taft came in third with only eight electoral votes.⁵⁷⁵ In January, the RNC assigned Sherman's electoral votes to Columbia University President Nicholas Butler.⁵⁷⁶

The other national ticket vacancy occurred in 1972 when Democratic vice presidential nominee Thomas Eagleton withdrew eighteen days after his nomination. Eagleton had suffered from bipolar II disorder and had been hospitalized and treated with electroshock therapy.⁵⁷⁷ Democratic presidential nominee George McGovern did not know about Eagleton's health history when he offered him the nomination, as the campaign hardly vetted Eagleton. He was a last-minute choice for McGovern, who invited him to join the ticket after a thirty-five-second phone call.⁵⁷⁸

Rumors about Eagleton's health quickly received extensive media attention following his nomination.⁵⁷⁹ When Eagleton told McGovern and his aides about his health history, McGovern said he believed the campaign could weather the challenges it posed.⁵⁸⁰ But McGovern soon took a grimmer outlook⁵⁸¹ and, on August 1, 1972, asked Eagleton to leave the

after receiving it at the 1860 Democratic National Convention. The party instead nominated Herschel V. Johnson as replacement on the same day. Herschel V. Johnson, *From the Autobiography of Herschel V. Johnson, 1856-1867*, 30 AM. HIST. REV. 311, 317 (1925).

570. *See Sherman Is Dead, Hurt by Speech*, N.Y. TIMES, Oct. 31, 1912, at 1.

571. MARK O. HATFIELD, VICE PRESIDENTS OF THE UNITED STATES 1783-1993, at 325-28 (Wendy Wolff ed., 1997). Sherman became the first sitting Vice President to be renominated since John C. Calhoun eighty years earlier. *Id.* at 331.

572. *Id.*

573. *Sherman Always Allied to Machine*, N.Y. TIMES, Oct. 31, 1912, at 5.

574. *Id.*

575. HATFIELD, *supra* note 571, at 331.

576. *May Be Taft and Butler*, N.Y. TIMES, Jan. 5, 1913, at 1.

577. James N. Giglio, *The Eagleton Affair: Thomas Eagleton, George McGovern, and the 1972 Vice Presidential Nomination*, 39 PRESIDENTIAL STUD. Q. 647, 659, 661 (2009).

578. *Id.* at 649-63. A more substantial vetting process may have uncovered that rumors about Eagleton's mental health had circulated for years in his home state of Missouri. *See id.* at 652.

579. *Id.*

580. *Id.* at 661.

581. *Id.* at 656-74.

ticket less than three weeks after he joined it.⁵⁸² On August 5, 1972, McGovern selected Sargent Shriver, the former director of the Peace Corps, to replace Eagleton.⁵⁸³ The Democratic National Committee (DNC) called a special committee vote to formally nominate Shriver several days later.⁵⁸⁴

After the Eagleton incident, the DNC put more focus on proper vice presidential vetting.⁵⁸⁵ With the Party feeling the pressure of loss and internal division, its chairman adopted a charter to reform the Party that included the Party's current rule on filling nominee vacancies.⁵⁸⁶

2. Scandals

Scandals have at least twice raised the prospect of candidates withdrawing in the final weeks of campaigns. In September 1952, reports emerged that Republican vice presidential nominee Richard Nixon maintained a fund of undisclosed donations.⁵⁸⁷ Nixon explained that the money was used to cover expenses that arose during his tenure in the Senate, but presidential nominee Dwight D. Eisenhower and his advisers were livid.⁵⁸⁸ New York Governor Thomas Dewey, who had encouraged Eisenhower to select Nixon, recommended that Nixon offer a public explanation and leave the ticket.⁵⁸⁹ Some advisers were more measured. Herbert Brownell, who would become Attorney General, was hesitant to remove Nixon without an investigation.⁵⁹⁰ Eisenhower said he wanted to give Nixon a chance to explain himself.⁵⁹¹

Nixon addressed the controversy in an impassioned address on national television.⁵⁹² The address became known as the Checkers speech because Nixon said one gift he would not return was Checkers, a dog given to his children by a donor.⁵⁹³ Journalists and voters accepted Nixon's denial of wrongdoing, and he remained on the ticket.⁵⁹⁴

During the 2016 campaign, lewd comments by Donald Trump drew harsh condemnation from Republican leaders and led the chairman of the RNC,

582. *Id.* at 670–71. In his statement announcing that Eagleton was leaving the ticket, McGovern said that health was not a factor. Instead, McGovern attributed his decision to the attention Eagleton's medical history was drawing from the greater national issues. *Id.* at 672.

