

# THE TWENTY-FIFTH AMENDMENT: AN EXPLANATION AND DEFENSE

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*In this article, Dean Feerick reviews the history of presidential succession before the Twenty-fifth Amendment's ratification, the debate and discussion leading to the amendment's adoption, and current criticisms of the amendment from the medical and political community. In particular, Feerick addresses current suggestions for the creation of an independent medical panel to determine presidential inability. He argues that such a panel would be contrary to both the principle of separation of powers and the philosophy of the Twenty-fifth Amendment that those closest to the President, and those accountable to the public, should be entrusted with the power to declare a President disabled. In sum, Feerick rejects arguments in favor of an additional constitutional amendment concerning presidential succession and concludes that the Twenty-fifth Amendment, as implemented today, remains the best possible scheme for the swift and efficient transition of presidential and vice presidential authority.*

The more we recognize the prospect of disability and understand the objectives of the 25th Amendment, the better prepared the nation will be for tragedy.<sup>1</sup>

Birch Bayh

## INTRODUCTION

The absence of procedures for dealing with cases of presidential inability and vice presidential vacancy had proven to be a great deficiency in our constitutional system of government long before the ratification of the Twenty-fifth Amendment on February 10, 1967.<sup>2</sup> Since its adoption, the amendment has been implicated at least five different times<sup>3</sup> and has

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1. Birch Bayh, *The White House Safety Net*, N.Y. TIMES, Apr. 8, 1995, at A23. Former Senator Bayh was one of the principal drafters of the Twenty-fifth Amendment.

2. JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* 237 (2d ed. 1992) [hereinafter FEERICK, TWENTY-FIFTH].

3. *Id.* at xix. The Twenty-fifth Amendment itself provides as follows:

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,

proven its utility in providing for a quick and efficient transfer of presidential and vice presidential power.<sup>4</sup>

Recently, however, the Twenty-fifth Amendment has come under attack.<sup>5</sup> Specifically, some members of the medical community have criticized the amendment for not placing enough emphasis on the role of doctors in determining presidential inability.<sup>6</sup> Some suggest that Congress has not given adequate consideration to the question of when the amendment should be invoked,<sup>7</sup> and propose the formation of a committee to

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the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

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

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

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

U.S. CONST. amend. XXV.

4. FEERICK, TWENTY-FIFTH, *supra* note 2, at xxvi.

5. See generally Pamela Warrick, *If the President Can't Lead Politics: Reagan, Wilson and Others Were Incapacitated In Office. A Physician/Author Says Steps Must Be Taken To Protect The Country*, L.A. TIMES, May 27, 1992, at E1 (giving historical examples of presidential inability and the shortcomings of the Twenty-fifth Amendment according to Herbert L. Abrams); Henry B. Gonzales, *The Relinquishment of Co-Equality by Congress*, 29 HARV. J. ON LEGIS. 331, 349-55 (1992) (detailing possible problems with the current presidential succession scheme).

6. See, e.g., Tom Saladino, *Presidential Inability Should Be Decided By Doctors, Panel Says*, HOUS. CHRON., Jan. 29, 1995, at 4; John Calvin Batchelor, *If Alzheimer's Struck the Oval Office . . . What Do We Do When The President's Brain Fails?*, NEWSDAY, Nov. 20, 1994, at 54.

7. Herbert L. Abrams, *A Question of Succession: When Is A President Disabled?*, SAN DIEGO UNION TRIB., Jan. 6, 1995, at B7.

determine medical guidelines.<sup>8</sup> These proposals fail to take into account the full scope of the amendment and the history which gave rise to each of its provisions.

This article reviews the history of presidential succession prior to ratification of the Twenty-fifth Amendment, as well as the debate and discussion which led to the amendment's adoption. The article also examines current criticisms of the amendment and concludes that the amendment provides the best possible scheme for the swift and efficient transition of presidential and vice presidential power and that no further constitutional change is necessary.

## I. HISTORY OF PRESIDENTIAL SUCCESSION

### A. *The Constitutional Convention and the Law of 1792*

The issue of presidential succession was first addressed at the Constitutional Convention of 1787. The delegates in attendance struggled to resolve the question of who would have executive authority if, for some reason, there were no President.<sup>9</sup> The issue was referred to a Committee of Eleven, which was commissioned to report on those parts of the Constitution that had not yet been acted upon or had been postponed.<sup>10</sup> The report of the committee was remarkable for its creation of an office of Vice President and the election of both the President and Vice President by an electoral college.<sup>11</sup> The report stated that:

[I]n case of his [the President's] removal as aforesaid, death, absence, resignation or inability to discharge the powers or duties of his office, the Vice President shall exercise those powers and duties until another President be chosen, or until the inability of the President be removed.<sup>12</sup>

Incorporating an initial proposal by Hugh Williamson of North Carolina, Edmund Randolph of Virginia suggested that the committee's succession provision be modified to read:

The legislature may declare by law what officer of the U.S.—shall act as Vice President in case of the death, resignation, or disability of the President and Vice President; and such officer shall act accordingly *until the time of electing a President shall arrive*.<sup>13</sup>

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8. *Id.* See also HERBERT L. ABRAMS, "THE PRESIDENT HAS BEEN SHOT": CONFUSION, DISABILITY, AND THE 25TH AMENDMENT IN THE AFTERMATH OF THE ATTEMPTED ASSASSINATION OF RONALD REAGAN 246-48 (1992) (detailing the assassination attempt, the President's surgery, confusion in the administration, and possible solutions to the problem of presidential disability).

9. RUTH C. SILVA, *PRESIDENTIAL SUCCESSION* 4 (1968).

10. *Id.* at 5.

11. *Id.*

12. JOHN D. FEERICK, *FROM FAILING HANDS* 45 (1965) [hereinafter FEERICK, *FAILING HANDS*].

13. FEERICK, *TWENTY-FIFTH*, *supra* note 2, at 36.

James Madison objected that the italicized words would prevent the filling of a vacancy by means of a special election of the President and suggested as an alternative the expression "until such disability be removed, or a President shall be elected."<sup>14</sup> At least one member of the Convention, John Dickinson of Delaware, immediately recognized the difficulties inherent in Madison's wording. Dickinson remarked on the proposal: "What is the extent of the term 'disability' and who is to be the judge of it?"<sup>15</sup> His observations foreshadowed the difficulties that would later prove to be so perplexing. Randolph's proposal, with Madison's amendment, was accepted by a vote of six to four and became part of Article II, Section 6, Clause 6 of the Constitution.