583. *Id.*

584. See James M. Naughton, *Shriver Is Named for Second Place by the Democrats*, N.Y. TIMES (Aug. 9, 1972), <http://www.nytimes.com/1972/08/09/archives/shriver-is-named-for-second-place-by-the-democrats-national.html> [<https://perma.cc/UQU9-SC9R>].

585. ROBERT E. DICLERICO, *THE CONTEMPORARY AMERICAN PRESIDENT* 456 (2016).

586. *Text of Party Charter Adopted at Democratic Conference Following Compromise*, N.Y. TIMES, Dec. 9, 1974, at 44.

587. Lee Huebner, *The Checkers Speech After 60 Years*, ATLANTIC (Sept. 22, 2012), <https://www.theatlantic.com/politics/archive/2012/09/the-checkers-speech-after-60-years/262172/> [<https://perma.cc/4Z92-QRTZ>].

588. See HERBERT BROWNELL WITH JOHN P. BURKE, *ADVISING IKE: THE MEMOIRS OF ATTORNEY GENERAL HERBERT BROWNELL* 124 (1993).

589. *Id.*

590. *Id.*

591. *Id.* at 125.

592. Richard Nixon Foundation, *Checkers Speech (full version)*, YOUTUBE (Jan. 16, 2012), <https://www.youtube.com/watch?v=JpWwgwytdzk> [<https://perma.cc/JY5D-G3C7>].

593. See Huebner, *supra* note 587.

594. See *id.*

Reince Priebus, to privately suggest that he leave the race.⁵⁹⁵ Although the comments in which Trump “bragged in vulgar terms about kissing, groping and trying to have sex with women” dated back to a 2005 filming of the show *Access Hollywood*, the video only became public on October 7, 2016, a month before the election.⁵⁹⁶

3. Threats and Violence Against Candidates

Presidential candidates have faced threats to their lives. In 1968, Democratic primary candidate Robert F. Kennedy was shot and killed on the night that he won the California primary.⁵⁹⁷ Many speculated that he would have been the Democratic nominee had he lived.⁵⁹⁸ Only four years later, during the 1972 campaign, George Wallace, another Democratic primary candidate, was shot.⁵⁹⁹ Wallace survived the assassination attempt, but it left him paralyzed and effectively ended his campaign.⁶⁰⁰

During the 1980 presidential campaign, the man who would eventually shoot President Reagan in early 1981 was “stalking” President Jimmy Carter, the Democratic nominee. John Hinckley Jr. came within feet of President Carter at a campaign event on October 2, 1980.⁶⁰¹ He was arrested a week later, with several guns, at an airport in Nashville, Tennessee, where Carter was holding a rally.⁶⁰²

B. Current Party Rules and Their Shortcomings

The Republican and Democratic Parties’ respective rules for filling candidate vacancies are inadequate.

595. Alexander Burns et al., *Donald Trump Apology Caps Day of Outrage over Lewd Tape*, N.Y. TIMES (Oct. 7, 2016), <https://www.nytimes.com/2016/10/08/us/politics/donald-trump-women.html> [https://perma.cc/KNS7-3J59]; Glenn Thrush & Maggie Haberman, *Republicans Look to Reince Priebus, Trump’s Chief of Staff, to Bring Stability*, N.Y. TIMES (Jan. 17, 2017), <https://www.nytimes.com/2017/01/17/us/politics/reince-priebus-chief-of-staff.html> [https://perma.cc/2TNB-AYTX] (reporting Priebus’s suggestion that Trump consider dropping out of the race). Two Republican Senators and Republican former Secretary of State Condoleezza Rice also called on Trump to drop out. *Growing Number of Republicans Rebuke Trump*, CBS NEWS (Oct. 7, 2016, 10:25 PM), <https://www.cbsnews.com/news/republicans-rebuke-trump-after-access-hollywood-tape-released/> [https://perma.cc/2PPR-8HZ3].

596. See David A. Fahrenthold, *Trump Recorded Having Extremely Lewd Conversation About Women in 2005*, WASH. POST (Oct. 8, 2016), https://www.washingtonpost.com/3b9ce776-8cb4-11e6-bf8a-3d26847eed4_story.html [https://perma.cc/QF9X-EFY9].

597. RONALD L. FEINMAN, ASSASSINATIONS, THREATS, AND THE AMERICAN PRESIDENCY: FROM ANDREW JACKSON TO BARACK OBAMA 112–13 (2015).

598. *Id.* at 112.

599. *Id.* at 127. Wallace’s would-be assassin also stalked and considered targeting President Richard Nixon, the 1972 Republican candidate. *Id.* at 125.

600. *Id.* at 129.

601. See Jeremy P. Kelley, *John Hinckley Stalked Carter in Dayton Before Shooting Reagan*, DAYTON DAILY NEWS (July 27, 2016, 1:55 PM), <http://www.daytondailynews.com/RCLJMW6RyC74XnbfX8MOpL/> [https://perma.cc/33LP-YHDS].

602. See *United States v. Hinckley*, 200 F. Supp. 3d 1, 3 (D.D.C. 2016).

1. Republican Party Rules

The Republican Party's procedures for filling vacancies are found in the Rules of the Republican National Committee. Rule 9 provides two options for "fill[ing] any and all vacancies which may occur by reason of death, declination, or otherwise of the Republican candidate" for the President or Vice President.⁶⁰³

The first option allows the RNC to choose the replacement nominee. The RNC comprises approximately 150 voting members with representatives from Republican parties in every state. If they were choosing a replacement nominee, RNC members would vote as part of their state delegations with each state casting the same number of votes as it would cast at the national convention.⁶⁰⁴ If the RNC members from a state could not agree on how to cast their votes, their votes would be divided equally among present RNC members or those voting by proxy.⁶⁰⁵ A replacement candidate needs a majority of votes for approval.⁶⁰⁶

The second option for filling vacancies provides that the RNC can reconvene the national convention to select a new candidate.⁶⁰⁷ Rule 9 does not specify any procedures for a reconvened national convention to follow.

2. Democratic Party Rules

The bylaws of the Democratic Party give the Democratic National Committee the "responsibility" of "filling vacancies in the nominations for the office of President and Vice President."⁶⁰⁸ A special meeting for this purpose is "held on the call of the [DNC] Chairperson."⁶⁰⁹ The Bylaws require a majority of the DNC membership to be present in person or by proxy to select a replacement candidate.⁶¹⁰ Replacement candidates are selected by majority vote.⁶¹¹ "[T]he DNC is composed of the chair and vice-chairs of each state Democratic Party Committee and over 200 members elected by Democrats in all 50 states and the territories."⁶¹²

603. See REPUBLICAN NAT'L COMM., RULES OF THE REPUBLICAN PARTY r. 9(a) (2016) [hereinafter RULES OF THE REPUBLICAN PARTY], <https://prod-cdn-static.gop.com/docs/2016-Republican-Rules-FINAL.pdf> [<https://perma.cc/3GN5-GKMU>].

604. *Id.* r. 9(b).

605. *Id.* r. 9(c).

606. *Id.* r. 9(d).

607. *Id.* r. 9(a).

608. DEMOCRATIC NAT'L COMM., *Bylaws*, in THE CHARTER AND THE BYLAWS OF THE DEMOCRATIC PARTY OF THE UNITED STATES art. 3, § 1(c) (2015), http://s3.amazonaws.com/uploads.democrats.org/Downloads/DNC_Charter__Bylaws_9.17.15.pdf [<https://perma.cc/U8S6-9LCP>].

609. *Id.* art. 2, § 7(c).

610. *Id.* art. 3, § 5.

611. *Id.* art. 2, § 8(d) ("Except as otherwise provided in the Charter or in these Bylaws, all questions before the Democratic National Committee shall be determined by majority vote of those members present and voting in person or by proxy.").

612. *The Democratic National Committee*, DEMOCRATS, <https://www.democrats.org/organization/the-democratic-national-committee> [<https://perma.cc/SY9D-VHJ6>] (last visited Nov. 19, 2017).

The 2016 Call for the Democratic National Convention appears to require the DNC Chairperson to consult elected officials in the Party before the DNC selects a replacement nominee. In the event of “death, resignation, and disability” of a presidential or vice presidential nominee, the Call requires the Chairperson to “confer with the Democratic leadership of the United States Congress and the Democratic Governors Association” and then “report to the Democratic National Committee.”⁶¹³

3. Shortcomings of the Rules

The DNC and RNC rules permitting the national committee to select a replacement candidate risk wasting time and heightening intraparty tensions. The RNC’s alternative procedure of recalling the conventions suffers these drawbacks while also posing significant logistical challenges.

Absent broad consensus on the replacement candidate, the committee process could be excessively time consuming. Potential replacement candidates might launch minicampaigns, and committee members would likely demand time to consider their options. Forging a consensus among a committee of over 150 members could also take time. With every lost day, the major disadvantages facing a party that lost its nominee in the final weeks of a campaign would only be made worse. The Clinic’s study of the length of time between party conventions and Election Day since 1980 revealed that the election was, on average, ninety days after the Democratic convention and eighty-three days after the Republican convention.