This succession provision, however, proved to be incomplete, and in 1792 Congress attempted to designate who, specifically, would act as President whenever there were concurrent vacancies in the offices of President and Vice President.<sup>16</sup> After much debate in both houses, Congress passed a law providing for succession beyond the Vice President by the President pro tempore of the Senate and Speaker of the House of Representatives, respectively.<sup>17</sup>

The law of 1792 was in effect when President John Tyler ascended to the presidency following the death of President William Henry Harrison on April 4, 1841. Although Tyler's succession was not contested, protests were echoed by some newspapers. Moreover, leaders of the opposition Whig Party referred to him simply as the "Acting President."<sup>18</sup> John Quincy Adams, a former President of the United States and then a member of the House of Representatives, had especially strong misgivings about Tyler's succession. On April 16, 1841, he wrote in his diary:

I paid a visit this morning to Mr. Tyler, who styles himself President of the United States, and not Vice-President, acting as President, which would be the correct style. But it is a construction in direct violation both of the grammar and context of the Constitution, which confers upon the Vice-President, on the decease of the President, not the office, but the powers and duties of the said office.<sup>19</sup>

Adams and others felt that if the Vice President assumed the "office" of the President rather than simply its powers and duties, the President would not be able to resume power in cases of a temporary inability.<sup>20</sup> Despite these objections, Tyler went on to finish Harrison's term. Thus, a precedent for the Vice President assuming the office of President in the event of a presidential vacancy became firmly established in our history. The question of what would happen in the case of presidential inability, however, was left unresolved.<sup>21</sup>

14. *Id.*

15. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 427 (Max Farrand ed., 1911).

16. FEERICK, TWENTY-FIFTH, *supra* note 2, at 37.

17. *Id.* at 38-39.

18. *Id.* at 6.

19. 10 THE MEMOIRS OF JOHN QUINCY ADAMS 463-64 (1877); FEERICK, TWENTY-FIFTH, *supra* note 2, at 6-7.

20. 10 THE MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 19, at 463-64.

B. *The Law of 1886*

Unlike the limited controversy surrounding Tyler's succession to the presidency, major confusion arose when President James A. Garfield was shot by an assassin on July 2, 1881. After the shooting, Garfield was confined to bed for the last eighty days of his life. During that time, Garfield received only a limited number of visitors. In fact, from July 2 through July 20, 1881, only Garfield's family and physicians were permitted to see him. Although occasional visits from members of the Cabinet were permitted thereafter, at no point did Vice President Chester A. Arthur confer with him. While the Cabinet tried to address the country's political matters in Garfield's absence, many important obligations of the presidency, such as the handling of foreign affairs, were neglected.<sup>22</sup>

Vice President Arthur succeeded to the presidency after Garfield's death on the evening of September 19, 1881.<sup>23</sup> His succession created a new constitutional question concerning who would be next in the line of succession if Arthur were unable to carry out the duties of the presidency.<sup>24</sup> The possibility that the country would be left without a presidential successor triggered two principal topics of debate: First, after the Vice President, who should be next in line to act as President?<sup>25</sup> Second, what was the status of a Vice President who served as President in a case of disability?<sup>26</sup> These questions led to considerable debate in Congress and in scholarly journals on how to amend and ameliorate the 1792 succession law.

The November 1881 issue of the *North American Review* contained a symposium on the issue of presidential inability, which included essays by Senator Lyman Trumbull of Illinois,<sup>27</sup> Governor Benjamin F. Butler of Massachusetts,<sup>28</sup> Judge Thomas M. Cooley of the Michigan Supreme Court,<sup>29</sup> and Professor Theodore W. Dwight of Columbia College.<sup>30</sup> Judge

21. FEERICK, TWENTY-FIFTH, *supra* note 2, at 7.

22. *Id.* at 8-9.

23. *Id.* at 9.

24. *Id.* at 40 (noting that the constitutional question arose because at that time there was neither a President pro tempore nor a Speaker to act as President if something happened to Arthur).

25. *Id.* at 41.

26. See, e.g., Lyman Trumbull, *Presidential Inability*, 133 N. AM. REV. 417, 418 (1881).

27. In identifying the problem of presidential succession, Trumbull wrote that "[t]he Constitution has provided no tribunal to determine what shall constitute inability, or the evidence of it, and it will be difficult for Congress to do so. It would be dangerous to vest the power of thus superseding [sic] the President in a petit jury, or any judicial tribunal." *Id.* at 420.

28. Butler stated that "[n]o one could doubt in such a case [where the President is in a paralyzed or catatonic state] though his official powers and duties were unexecuted by him, that he would still be President until removed by impeachment because of his physical condition." Benjamin F. Butler, *Presidential Inability*, 133 N. AM. REV. 428, 428 (1881).

29. Thomas M. Cooley, *Presidential Inability*, 133 N. AM. REV. 422 (1881).

30. Theodore W. Dwight, *Presidential Inability*, 133 N. AM. REV. 436 (1881).

Cooley succinctly summarized his position, and echoed the thoughts of Trumbull and Butler, when he wrote that a case of presidential inability would make the Vice President "acting President de facto."<sup>31</sup> Conversely, Professor Dwight felt that "in case of the disability of the President, the Vice President becomes President with all the functions of the office."<sup>32</sup>

At the same time, debate on the issue of presidential succession began in Congress. Many members of Congress felt that the 1792 presidential succession law violated the principle of separation of powers, since the President pro tempore and the Speaker, if called upon to act as President, would continue to occupy their congressional office. Consequently, most critics favored a Cabinet line of succession, believing that there was no doubt about a Cabinet member's status under the Constitution, and that such a line would produce continuity of administration and policy.<sup>33</sup> On December 6, 1881, Vice President Arthur sent a message to Congress in which he inquired:

If the [President's] inability proves to be temporary in its nature, and during its continuance the Vice President lawfully exercises the functions of the Executive, by what tenure does he hold office? Does he continue as President for the remainder of the four years' term? Or would the elected President, if his inability should cease in the interval, be empowered to resume his office? And if, having such lawful authority, he should exercise it, would the Vice President be thereupon empowered to resume his powers and duties as such?<sup>34</sup>

The necessity of finding clear and concise answers to these questions spurred Congress into action. On January 19, 1886, Congress enacted a new presidential succession law which replaced the President pro tempore and the Speaker with a Cabinet line of succession, and inserted a provision providing that a successor became Acting President "until . . . a President shall be elected."<sup>35</sup> Although the 1886 law was criticized for leaving "the question of the constitutionality and expediency of a special election absolutely unsettled," it remained in force until 1947.<sup>36</sup>

### C. *The Wilson Inability*

In late 1919, President Woodrow Wilson became ill during a speaking tour of the United States.<sup>37</sup> His illness was attributed variously to over-

31. Cooley, *supra* note 29, at 426.

32. Dwight, *supra* note 30, at 444.

33. *Id.*

34. John D. Feerick, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, 32 *FORDHAM L. REV.* 73, 95 (1963) (quoting 8 JAMES D. RICHARDSON, *MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897*, at 65 (1898)).

35. FEERICK, *TWENTY-FIFTH*, *supra* note 2, at 42.

36. FEERICK, *FALLING HANDS*, *supra* note 12, at 146 (quoting Charles S. Hamlin, *The Presidential Succession Act of 1886*, 18 *HARV. L. REV.* 183, 191 (1905)).