The committee process could also expose rifts among the party’s factions. Sometimes hard feelings from hotly contested primaries remain well into the general election season, a phenomenon apparent in both parties during the 2016 campaign.⁶¹⁴ When Eisenhower’s 1952 campaign grappled with Nixon’s scandal, Herbert Brownell feared that recalling the convention to replace Nixon would reignite tension with Eisenhower’s more conservative primary opponent.⁶¹⁵ Reawakening intraparty tensions in the process of choosing a replacement nominee, especially at a late stage in the campaign, could undermine the replacement candidate.

The RNC option of reconvening the convention to select a replacement nominee could provide a high-profile platform for the replacement candidate’s introduction to the public and could even result in something of

613. DEMOCRATIC NAT’L COMM., *Call for the 2016 Democratic National Convention*, in DELEGATE SELECTION MATERIALS art. VIII(G) (2014) [hereinafter *Call for the 2016 Democratic National Convention*], http://www.demrulz.org/wp-content/files/12.15.14_Delegate_Selection_Documents_Mailing_-_Rules_Call_Regs_Model_Plan_Checklist_12.15.14.pdf [https://perma.cc/NVX9-82QB].

614. See Gabrielle Debenedetti, *Democrats Sweat Clinton vs. Sanders Rift*, POLITICO (Jan. 16, 2017, 6:52 AM), <http://www.politico.com/story/2017/01/democrats-clinton-sanders-dnc-233648> [https://perma.cc/L8EU-F3BS]; Peter Schroeder, *No Trump Endorsement from Cruz: ‘Vote Your Conscience,’* HILL (July 20, 2016, 9:56 PM), <http://thehill.com/blogs/ballot-box/presidential-races/288607-no-trump-endorsement-from-cruz-who-tells-gop-vote-your> [https://perma.cc/NU2W-MGCP].

615. See BROWNELL WITH BURKE, *supra* note 588, at 124–25.

a “convention bump” in popularity. However, the party almost certainly could not organize an event of the magnitude of regular conventions.

Reconvening the convention presents several challenges. First, the logistics of holding a convention on short notice may be prohibitive. The party could struggle to find a large enough venue to accommodate the thousands of delegates,⁶¹⁶ and many delegates may not be able to attend. The party may have trouble funding a second convention, as the party only budgets for one convention.⁶¹⁷ Second, the convention would have to create procedures for selecting a replacement nominee. Under normal circumstances, almost all convention delegates are bound to vote for candidates based on the outcomes of their states’ primaries.⁶¹⁸ It is unclear how a special convention to name a replacement candidate would implicate these rules.

C. Recommended Procedures

This Part discusses possible replacement procedures before arriving at a recommendation. These proposals do not address vice presidential nominee vacancies, which raise different considerations than presidential nominee vacancies.⁶¹⁹

1. Designated Replacement Candidate

The parties could designate officials to automatically succeed to the nomination in case of a vacancy. Such a procedure would not require any additional proceedings, such as a committee meeting or reconvened convention. It would save time and allow the replacement candidate to quickly begin campaigning in earnest. However, this approach is not without at least one drawback. A rule for having a predetermined successor could preclude a superior candidate from being the nominee, which would disadvantage the party.

There are two logical choices for automatic replacement: the vice presidential nominee and the runner-up primary candidate.

a. Vice Presidential Nominee as Designated Replacement

The vice presidential nominee is, in a way, the most natural replacement, given the Vice President’s constitutionally designated role as successor to the

616. There were 2472 delegates to the 2016 Republican National Convention. *Republican National Convention Roll Call*, CNN, <http://www.cnn.com/interactive/2016/politics/republican-convention-delegate-count/> [<https://perma.cc/93Z4-GP4X>] (last visited Nov. 19, 2017).

617. See, e.g., Emily Shah, *How Much Will the Democratic National Convention Cost?*, FISCAL TIMES (July 27, 2016), <http://www.thefiscaltimes.com/2016/07/27/How-Much-Will-Democratic-National-Convention-Cost> [<https://perma.cc/R7NR-MF6R>].

618. RULES OF THE REPUBLICAN PARTY, *supra* note 603, r. 16(a)(2).

619. This report assumes that the presidential nominee typically has nearly unfettered discretion in choosing the vice presidential nominee, whereas choosing a presidential candidate is a decision for the party.

presidency.⁶²⁰ Vice Presidents are “understudies” whose position affords them the ability to understand the issues they would face if required to assume the presidency.⁶²¹ Vice Presidents also typically share many of their Presidents’ views, which would prevent any major policy changes if a Vice President succeeded to the presidency.