37. See generally GENE SMITH, *WHEN THE CHEERING STOPPED: THE LAST YEARS OF WOODROW WILSON* (1964) (discussing in detail President Woodrow Wilson's disability). President Wilson's tour was intended to help him gain support for his League of Nations

work, an apparent attack of influenza the previous April, and his trips to Europe in December 1918 and in March 1919.<sup>38</sup> On October 2, 1919, Wilson suffered a stroke which paralyzed the left side of his body. The severity of the illness prompted the President's close friend and physician, Dr. Cary T. Grayson, to release a bulletin stating, "[t]he President is a very sick man."<sup>39</sup>

During President Wilson's illness, facts about his inability not only were kept from the media and the public, but also from Congress. Only a few members of the President's Cabinet, including Secretary of State Robert Lansing, were kept informed of the severity of his condition. The result was that while President Wilson lay ill, strictly guarded by the First Lady and Dr. Grayson, the country had no leader capable of executing the powers and duties of the office of President.<sup>40</sup>

President Wilson apparently failed to recognize the potentially dire consequences of not having a capable Chief Executive. During Wilson's illness, Secretary of State Lansing, in an effort to give direction to the government, called several meetings of the Cabinet.<sup>41</sup> Upon learning of the Cabinet meetings and Lansing's suggestion that Vice President Thomas R. Marshall assume the powers of the presidency, Wilson dismissed Lansing in February 1920.<sup>42</sup>

During the period following Lansing's dismissal, several inability proposals were introduced in Congress. On February 18, 1920, Representatives Simeon D. Fess of Ohio and John J. Rogers of Massachusetts introduced proposals to empower the Supreme Court to declare a President disabled when authorized to do so by resolution of Congress.<sup>43</sup> On the following day, Representative Martin B. Madden of Illinois introduced a bill which would authorize the Secretary of State to convene the Cabinet to inquire into a President's ability to discharge his powers and duties whenever the President had been unable to do so for six consecutive weeks.<sup>44</sup> Despite the questions raised by the Wilson inability, interest in the issue waned as he resumed his duties, and no action was ever taken on these proposals.

#### D. *The Law of 1947*

The death of President Franklin Delano Roosevelt on April 12, 1945, and the succession of Vice President Harry S. Truman, once again brought the issue of presidential succession to the forefront of American political debate. In a special message to Congress, President Truman declared:

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initiative.

38. FEERICK, TWENTY-FIFTH, *supra* note 2, at 13.

39. *Id.*

40. *Id.*

41. BIRCH BAYH, ONE HEARTBEAT AWAY: PRESIDENTIAL DISABILITY AND SUCCESSION 20 (1968).

42. FEERICK, TWENTY-FIFTH, *supra* note 2, at 14.

43. FEERICK, FAILING HANDS, *supra* note 12, at 179.

44. *Id.*

[B]y reason of the tragic death of the late President, it now lies within my power to nominate the person who would be my immediate successor in the event of my own death or inability to act.

I do not believe that in a democracy this power should rest with the Chief Executive.

Insofar as possible, the office of the President should be filled by an elective officer. There is no officer in our system of government, besides the President and Vice President, who has been elected by all the voters of the country.

The Speaker of the House of Representatives, who is elected in his own district, is also elected to be the presiding officer of the House by a vote of all the Representatives of all the people of the country. As a result, I believe that the Speaker is the official in the Federal Government, whose selection next to that of the President and Vice President, can be most accurately said to stem from the people themselves.<sup>45</sup>

Truman also recommended that whoever succeeded the Vice President should serve as President only until a new President and Vice President were chosen, either at the time of the next congressional election or by means of a special election.<sup>46</sup>

The President's suggestions were introduced in Congress in a bill sponsored by Representative Hatton W. Sumners of Texas in 1945, but Congress failed to act upon the bill before the end of the term.<sup>47</sup> Although the 1946 congressional elections placed the opposition party in power in Congress, Truman reiterated his call to change the succession law, and Senator Kenneth S. Wherry of Nebraska reintroduced the President's proposals.<sup>48</sup> During debate on the bill, objections were once again raised as to the constitutionality of having the Speaker assume the presidency in light of the separation of powers doctrine.<sup>49</sup> This constitutional question, however, was largely ignored, and the bill passed the House and Senate and was signed by the President on July 18, 1947.<sup>50</sup> The law changed the line of succession so that in the event there was neither a President nor a Vice President, the Speaker, upon his resignation from Congress, would act as President followed by the President pro tempore and then by the members of the Cabinet in the order of the creation of the various executive departments.<sup>51</sup>

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45. Harry S. Truman, Special Message to the Congress on the Succession to the Presidency, June 19, 1945, in *PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES* 129 (1961); 91 CONG. REC. 6272 (1945).

46. 91 CONG. REC. at 6272.

47. FEERICK, *TWENTY-FIFTH*, *supra* note 2, at 44-45.

48. *Id.*

49. *Id.*

50. 3 U.S.C. § 19 (1964), amended by 3 U.S.C. § 19 (1970); FEERICK, *TWENTY-FIFTH*, *supra* note 2, at 44-45.

51. FEERICK, *TWENTY-FIFTH*, *supra* note 2, at 44-45.



## II. THE ADOPTION OF THE TWENTY-FIFTH AMENDMENT

On September 24, 1955, Vice President Richard Nixon was stunned to learn that President Dwight Eisenhower had suffered a heart attack instead of the "digestive upset" which the media had reported.<sup>52</sup> Nevertheless, Eisenhower, dissatisfied with the functioning of the succession laws enacted up to that point, had taken precautions to avoid the inadequacy and secrecy of the procedures used by the Wilson administration.<sup>53</sup> Eisenhower had relied heavily on Nixon in the operation of his administration and had made clear his views on the direction of the country and the policies his administration advocated. It was no secret that Eisenhower preferred full disclosure and temperate but decisive action so that the business of government could continue should he experience any physical crisis.<sup>54</sup> As a result, for the length of Eisenhower's convalescence, Nixon attended to the President's affairs, presiding over Cabinet meetings and performing ceremonial duties. Nixon later described this unwritten agreement approach in handling a case of inability:

[The committee system] worked during the period of President Eisenhower's heart attack mainly because . . . there was no serious international crisis at that time. But had there been a serious international crisis requiring Presidential decisions, then . . . the committee system might not have worked.<sup>55</sup>

Perhaps influenced by the drama of these events, later that month the Chairman of the House Judiciary Committee, Emanuel Celler of New York, ordered the committee staff to undertake a study of presidential inability.<sup>56</sup>

In an introduction to a House Committee Report on Presidential Inability, Representative Celler wrote:

In view of the precarious condition of present world affairs and the tremendous responsibility which world leadership has placed in our hands, it ill behooves us to tempt providence once more by inaction.

The time to strike at the heart of the problem is here. Clarification must supplant procrastination.<sup>57</sup>

To this end, Celler sent a letter to many of the country's foremost scholars in history, political science, and law, requesting that they provide answers to a prepared questionnaire.<sup>58</sup> The questionnaire asked the following questions: (1) What was intended by the term "inability"?; (2) Who should initiate and make the determination of inability?; (3) Are there any constitutional prohibitions on initiating and determining inabil-

52. BAYH, *supra* note 41, at 23.

53. *Id.*

54. *Id.* at 23-24.

55. FEERICK, TWENTY-FIFTH, *supra* note 2, at 20.

56. *Id.* at 52.

57. STAFF OF THE HOUSE COMM. ON THE JUDICIARY, 84TH CONG., 2D SESS., REPORT ON PRESIDENTIAL INABILITY 1 (Comm. Print 1956) [hereinafter *1956 Comm. Print*].

58. *Id.* at 2-3.

ity?; (4) Shall dual authority, both to initiate the question and determine the question, be vested in the same body?; (5) Who raises the issue that a disability has ceased to exist?; (6) Does the Vice President succeed to the powers and duties of the office or to the office itself?; (7) In case of inability, should a presidential election be held immediately?; and (8) Is a constitutional amendment necessary?<sup>59</sup> The extremely varied responses<sup>60</sup> to these questions spurred Chairman Celler to call for hearings on the subject in 1956.<sup>61</sup>

When the hearings began, the Special Subcommittee to Study Presidential Inability of the House Judiciary Committee heard testimony from Senator Frederick Payne of Maine, Arthur Krock of the *New York Times*, Professor Arthur Sutherland of Harvard Law School, and Professor Joseph E. Kallenbach of the University of Michigan.<sup>62</sup> These authorities quickly identified the core issue: As Senator Payne asked during his testimony, "[w]hat then does it really boil down to? In general terms it is a question of determining presidential inability."<sup>63</sup> Payne suggested that Congress pass a bill that directed the Chief Justice, upon being informed by the Vice President of a suspected inability, to appoint a panel of civilian experts to evaluate the President.<sup>64</sup> Arthur Krock, however, explicitly rejected this suggestion, indicating that "[t]he objections to this are: (a) The choice of Vice President to initiate a promotion for himself. (b) The imposition on the Supreme Court of the kind of extra judicial function it has always rejected."<sup>65</sup> This proposal was also opposed by Professor Kallenbach, who stated:

There is first of all, a question of whether Congress can impose such a responsibility upon the Chief Justice<sup>66</sup> . . . Moreover, the panel of med-

59. *Id.* at 3.

60. For example, as to the question of who should determine presidential inability, Professor Everett Brown of the University of Michigan suggested that the issue be left to the Vice President, Cabinet, and presiding officers of the House and Senate. Professor Stephen K. Bailey of Princeton University suggested that the Chief Justice of the Supreme Court be empowered to determine presidential inability. Professor Charles Fairman of Harvard Law School suggested that Congress provide for an inability commission made up of Justices of the Supreme Court and some members of Congress (perhaps the majority and minority members of the judiciary committees). *Id.* at 4-20.

61. FEERICK, *TWENTY-FIFTH*, *supra* note 2, at 52-53.

62. *Presidential Inability: Hearings Before Special Subcomm. To Study Presidential Inability of the House Comm. on the Judiciary*, 84th Cong., 2d Sess. (1956) [hereinafter *1956 House Hearings*].

63. *Id.* at 14 (statement of Senator Frederick Payne).

64. *Id.* at 16.

65. *Id.* at 61 (statement of Arthur Krock).

66. It is interesting to note that these positions on the role of the Supreme Court were later confirmed by Chief Justice Earl Warren in a letter to Representative Kenneth Keating of New York in which he stated:

It has been the belief of all of us that because of the separation of powers in our Government, the nature of the judicial process, the possibility of controversy of this character coming to the Court, and the danger of disqualification which might result in lack of a quorum, it would be inadvisable for any member of the Court to serve on such a Commission.

ical experts would be entrusted with making a kind of decision which would actually lie beyond their competence. They could be trusted, of course, to discover the facts relative to the actual physical or mental condition of the President; but a judgment on whether the condition found to exist is one which prevents the President from discharging the powers and duties of his office in the manner in which the public interest requires goes beyond that. It involves a determination of the question whether his physical or mental condition is such that the public interest would be seriously affected if the exercise of presidential powers and duties were to remain in the President's hands. Furthermore, there may be other conditions than physical ill health which give rise to the question of presidential inability.<sup>67</sup>

Professor Sutherland adopted an entirely different approach. He believed that "the temporary or permanent displacement of one man by another to perform the duties of the Presidency should take into account the fact that the electors of the country have for the time being entrusted the administration to candidates of a successful political party."<sup>68</sup> Consequently, he advocated a constitutional amendment that would create a special body to determine presidential inability, consisting of the Chief Justice, the Secretaries of State and Defense, and the leaders of the President's party in the Senate and the House.<sup>69</sup> Additionally, this body would inform itself by medical and other expert opinion as the Chief Justice of the United States deemed necessary.<sup>70</sup>

Chairman Celler had also developed his own solution. He recommended the establishment of procedures under which the President could declare himself disabled, as could the Vice President, by announcement to Congress.<sup>71</sup> In effect, Celler preferred leaving the entire process to the President and Vice President, with the President empowered to declare the end of any inability.<sup>72</sup> In light of these conflicting views, it is not surprising that the House Judiciary Committee failed to reach any agreement and that, as a result, the efforts at reform came to a halt in the House.<sup>73</sup>

Soon thereafter, however, new proposals for addressing the problem emerged. Former President Truman advanced a proposal for a presidential inability commission in a *New York Times* article dated June 27, 1957.<sup>74</sup> He suggested a seven-person committee to determine presidential

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*Presidential Inability: Hearings Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 85th Cong., 2d Sess 14 (1958) [hereinafter 1958 Senate Hearings].*

67. 1956 House Hearings, *supra* note 62, at 85.

68. *Id.* at 78.

69. *Id.*

70. *Id.*

71. FEERICK, *FAILING HANDS*, *supra* note 12, at 240.

72. FEERICK, *TWENTY-FIFTH*, *supra* note 2, at 54.

73. *Id.*

74. Harry S. Truman, *Truman Proposes a Panel On a President's Disability*, N.Y. TIMES, June 27, 1956, at 1.

inability, consisting of the Vice President, the Chief Justice of the United States, the Speaker of the House, and the majority and minority leaders of both the House of Representatives and the Senate.<sup>75</sup> President Eisenhower, on the other hand, presented this solution to the public on March 3, 1958:

The President and the Vice President have agreed that the following procedures are in accord with the purposes and provisions of Article 2, Section 1, of the Constitution, dealing with Presidential inability. They believe that these procedures, which are intended to apply to themselves only, are in no sense outside or contrary to the Constitution but are consistent with its present provisions and implement its clear intent.

(1) In the event of inability the President would—if possible—so inform the Vice-President, and the Vice President would serve as Acting President, exercising the powers and duties of the office until the inability had ended.

(2) In the event of an inability which would prevent the President from so communicating with the Vice President, the Vice President, after such consultation as seems to him appropriate under the circumstances, would decide upon the devolution of the powers and duties of the Office and would serve as Acting President until the inability had ended.

(3) The President, in either event, would determine when the inability had ended and at that time would resume the full exercise of the powers and duties of the Office.<sup>76</sup>

President Eisenhower's informal agreement with Vice President Nixon represented the first significant attempt by a President and Vice President at meeting the inability problem.<sup>77</sup>

The next step taken toward a solution to the inability issue came in early 1958 when hearings were commenced by the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee, chaired by Estes Kefauver.<sup>78</sup> The Committee received testimony from a wide variety of individuals, including Justice Michael A. Mussmanno of the Supreme Court of Pennsylvania, Charles Rhyne, then President of the American

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75. *Id.*

76. FEERICK, TWENTY-FIFTH, *supra* note 2, at 55-56.

77. This agreement was later adopted by President John F. Kennedy and Vice President Lyndon B. Johnson in August 1961, by President Lyndon B. Johnson and Speaker John W. McCormack in December 1963, and by President Lyndon B. Johnson and Vice-President Hubert H. Humphrey in January 1965. Nan Robertson, *McCormack Asked to Join in Key Meetings on Policy*, N.Y. TIMES, Dec. 4, 1963, at 1. President Johnson's last agreement was originally an oral one, which was later put into writing. *Transcript of Johnson's Assessment in TV Interview of Its First 100 Days in Office*, N.Y. TIMES, Mar. 16, 1964, at 18. The oral nature of this agreement with Humphrey received some criticism. Charles Mohr, *Johnson Reaches Disability Accord*, N.Y. TIMES, Jan. 28, 1965, at 13. Arthur Krock, *The Johnson-Humphrey Agreement Mystery*, N.Y. TIMES, Jan. 28, 1965, at 28.