Vice presidential candidates could fill a similar role. Upon selection, they typically educate themselves on the presidential candidate’s positions and campaign on them. The candidates’ similar ideological outlooks would help the campaign retain its supporters in the event of a vacancy. Additionally, the Vice President’s succession responsibilities tend to encourage presidential candidates to choose running mates based at least partially on their suitability to assume the Oval Office.⁶²² Furthermore, vice presidential candidates normally undergo rigorous vetting before selection.⁶²³

But the vice presidential nominee may not always be the best choice to assume the top of the ticket. In some cases, the vice presidential nominee may not have experience campaigning on the national level, which could be detrimental to the campaign. This potential shortcoming could also make it difficult for the successor candidate to overcome a lack of public exposure relative to the opposing presidential nominee.⁶²⁴

Another drawback to making the vice presidential nominee the automatic successor is that prospective vice presidential nominees’ “competency to assume the presidency” is not always the primary criterion for selection.⁶²⁵ Indeed, some presidential nominees do not choose vice presidential candidates “to succeed them” but “to help them succeed.”⁶²⁶ For example, Republican nominee John McCain’s selection of Sarah Palin in 2008 sought to “energize” the conservative base,⁶²⁷ but the McCain campaign chose Palin without probing the depth of her knowledge on domestic and foreign policy.⁶²⁸ Palin’s lack of policy knowledge became apparent in the weeks

620. U.S. CONST. art. II, § 1, cl. 6; *id.* amend. XXV.

621. See GOLDSTEIN, *supra* note 106, at 248–49.

622. Telephone Interview with Michael S. Dukakis, Distinguished Professor of Political Sci., Ne. Univ. (Apr. 20, 2017).

623. *Id.* (explaining his process for selecting his running mate).

624. This lack of public exposure and input has been a major concern over the years and has generated many proposals designed to improve upon the way the United States selects its vice presidential candidates. See DICLERICO, *supra* note 585, at 465. One proposal “calls for having candidates run for the vice presidency in the primaries and caucuses, just as presidential candidates do now.” *Id.* A second plan would be to “automatically award the vice presidency to the runner-up in the presidential contest, thereby increasing the likelihood that the Vice President would be someone of reasonably high quality.” *Id.*

625. *Id.*

626. *Id.*

627. See *id.*; Michael Cooper & Elisabeth Bumiller, *McCain Chooses Palin as Running Mate*, N.Y. TIMES (Aug. 29, 2008), <http://www.nytimes.com/2008/08/30/us/politics/30veep.html> [<https://perma.cc/PML7-C638>].

628. See DICLERICO, *supra* note 585, at 464.

following her selection,⁶²⁹ leading a majority of Americans to conclude that Palin was not qualified to serve as President.⁶³⁰

b. Primary Runner-Up as Designated Replacement

The primary candidate who received the second highest number of delegate votes at the party's convention is another possible designated successor. A primary candidate is guaranteed to have experience campaigning at the national level and the ambition to run for President, unlike some vice presidential nominees. The runner-up will have withstood the physical, mental, and managerial challenges of national campaigning, which increases the likelihood that he or she would be an effective presidential candidate. Additionally, primary candidates are typically well known to the public and have undergone public scrutiny over the course of months, making it more likely that they can withstand the scrutiny placed on presidential candidates.

Still, one may argue there are good reasons that the runner-up candidate did not win the nomination and that automatically giving that candidate the presidential nomination would go against the will of primary voters and the party. Furthermore, the runner-up's policy positions may be substantially different from the original nominee's positions, which could prevent the runner-up candidate from winning the support of many of the party's voters.

2. Designated Replacement with Override Provision

If the parties designate successors to the nomination, the parties might include a "safety valve" provision that allows them to override the designees' succession in extraordinary circumstances. Such a rule would presume the succession of the vice presidential nominee, primary runner-up, or someone else but would allow the national committee to prevent automatic succession with a two-thirds vote. This approach would likely retain the main benefits of the designated successor rule, particularly the efficiency of the process and the minimization of intraparty division, while providing for scenarios where the designated successor was unwilling or unable to become the nominee or where there was an obviously superior replacement candidate. The two-thirds, or supermajority, vote requirement would ensure that there was good reason to override succession of the designated candidate.

However, a safety valve provision could encourage division within the party, whose members might collude or campaign for a replacement other than the designated replacement. Such efforts could create actual or perceived disunity late in a presidential campaign—a moment when it is important for a party to be united behind a nominee.