78. FEERICK, TWENTY-FIFTH, *supra* note 2, at 54.

Bar Association, Attorney General William P. Rogers, and Martin Taylor, chairman of a New York State Bar Association committee.<sup>79</sup>

Once again, owing to the complexity of the question, the testimony on proposed reform was varied. For example, Justice Mussmanno rejected the formation of a commission representing the executive, legislative, and judicial branches of government, as one proposal suggested, "because two-thirds of the Commission would be made up of persons not elected by the people and, to that extent, the plan would deny the people an authoritative voice in the selection of their President."<sup>80</sup> Instead, Mussmanno believed that "[t]he only logical governmental body to decide Presidential inability is Congress which is responsible directly to the people."<sup>81</sup> Charles Rhyne disagreed, stating that a constitutional amendment was necessary, that the initial determination of presidential inability should remain with the executive branch, and that Congress should have the ultimate power of review in the event of a dispute over restoration of the President to his office.<sup>82</sup> Perhaps the strongest advocate for the proposition that only the Cabinet should have the constitutional authority to decide presidential inability was Attorney General Rogers, who testified as follows:

It would appear to be a violation of the doctrine of separation of powers for officials of the Congress to participate in any initial decision of Presidential inability. Especially is it the case where under a proposed plan more than a majority of the commission empowered to vote would come from the legislative branch. In effect, it would enable congressional leaders to put the President out of office, and to keep him out, by declaring that he lacks the ability to perform his duties.<sup>83</sup>

Rogers also felt that establishing complicated procedures and elaborate legal machinery would slow down the succession process and would be unnecessary except in the event of a dispute between the President and Vice President.<sup>84</sup> Consequently, he opposed any role involving the Supreme Court or an inability commission.<sup>85</sup>

Despite the testimony advising against a role for members of Congress and the Supreme Court in determining presidential inability, at the conclusion of the 1958 hearings, the committee approved a resolution similar to the proposal put forth by President Truman. Congress adjourned without acting on the proposal and, in the following year, it was favorably reported by the subcommittee. Nevertheless, again neither the parent committee nor the Senate took any action on the proposal. During the period from 1956 to 1958, Congress heard testimony and received written submissions from scores of authorities and entertained at least

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79. 1958 Senate Hearings, *supra* note 66.

80. *Id.* at 71.

81. *Id.*

82. *Id.* at 195.

83. *Id.* at 165.

84. *Id.*

85. *Id.*

twenty distinct proposals on presidential inability.<sup>86</sup>

At the outset of President John F. Kennedy's administration, Attorney General Robert Kennedy was asked to analyze the question of presidential inability. He responded to the President's inquiry in a memorandum dated August 2, 1961,<sup>87</sup> in which he emphasized that "there is no question that the Vice President acts as President in the event of the President's inability and acts in that capacity 'until the disability be removed.'"<sup>88</sup> Robert Kennedy went on to say that "there is no substantial question that it is the Vice President who determines the President's inability if the President is unable to do so."<sup>89</sup> He concluded by endorsing the agreement reached by President Eisenhower and Vice President Nixon, declaring that he was "of the opinion that the understanding between the President and the Vice President which I have approved of above is clearly constitutional and as close to spelling out a practical solution to the problem as is possible."<sup>90</sup>

With the endorsement of the Kennedy administration, the Eisenhower-Nixon approach may have remained the country's solution to the problem of presidential inability. The assassination of President Kennedy, however, produced a flurry of additional proposals dealing with the subject. These proposals were influenced by the sense at that time that, if Kennedy had lived, the country would have had to deal with the problem of presidential inability in a most tragic setting. Senate Joint Resolution 139, introduced by the new chair of the Subcommittee on Constitutional Amendments, Senator Birch Bayh of Indiana, quickly became the focus of attention.<sup>91</sup> During hearings held in early 1964, the subcommittee received testimony from forty-seven individuals, including Attorney General Herbert Brownell, Professor James MacGregor Burns of Williams College, President Walter Craig of the American Bar Association, Professor Richard Neustadt of Columbia University, and Lewis F. Powell, the

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86. These proposals ranged, for example, from those of President Truman, Hon. J.W. Fulbright, and Senator Frederick Payne of Maine, calling for the Supreme Court's involvement in the inability process, to that of Martin Taylor, Chairman of the Subcommittee on Presidential Inability of the New York State Bar, calling for Congress to create a small tribunal to decide a question of presidential inability, and to that of Attorney General Herbert Brownell, stating a preference for leaving the entire determination process in the hands of the executive branch. See, e.g., *1958 Senate Hearings*, supra note 66, at 11 (letter of President Truman); *id.* at 34 (statement of Senator Payne); *id.* at 38 (statement of Hon. J.W. Fulbright); *id.* at 85 (statement of Martin Taylor); *Presidential Inability: Hearing Before the Special Subcom. on the Study of Presidential Inability of the House Comm. on the Judiciary*, 85th Cong., 1st Sess. 4 (1957) (statement of Herbert Brownell). See generally *1956 Comm. Print*, supra note 57; *1956 House Hearings*, supra note 62 (containing additional proposals).

87. See generally 42 Op. Att'y Gen. 69 (1961-1974) (providing an official statement on the proper role of the Vice President during a period of presidential inability).

88. *Id.* at 94.

89. *Id.*

90. *Id.*

91. William F. Brown & Americo R. Cinquegrana, *The Realities of Presidential Succession: "The Emperor Has No Clones,"* 75 GEO. L.J. 1389, 1400 (1987).

President-elect of the American Bar Association and a future Supreme Court Justice.<sup>92</sup> The subcommittee testimony included a discussion of cases in which a President recognizes and is willing to declare his own inability, as well as situations involving a vacancy in the office of Vice President.<sup>93</sup> There was little serious controversy concerning how to treat these events. The debate focused on who should determine a President's inability when the President failed to do so.

A majority of the witnesses expressed their support for the position advanced by a special task force assembled by the American Bar Association, which recommended that an amendment be adopted to provide

that the inability of the President may be established by declaration in writing of the President. In the event that the President does not make known his inability, it may be established by action of the Vice President or person next in line of succession with concurrence of a majority of the Cabinet or by action of such other body as the Congress may by law provide.<sup>94</sup>

Among the supporters of this view were General Brownell,<sup>95</sup> Professor Paul Freund of Harvard Law School, Ruth Silva, a noted scholar on pres-

92. Others who also testified include: former Attorney General Francis Biddle, Professor Paul Freund of Harvard Law School, Laurens Hamilton, Sydney Hyman, Professor James Kirby of Vanderbilt University, former Vice President, and later, President Richard Nixon, Professor Clinton Rossiter of Cornell University, Professor Ruth Silva of Pennsylvania State University, and the author. *Presidential Inability and Vacancies in the Office of Vice President: Hearings Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess. 1 (1964) [hereinafter *1964 Senate Hearings*].