629. *See id.*

630. *See id.*

3. Special Party Committee to Select a Replacement

Instead of designating a replacement candidate, the parties could provide for the creation of a special committee to recommend replacement candidates to the party committee. A “Vacancy Committee” comprising predetermined members could convene immediately when a vacancy occurs. The committee could have seven members from different regions of the country. They might include party officials, legal advisors, campaign managers, communications experts, and specialized consultants in areas of social media and technology to aid in proper vetting.⁶³¹

The Vacancy Committee would only have the power to submit a report to the party recommending between two and four individuals for the nomination. The party committee then would have full discretion in choosing the nominee. This purely advisory role is more appropriate than allowing the committee to unilaterally choose the nominee, which would vest an enormously consequential decision in a small group and mark a substantial change from the current party rules.

Using a committee to aid the selection of a replacement candidate would have two primary benefits. First, it might help instill public confidence in the new nominee. Although members of the public would not have any direct input on the selection, as they do in the primary process, they would at least know that a transparent and rational process was followed to arrive at the new nominee. Second, the committee would help narrow the field of potential replacements. Without a way to limit the choices, the party committees’ selection processes could become prolonged and unwieldy.

The committee approach is not without its drawbacks. First, choosing committee members who adequately consider the parties’ interests and represent its constituencies would be challenging. And if the committee did not have these characteristics, it would lose some or all of its ability to choose an effective nominee in whom the public and party had confidence. Second, allowing the committee to limit the choice of possible nominees would inhibit the party’s and public’s participation in the process, which might undermine engagement with and support for the replacement nominee’s campaign. Finally, if a vacancy occurred late in a campaign, the Vacancy Committee approach could be unreasonably time consuming and place the party at a disadvantage at a moment when there is likely little time to spare.

4. Recommended Rule: Combined Timeline Approach

The Clinic recommends that the parties take an approach that combines aspects of the above options. The recommended rule would provide for

631. See BIPARTISAN POLICY CTR., SELECTING A VICE PRESIDENT: ADVICE FOR PRESIDENTIAL CANDIDATES 11 (2016), <https://cdn.bipartisanpolicy.org/wp-content/uploads/2016/04/BPC-VP-Selection-Process.pdf> [<https://perma.cc/L9NS-G53M>].

different replacement procedures for two periods of time following the convention.

If the vacancy occurs between—

- (a) the convention and September 15, a vacancy committee shall select two to four individuals for recommendation to the national committee, which will then have full discretion in choosing the replacement nominee.
- (b) September 16 and Election Day, the vice presidential nominee shall become the presidential nominee unless two-thirds of the national committee vote against this presumption.

This approach is designed to respond to time and efficiency considerations while maximizing the parties' discretion to the greatest practical extent. As discussed, the short period between the convention and the election places significant limitations on the deliberative process available for choosing replacement nominees. But the recommended approach recognizes that there is a greater opportunity for a more considered process in the time period immediately after the convention.

In the first period (convention to September 15), there is still sufficient time for the Vacancy Committee to carefully deliberate on the party's best replacement options and ultimately to recommend two to four candidates to the national committee. If the Vacancy Committee carried out its work effectively, including by avoiding some of the drawbacks outlined above, it would help the party arrive at a nominee the public and party could confidently support.

In the second period (September 16 to Election Day), the vice presidential candidate would be the presumed successor because there would be less time for deliberation. Additionally, at this point in the campaign the vice presidential nominee is more likely to be a viable successor than in the period immediately following the convention. The vice presidential candidate will have campaigned for several weeks, gained familiarity with the public, and embraced the presidential candidate's policies.

However, the national committee would still have the ability to override the vice presidential candidate's succession to the presidential nomination by a two-thirds vote. This high barrier is intended to prevent overrides in all but the most extraordinary circumstances, such as where the vice presidential candidate has died, is disabled, or is blatantly ill-suited to be the presidential nominee. Barring these conditions, a deliberative process to choose a new nominee would likely be detrimentally time consuming and could ignite intraparty tensions at a moment when such behavior would do more harm than good. Additionally, the provision for an automatic successor is critical because it might be impossible to choose a replacement nominee in the final days of a campaign, as was the case with the vacancy caused by James Sherman's death in 1912.⁶³²

632. *See supra* Part VII.A.1.

D. Removal

A party may need to replace a presidential candidate in a range of circumstances. In some of those circumstances, the need for replacement is unambiguous, such as where a candidate withdraws or dies. However, other circumstances are more ambiguous, such as where a candidate becomes disabled or faces a catastrophic scandal. In these cases, a candidate may be unable or unwilling to withdraw from the ticket, putting the onus on a party to affirmatively remove the candidate before replacing him or her. But neither party has rules that clearly grant it removal authority. The Clinic recommends that the parties create explicit removal provisions, at least to cover situations where candidates become physically disabled.