93. This testimony was relatively uncontroversial. For example, responding to a question from Senator Bayh regarding the need to fill a vacancy in the office of the Vice President, Professor Burns testified:

I do not feel that this is a crucial problem. To a great extent, the Vice-presidency in history has been an awkward institution, as you know, despite the steps which we have taken in recent years. I think it would be dangerous to develop this institution any further, both because it may clutter up the national establishment, and also because it again would weaken the chances of a change being adopted by the people.

*Id.* at 122.

94. *Id.* at 6, 204.

95. Interestingly, although Attorney General Brownell felt that he could secure a letter from President Eisenhower in support of the ABA proposal, this turned out not to be the case. Senator Bayh described receiving the letter in the following way:

On the problem of disability—of which he had the direct experience which would give weight to his words—he had endorsed us one hundred per cent. That would be powerful persuasion for reluctant legislators! I went on reading—and my spirits plummeted . . . [I]n the area most loaded with political controversy, the occasion of possible disagreement between President and Vice President over the former's ability to perform his task—Ike had suggested a commission to solve the problem. Not only that, but the commission he proposed [comprised of the three senior members of the Cabinet, the Speaker of the House of Representatives, the leader of the minority party of the House, the President pro tem of the Senate, the leader of the minority party in the senate, and four medical personnel recognized by the American Medical Association] was made in a more

idential succession, Richard Nixon, and Justice Powell. Although a number of other proposals were presented, including the formation of an inability commission chosen by Congress,<sup>96</sup> the continued use of the informal agreement between a President and Vice President,<sup>97</sup> and the vesting of greater power in the Vice President,<sup>98</sup> a consensus gradually began to take shape along the lines of the ABA approach. Consequently, the provisions of Senate Joint Resolution 139 were changed to reflect the recommendations of the ABA, and the proposal was passed by the Senate in September 1964.<sup>99</sup> The House, however, took no action because it was anxious not to do anything that might be interpreted as an insult of its well-liked Speaker, John McCormack, who was in the immediate line of succession.<sup>100</sup>

After Congress reconvened in January 1965 and President Lyndon Johnson reinforced the momentum for a solution by addressing the issue of presidential inability in his state of the union message,<sup>101</sup> Senator Bayh introduced as Senate Joint Resolution 1 the proposal that had passed the Senate in September 1964.<sup>102</sup> The Subcommittee on Constitutional Amendments once again approved the proposal and sent it to the full Judiciary Committee, which also gave its approval.<sup>103</sup> The resolution was debated in the Senate beginning on February 19, 1965.<sup>104</sup> Senator Everett Dirksen of Illinois argued against the specificity contained in the inability provisions of Senate Joint Resolution 1, suggesting that they be changed to read "[t]he commencement and termination of any inability shall be determined by such method as Congress may by law provide."<sup>105</sup> Senator Bayh, however, explained the necessity for specificity as follows:

We are making a general policy determination . . . as to whether we are going to open a Pandora's box to permit a blanket provision to be given to Congress to provide laws in these vital areas at some later date. There has been a general trend of thinking that if we have a loosely drawn, nonspecific constitutional amendment, the legislative bodies might be more inclined to accept it. [However, the] preponderance of the evidence—I believe we received only three letters to the contrary—was that State legislative bodies would prefer to enact the ratification resolution, that State legislatures should deal with a specific

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complicated way than any other that had been suggested to the committee!

BAYH, *supra* note 41, at 76.

96. 1964 Senate Hearings, *supra* note 92, at 115-16.

97. *Id.* at 214.

98. *Id.* at 181.

99. BAYH, *supra* note 41, at 50.

100. Brown & Cinquegrana, *supra* note 91, at 1400.

101. President Johnson later followed up on the inability issue in a letter to Congress in which he wrote: "I urge the Congress to approve them [Senate Resolution 1 and House Resolution 1] forthwith for submission to ratification by the States." BAYH, *supra* note 41, at 178.

102. In his book, Senator Bayh described this time with humor. *Id.* at 162.

103. FEERICK, TWENTY-FIFTH, *supra* note 2, at 84-95.

104. *Id.*

105. 111 CONG. REC. 3257 (1965).



proposal and not give Congress a blank check to take away the safeguards to which the Senator from North Carolina has so adequately directed our attention.<sup>106</sup>

Although Dirksen's proposed amendment failed, some suggested changes were accepted and Senate Joint Resolution 1 was unanimously adopted by a vote of seventy-two to zero.<sup>107</sup>

Concurrently, the full House Judiciary Committee, on February 9, 1965, commenced hearings on House Joint Resolution 1 (the companion to Senate Joint Resolution 1) and the more than thirty proposals dealing with presidential inability and vice presidential vacancy.<sup>108</sup> The committee heard testimony once again from General Brownell and ABA President Powell, as well as from Senator Bayh and Representative Charles M. Mathias, Jr. of Maryland.<sup>109</sup> House Joint Resolution 1 was then approved by the committee on March 24, 1965.<sup>110</sup> The proposal, however, faced criticism both in the House Rules Committee and, once approved, on the floor of the House.<sup>111</sup> Once again the issues involving who should declare a President disabled and the need for a constitutional amendment were discussed. Changes were made in the proposed amendment regarding the time period by which Congress would be required to act in the event of disagreement over a declared inability.<sup>112</sup> Finally, House Joint Resolution 1 was passed in the House by a vote of 386 to 29.<sup>113</sup>

Since the House and Senate versions of the proposed amendment differed, a conference committee was established to reconcile the differences. The committee's report passed the House with little debate by a voice vote on June 30, 1965. In the Senate, however, several members expressed reservations about the definition of inability and the individuals entrusted with the decision of presidential inability. They voiced concerns about what might occur in a hostile situation where the Vice President or members of the Cabinet attempted to use the inability provisions to remove a President.<sup>114</sup> Nevertheless, their concerns were not shared by a significant majority of the members, and the Senate approved the conference report by a vote of sixty-eight to five. The proposed amendment was then sent to the states for ratification. Within a short time, the amendment was ratified by the necessary thirty-eight state legislatures and formally proclaimed the Twenty-fifth Amendment to the

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106. BAYH, *supra* note 41, at 261.

107. FEERICK, TWENTY-FIFTH, *supra* note 2, at 95.

108. *Id.*

109. *Presidential Inability: Hearings Before the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 1 (1965); *id.* at 39 (statement of Senator Bayh); *id.* at 201 (statement of Representative Mathias); *id.* at 223 (statement of Lewis Powell); *id.* at 238 (statement of Herbert Brownell).

110. H.R. REP. No. 203, 89th Cong., 1st Sess. (1965).

111. FEERICK, TWENTY-FIFTH, *supra* note 2, at 99-104.

112. *Id.* at 103.

113. 111 CONG. REC. 7968-69 (1965).

114. See generally BAYH, *supra* note 41, at 305-14 (discussing Senate treatment of the conference report).

Constitution at a White House ceremony held on February 23, 1967.<sup>115</sup>

The Twenty-fifth Amendment confirms the practice of a Vice President assuming the office of the President in the event of the President's death, resignation or removal. The amendment also establishes a procedure for filling a vacancy in the office of the Vice President so as to reduce the possibility of resorting to the statutory line of succession. In addition, the amendment allows a President to declare his own inability and, where the President does not do so, provides a procedure for determining a case of inability, using the Vice President, members of the Cabinet, or other body as Congress may provide. Where there is a disagreement between the President and the determining body regarding inability, the amendment assigns Congress the ultimate role of resolving it.

### III. CURRENT DEBATE ON THE TWENTY-FIFTH AMENDMENT

The Twenty-fifth Amendment has come under a certain amount of criticism because it has seldom been invoked since its ratification in 1967. Nevertheless, the amendment has functioned well when it actually has been used. For example, President Richard Nixon did not hesitate to accept the resignation of Vice President Spiro Agnew, knowing that a constitutional measure was in place to provide for a new "untarnished" Vice President. In fact, the smooth transition to Vice President led former Representative Gerald Ford to state when he became Vice President:

Together we have made history here today. For the first time we have carried out the command of the 25th Amendment. In exactly 8 weeks, we have demonstrated to the world that our great republic stands solid, stands strong upon the bedrock of the Constitution.<sup>116</sup>

Similarly, when President Nixon resigned under the pressure of imminent impeachment by the House of Representatives, there was a swift and orderly transfer of presidential power to Vice President Ford, made possible because of the Twenty-fifth Amendment.<sup>117</sup> Finally, President Ford implemented the provisions of the Twenty-fifth Amendment to fill the vice presidential vacancy left by his ascension to the presidency. He nominated Governor Nelson Rockefeller of New York, who was approved by Congress as Vice President.

Despite the foregoing examples, some critics argue that the amendment has not been implemented at all relevant times.<sup>118</sup> For instance, Dr. Daniel Ruge, President Reagan's personal physician, noted that in hind-

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115. FEERICK, TWENTY-FIFTH, *supra* note 2, at 111.

116. 119 CONG. REC. 39,926 (1973).

117. Interestingly, the smoothness of the transfer was not accidental. Transition planning for a Ford presidency had begun secretly in May 1974. See FEERICK, TWENTY-FIFTH, *supra* note 2, at 139.

118. For a discussion of the health of the Presidents, see generally JOHN R. BUMGARDNER, M.D., THE HEALTH OF THE PRESIDENTS: THE 41 UNITED STATES PRESIDENTS THROUGH 1993 FROM A PHYSICIAN'S POINT OF VIEW (1994).

sight the emergency provisions of the Twenty-fifth Amendment providing for the temporary transfer of power should have been invoked following the assassination attempt by John W. Hinkley in 1981.<sup>119</sup> Others have suggested that the much-publicized fight President Reagan is now losing to Alzheimer's disease began while he was in office, thus preventing him from adequately performing his duties.<sup>120</sup> Still other critics of the amendment claim that the term "inability" is much too vague and unworkable, and they question whether a Cabinet ever would be able to declare a President disabled.<sup>121</sup> Not surprisingly, there have been calls for changes in the amendment itself and, more recently, proposals for the establishment of a medical panel to determine a President's inability.<sup>122</sup>

In responding to these suggestions and criticisms, it should be noted that the idea of an independent panel of doctors to determine a President's inability was extensively considered and discussed during the hearings which led to the adoption of the Twenty-fifth Amendment. In his remarks to the Senate Subcommittee on Presidential Inability, for example, Attorney General Rogers stated:

Some have suggested that the commission be empowered to employ physicians and require the President to submit to physical and mental examinations, and there have been different proposals for the commission and the vote of the commission and so forth. We think these plans should be rejected for a number of reasons.

First, it seems unwise to establish elaborate legal machinery for giving the President physical and mental examinations. This would give a hostile commission power to harass the President constantly, and risk danger of irresponsible demands for commission action. Not only would provision for such physical and mental examinations be an affront to a President's personal dignity but it would also degrade the presidential office itself.

Second, it seems ill advised to establish complicated procedures which would prevent immediate action in case of an emergency, because there is a need for continuity in the exercise of Executive power and leadership—especially in time of crisis. Investigations, hearings, findings, and votes of a commission could drag on for days or weeks and result in a governmental crisis, during which no one would have a clear right to exercise Presidential power.

Third, such a commission would be totally unnecessary except where there was a dispute between the President and the Vice President in the executive branch itself.<sup>123</sup>

Moreover, virtually every proposal submitted for congressional consideration expected that the body determining presidential inability would seek

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119. *Reagan Doctor Says 25th Amendment Should Have Been Used in '81*, L.A. TIMES, Feb. 21, 1989, at 21.

120. See, e.g., Batchelor, *supra* note 6, at 54.

121. FEERICK, TWENTY-FIFTH, *supra* note 2, at xxii.

122. See, e.g., ABRAMS, *supra* note 8, at 249-63.

123. *1958 Senate Hearings*, *supra* note 66, at 165.

and obtain independent medical advice.<sup>124</sup> Thus, all relevant knowledge and information would be incorporated into the process of determining inability, while the final responsibility would be with officials who were accountable to the public, either as elected officials or their appointees. Although the drafters of the amendment were acutely aware of the idea of an independent medical panel determining presidential inability, they rejected the idea in favor of an advisory role for doctors.<sup>125</sup>

The subject of a medical panel determining presidential inability was carefully revisited in a 1988 conference held at The Miller Center of Public Affairs of the University of Virginia.<sup>126</sup> The conference, co-chaired by former Attorney General Brownell and Senator Bayh, provided an opportunity to compile a body of excellent papers and statements on the subject of presidential inability.<sup>127</sup> Many of those who spoke at the conference expressed reservations concerning the formation of a panel of physicians to determine presidential inability. For example, Dr. Kenneth Crispell, Dean and Vice President for Health Affairs at the University of Virginia Medical School, stated:

During the Twenty-fifth Amendment hearings in 1963 Truman suggested the creation of a committee of seven to decide, constituted of two members from the House, two from the Senate, two from Justice, and one other person. They would decide about the President's ability, but they would be in consultation with four medical leaders. I have some objections. First of all, it is almost impossible to get seven people to agree and four doctors to agree, so there is going to be a delay. I think the question is really one of judgment and it is difficult for anyone to decide about his [the President's] judgment.<sup>128</sup>

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124. See, e.g., 1956 *Comm. Print*, *supra* note 57, at 4 (reply of Stephen K. Bailey, Princeton University) (replying to Celler's questionnaire and proposing a panel to include "at least 2 men of outstanding reputation in medicine and psychiatry"); *id.* at 5 (reply of Everett S. Brown, University of Michigan) (proposing a panel to include "proper medical experts"); 1958 *Senate Hearings*, *supra* note 66, at 37 (statement of Frederick G. Payne) (proposing that the Chief Justice appoint a panel of qualified medical experts).

125. I echoed these sentiments in my remarks to the Senate Subcommittee on Constitutional Amendments in 1964:

I would be very reluctant to see us set up a commission consisting of people who were neither appointed nor elected, simply because they may have certain medical qualifications.

Inability is far more than a medical question. It is a question that one determines one way or the other, depending on the circumstances in the country at the time, the need for a Vice-President to act as President, so that I don't know that a medical commission is by any means the answer to the question.