1. Current Rules

The Democratic Party's rules explicitly mention the possibility of replacement when a presidential candidate is disabled,⁶³³ while the Republican Party's rules do not. But the Republican replacement rule uses broader language that likely does encompass disability scenarios. It states that the national committee or a recalled convention may replace a presidential candidate in instances of "death, declination, or *otherwise*."⁶³⁴ The "otherwise" contingency appears to be a catchall, likely covering cases of disability or anything else that could cause the national committee to deem replacement necessary.

2. Constitutional Concerns

Removing a candidate from the national ticket might implicate the First Amendment right of political association.⁶³⁵ The First Amendment protects individuals' freedom to join political parties and support their preferred candidates⁶³⁶ while protecting political parties' ability to manage their affairs, including determining who can run under their mantles.⁶³⁷ These protections may come into conflict if a political party attempted to remove a candidate from its line on the general-election ballot.

A court has never addressed whether a political party can remove a presidential nominee from general-election ballots. But a state party's ability to block a candidate from its primary ballot has been upheld.⁶³⁸ When the Georgia Republican Party did not allow David Duke, a former Ku Klux Klan leader, to run as a Republican in the 1992 presidential primary, Duke and

633. See *Call for the 2016 Democratic National Convention*, *supra* note 613, art. VIII(G).

634. RULES OF THE REPUBLICAN PARTY, *supra* note 603, r. 9(a) (emphasis added).

635. See U.S. CONST. amend. I.

636. See *Buckley v. Valeo*, 424 U.S. 1, 22 (1976) (stating that the right of political association allows individuals to make political donations and join political parties, which "serves to affiliate a person with a candidate . . . [and] it enables like-minded persons to pool their resources in furtherance of common political goals").

637. See *Duke v. Massey*, 87 F.3d 1226, 1234–35 (11th Cir. 1996).

638. See *id.*

voters who wanted to support him sued both the party committee that made the decision and the Georgia Secretary of State who effectuated it.⁶³⁹ Duke and his supporters alleged violations of their First and Fourteenth Amendment rights.⁶⁴⁰

The Eleventh Circuit rejected those claims in *Duke v. Massey*.⁶⁴¹ It held that Duke had no “right to associate with an ‘unwilling partner’” and that his supporters did not have a “right to associate with [Duke] as a Republican Party presidential candidate.”⁶⁴² “Duke’s supporters were not foreclosed from supporting him as an independent candidate or as a third-party candidate in the general election.”⁶⁴³ The court analyzed the alleged violations with strict scrutiny because, it ruled, barring Duke constituted state action.⁶⁴⁴ Nevertheless, the court held that the government has a “compelling interest in protecting political parties’ right to define their membership.”⁶⁴⁵ That right, the court stated, flowed from the party’s “freedom of association and an attendant right to identify those who constitute the party based on political beliefs.”⁶⁴⁶

The removal of a presidential nominee would occur under fairly different circumstances than those in *Duke*. Most significantly, Duke was never on the ballot, whereas a candidate subject to removal necessarily will be on the general election ballot and would have been on the primary ballot. Many primary voters would have cast their ballots for the candidate. Those voters might argue that a removal violated their rights because, unlike in *Duke*, they would not have an option to adjust their vote. The prospective Duke voters could have written him in, as the court observed, or they could have voted for another candidate. Primary voters in a removal scenario would have no similar recourse. The candidate’s options would also be more limited because it would likely be too late to run on another party line. This could provide a basis for the candidate to argue that his or her rights were violated, although the candidate could mount a write-in campaign.

Duke makes clear that a party can control access to its ballot line to ensure that candidates who appear on it represent the party’s beliefs. There are circumstances in which a party might seek to remove a candidate for that purpose, such as where a scandal raises questions about the candidate’s personal values. However, in the more likely removal scenario, where a candidate becomes disabled, the candidate—if conscious and determined to stay on the ballot—might challenge his or her removal as discrimination against a disabled person and thus a violation of the Equal Protection Clause.⁶⁴⁷ A court might treat such a claim differently than Duke’s suit

639. *Id.* at 1228–30.

640. *Id.* at 1230.

641. 87 F.3d 1226 (11th Cir. 1996).

642. *Id.* at 1234.

643. *Id.*

644. *Id.* at 1231.

645. *Id.* at 1234.

646. *Id.*

647. *See, e.g.,* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 447–50 (1985).

because the presence of a disabled candidate on the party's ticket does not bear on the party's policy stances.

Ultimately, however, parties' discretion over who appears on their ballots would probably cover most removal scenarios. As *Duke* shows, the First Amendment protections afforded to political parties grant them broad leeway to chart their political courses. And a party's presidential candidate is critical to promoting the party's positions and advancing its political fortunes. Therefore, a party would have a strong argument that it is empowered to remove a candidate who severely disadvantaged its electoral prospects or undermined its core political convictions. Furthermore, in the most likely removal scenario, where a candidate is severely disabled, there would probably never be a legal challenge, as removal would only be necessary because the candidate was not capable of withdrawing.

3. Crafting Removal Rules

The political parties should create procedures to remove presidential candidates who are medically disabled. The removal procedure should allow a majority of the national committee to effectuate a removal. The Clinic does not recommend explicit removal procedures for any other instances, such as scandals. The narrowness of this proposal reflects concerns about the undemocratic nature of candidate removal, possible constitutional challenges, and possible misuse of a removal provision.

In developing a candidate removal proposal, the Clinic looked to the Twenty-Fifth Amendment and the reasoning behind its provisions, as the Amendment addresses similar issues and its framers had to navigate similar concerns.

The Twenty-Fifth Amendment responded to the absence of constitutional procedures for declaring the existence of a presidential "inability" to serve. Similarly, the political parties do not have explicit procedures for situations where presidential candidates become unable to serve. The parties' current replacement rules might be read to infer the power of the national committees to remove candidates, but explicit procedures are preferable. Removing a President or presidential candidate is a profoundly consequential action. In most circumstances, the decision-makers will, appropriately, be hesitant to act. But the lack of clear removal procedures could deter action even when it is required. Indeed, the absence of explicit constitutional procedures to declare presidential incapacities created confusion and led to clearly disabled Presidents remaining in power.⁶⁴⁸

When the Twenty-Fifth Amendment's framers designed procedures for the President's temporary removal, they grappled with an issue that also exists with presidential candidate removal rules: how far those rules should go in defining the situations in which they should be used. The Twenty-Fifth

648. See FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 8–10, 14–16.

Amendment's text simply states that its provisions should be used when the President is "unable to discharge the powers and duties of his office."⁶⁴⁹

The Amendment's framers deliberately did not offer more detail because they believed that "inability" could manifest itself in different ways and that a strict definition could impede removal during an unpredictable crisis.⁶⁵⁰ Of course the framers did envision limitations; Section 4's involuntary removal provision was intended to be narrowly tailored to solving crises involving severe medical or psychological ailments.⁶⁵¹ But the term might take on a fairly expansive meaning in Section 3, the voluntary declaration provision. For example, President Nixon might have been able to invoke the Amendment to temporarily step aside during the Watergate scandal.⁶⁵²

The parties should probably reserve their removal rules for disabilities similar to those that Section 4 is intended to address. The broad meaning of inability in Section 3 results from the President's discretion to determine whether an inability exists.⁶⁵³ A presidential candidate would not have similar discretion. Additionally, determining the existence of more borderline disabilities, such as scandals, might be contentious and require a fact-intensive investigation. Even though Section 4 does not envision liberal usage, it still incorporates the possibility of congressional involvement to review inability determinations. There likely is not sufficient time to engage in such a process during a campaign. And if there were time for an investigation, it still might not prevent intense and divisive disagreement within the party on the issue. Accordingly, candidate removal procedures should be designed only for use in cases of physical or mental incapacity.

CONCLUSION

Fifty years after the Twenty-Fifth Amendment's ratification, the country must continue to build on the Amendment's legacy by taking further steps to plan for presidential succession. The Clinic's recommendations provide ways to address some of the most pressing remaining issues. It took a tragedy to jolt lawmakers into crafting and implementing the Twenty-Fifth Amendment. Today's policy-makers should not wait for a similar impetus.

649. U.S. CONST. amend. XXV, §§ 3–4.

650. See FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 111; *supra* Part I.B.

651. See Feerick, *supra* note 175, at 925–26.

652. FEERICK, TWENTY-FIFTH AMENDMENT, *supra* note 16, at 161.

653. See *supra* Part I.B.1.

APPENDIX A

U.S. CONSTITUTION
ARTICLE II, SECTION I, CLAUSE 6

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.⁶⁵⁴

654. U.S. CONST. art. II, § 1, cl. 6.

APPENDIX B

U.S. CONSTITUTION
TWENTY-FIFTH AMENDMENT

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

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 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.⁶⁵⁵

655. U.S. CONST. amend. XXV.

APPENDIX C

PRESIDENTIAL SUCCESSION ACT
3 U.S.C. § 19 (2012)

§ 19. Vacancy in offices of both President and Vice President; officers eligible to act

(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 that—

(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, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health and Human Services, Secretary of Housing and Urban Development, Secretary of Transportation, Secretary of Energy, Secretary of Education, Secretary of Veterans Affairs, Secretary of Homeland Security.

(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.

(e) 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 the 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.⁶⁵⁶

656. 18 U.S.C. § 19 (2012).