1964 *Senate Hearings*, *supra* note 92, at 157 (statement of John D. Feerick).

126. See generally PAPERS ON PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT BY SIX MEDICAL, LEGAL AND POLITICAL AUTHORITIES (Kenneth W. Thompson ed., 1988) [hereinafter PAPERS ON PRESIDENTIAL DISABILITY I]; PAPERS ON PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT BY SIX MEDICAL, LEGAL AND POLITICAL AUTHORITIES, VOL. II (Kenneth W. Thompson ed., 1991) [hereinafter PAPERS ON PRESIDENTIAL DISABILITY II] (discussing alternatives for the determination of presidential inability).

127. PAPERS ON PRESIDENTIAL DISABILITY II, *supra* note 126, at 60.

128. *Id.* at 61.

Similarly, Chalmers M. Roberts, a former reporter for the *Washington Post* and a draftsman of the Miller Commission (the Commission) report, defended the mechanism set up by the Twenty-fifth Amendment and suggested that the very flexibility now decried by those who would establish a permanent panel of physicians is what makes the amendment so valuable. In his testimony, Roberts said:

The general consensus at the time [of the drafting of the Amendment] was that the circumstances of the incident, when and if it happens, all dictate what the proper method will be to handle it. Sometimes the medical problem and the political relationships of the moment are such that the vice president and the Cabinet can do what the Amendment allows them to do. Sometimes Congress is going to have to intervene by setting up a special body. These are questions for which there is a framework for an answer. I really don't think you can ask for more than that.<sup>129</sup>

In light of this and other testimony,<sup>130</sup> the Commission recommended that Congress not create such a medical body, stating:

[T]he Commission has reviewed the various arguments and proposals made in the hearings leading up to the framing of the Amendment, as well as current proposals, and has concluded not to recommend the creation of some other statutory body. The Commission recognizes that although the Cabinet . . . may not be an ideal group, it is unlikely that any other body could be designed that would be free of other difficulties or receive as much political acceptance.<sup>131</sup>

The Commission did advance a number of useful suggestions on how to implement the Twenty-fifth Amendment. In its report, it suggested that written guidelines be developed by each administration for three different medical contingencies: an emergency, a planned procedure, and treatment of chronic illness.<sup>132</sup> Additionally, the Commission recommended an increased role for the White House physician, as well as consultation with this physician during a President's term for his or her input and knowledge of the President's health.<sup>133</sup> These suggestions are plainly desirable and will ensure the proper functioning of the Twenty-fifth Amendment.

As for a more formal role for the White House physician, I expressed elsewhere these thoughts:

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129. *Id.*

130. The Commission also received testimony from former Attorney General Herbert Brownell, former IRS Commissioner Mortimer Caplan, former Representative Caldwell Butler, former presidential physician Dr. T. Burton Smith, Dr. Leonard Emmerglick of the University of Miami, former Senator Birch Bayh, Professor Paul B. Stephan II of the University of Virginia Law School, Dr. C. Knight Aldrich, and Professor James Childress of the University of Virginia. *Id.*

131. PAPERS ON PRESIDENTIAL DISABILITY I, *supra* note 126, at 176.

132. *Id.* at 121-42.

133. *Id.*

I do not think this is necessary or desirable. First, there must be the highest level of confidence between the President and those who serve him (or her) medically, a confidence which promotes a full exchange of information. Both the President and the nation benefit from such an exchange. To introduce into that relationship formal reporting obligations by medical personnel to third parties irrespective of presidential wishes could prevent the development of the kind of bond that should exist between a doctor and patient. This is not to say that there might not be circumstances where conscience and ethics require action by a doctor in the public interest without a patient's consent. For my part, I would leave that to the circumstances of a particular moment rather than requiring it as a matter of law.<sup>134</sup>

There is also the danger that the White House physician will be unable to give useful advice given the probability that his or her area of expertise may not be applicable to the particular circumstances of a President's medical condition. Moreover, there could be situations not involving medicine, such as a kidnapping or other circumstances which prevented a President from communicating with the White House, which would bring the amendment into play.

With respect to other criticisms of the amendment, one would be mistaken to attempt to define with specificity what constitutes an "inability." No set of definitions could possibly deal with every contingency, and the use of detailed language could create a situation where, during a time of national trauma, unnecessary debate occurs over whether or not the particular facts fit the definitions, or vice versa. The use of a general word like "inability," a term given to us by the framers of the Constitution, allows for flexibility and discretion, not unlike other expressions of our great charter of government. The case simply has not been made that the expression of "inability" is "unworkable."

Finally, scrapping the provisions of the Twenty-fifth Amendment would take us back to the beginning of an eighty-year debate over a procedure for determining presidential inability. Moreover, if there were a better system, the amendment itself gives Congress the ability to create it. Section 4 of the amendment provides a flexible solution in dealing with the unforeseen and unforeseeable. Congress can adapt the amendment to the unique needs of each particular case of presidential inability. The legislative history clearly indicates that Congress' Section 4 power to create another body can be exercised even in the midst of a case of presidential inability. Congress can designate the "other body" as itself, expand or restrict the membership of the Cabinet, combine the Cabinet for purposes of a determination with other officials, require a unanimous vote of the body established by law, and prescribe the rules and procedures to be followed by that body.<sup>135</sup> This flexibility inherent in Section 4 is a necessary component of the amendment, ensuring the most complete response to the possibility of presidential inability.

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134. *Id.* at xxiv.

135. *Id.* at 206.

So, in the final analysis, the Twenty-fifth Amendment offers its own solution if existing procedures do not work. Nevertheless, care should be taken before the procedure involving the Cabinet is changed. The amendment, of course, is not perfect. It does not deal with every possible contingency, a fact understood by its framers, but the amendment has moved the nation forward in an area that has perplexed it since 1787. Nothing in the record to date indicates that there is a superior remedy for dealing with the complex problems involved. The amendment treats the subjects of presidential inability and vice presidential vacancy practically, in a manner consistent with the important principle of separation of powers, and in a way that protects the office of President and assures stability and continuity in the event of succession. In considering any change to the Twenty-fifth Amendment, attention must be given to the interrelationships of its provisions. While the amendment weighs in favor of the elected President, it stands ready to deal with a case of serious inability in a workable and appropriate manner. One must proceed carefully in changing the balances of the amendment. History provides examples of new rules producing unexpected and undesirable results.

#### CONCLUSION

The Twenty-fifth Amendment is the product of extensive debate and discussion, in which full account was taken of the history of presidential succession and the many worthy suggestions offered for improvements in the succession framework. The amendment provides an approach to presidential succession which allows for an effective transfer of power in all cases of presidential inability. In my view, the current suggestions for an independent medical panel to determine presidential inability are ill-advised. The creation of such a panel is contrary to both the principle of separation of powers and the philosophy of the amendment that those closest to the President, and those accountable to the public, should be entrusted with the power to declare a President disabled. As Everett Dirksen, the minority leader of the Senate, said at the time the Twenty-fifth Amendment was passed: "You've got to trust the system; you've got to have faith that honorable men will act honorably in a real crisis like this."<sup>136</sup>

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136. PAPERS ON PRESIDENTIAL DISABILITY II, *supra* note 126, at 61.

