

# THE TWENTY-FIFTH AMENDMENT AND THE ESTABLISHMENT OF MEDICAL IMPAIRMENT PANELS: ARE THE TWO SAFELY COMPATIBLE?

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## INTRODUCTION

The history of the American presidency has been replete with instances of serious physiological illnesses in Presidents. The list of Presidents who suffered such illnesses includes Washington, Adams, Madison, Monroe, Jackson, W.H. Harrison, Taylor, Lincoln, Garfield, Arthur, Cleveland, McKinley, Wilson, Harding, F.D. Roosevelt, Eisenhower, Kennedy, Johnson, Reagan, George H.W. Bush, and Clinton.<sup>1</sup> Collectively, these Presidents suffered such medical problems as heart attacks, strokes, cancer, hemorrhages, pneumonia, convulsions, bullet wounds, gangrene, Addison's disease, Bright's disease, malaria, atrial fibrillation, alcoholism, scarlet fever, smallpox, infections, excruciating headaches, hypertension, ileitis, tremors, gallbladder disease, prostate disease, hyperthyroidism, torn ligaments, and delirium.<sup>2</sup>

In addition to such *physiological* ailments, Presidents have likely suffered from *psychological* illness as well. Calvin Coolidge is quite likely an example of a President who has suffered such affliction. After his sixteen-year-old son died in July 1924 of blood poisoning, as a result of raising a blister on his toe while playing tennis, Coolidge blamed himself for the death, saying to visitors, "if I had not been President he would not have raised a blister on his toe, which resulted in blood poisoning, playing lawn tennis in the [White House] south grounds."<sup>3</sup> In the period after his son's death, President Coolidge seemed to have suffered from an unrelenting clinical

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1. For a broad discussion of presidential illness throughout U.S. history, see RUDOLPH MARX, *THE HEALTH OF THE PRESIDENTS* (1960).

2. *Id.*

3. *Unusual Political Career of Calvin Coolidge, Never Defeated for an Office*, N.Y. TIMES (Jan. 6, 1933), <http://www.nytimes.com/learning/general/onthisday/bday/0704.html> [<https://perma.cc WR3L-79DX>]; see also ROBERT SOBEL, *COOLIDGE: AN AMERICAN ENIGMA* 295-99 (1998).

depression.<sup>4</sup> The Physician to the President at the time described him as having “temperamental derangement” and an aide described him as showing signs of “mental illness,” but no one in or outside the White House realized that Coolidge was psychologically ill *and* would never fully recover.<sup>5</sup> For the country, the President’s condition was disastrous as economic storm clouds were gathering that would soon develop into the Great Depression. Coolidge’s presidency and his life were simply destroyed by unrelenting grief. In his 1929 autobiography, Coolidge wrote all too truly: “In his suffering he was asking me to make him well. I could not. When he went, the power and glory of the Presidency went with him.”<sup>6</sup>

The Twenty-Fifth Amendment was added to the Constitution, after years of effort, in 1967, to resolve instances of debilitating illnesses of all kinds. The Amendment’s four sections deal with: (1) vice presidential succession to the presidency; (2) replacement of the Vice President when that office becomes vacant; (3) voluntary withdrawal of the President from office and his or her replacement by the Vice President who becomes Acting President; and (4) involuntary replacement of the President by the Vice President who becomes Acting President.

#### I. TWENTY-FIFTH AMENDMENT

The Twenty-Fifth Amendment has four sections, each of substantial importance.

SECTION 1. In case of the removal of the President from office or 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 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

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4. ROBERT E. GILBERT, *THE TORMENTED PRESIDENT: CALVIN COOLIDGE, DEATH, AND CLINICAL DEPRESSION* 147–74, 219–21 (2003).

5. *Id.* at 221, 255.

6. CALVIN COOLIDGE, *THE AUTOBIOGRAPHY OF CALVIN COOLIDGE* 190 (1931).

declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.<sup>7</sup>

After the Amendment was added to the Constitution, it demonstrated its usefulness very quickly. Section 1 was invoked for the first time on August 9, 1974, only seven years after its enactment, when Richard Nixon resigned the office of the presidency under threat of impeachment as a result of the Watergate scandal.<sup>8</sup> He was immediately replaced by Vice President Gerald Ford who became, under the terms of Section 1 of the Twenty-Fifth Amendment, President of the United States. No longer was there doubt that the Vice President became President rather than Acting President whenever the President permanently vacated the office. By writing in the Constitution that the Vice President inherits the “powers and duties” of the presidential office rather than the office itself, the Constitution’s framers seemed to imply a preference for an “Acting President” designation in instances of presidential transition.<sup>9</sup> However, the 1967 Amendment decided otherwise.

Section 2 of the Twenty-Fifth Amendment was invoked for the first time in October 1973, when President Nixon nominated Michigan Congressman and Republican House Minority Leader Gerald Ford to be the nation’s new Vice President after incumbent Vice President Spiro Agnew was compelled to resign his office.<sup>10</sup> Agnew’s resignation came about as part of a plea bargain that resulted from the embarrassing—and illegal—financial dealings in which he was involved while serving as Baltimore County Executive and afterward as Governor of Maryland.<sup>11</sup> After initially denying any wrongdoing, Agnew finally pled no contest to the felony of tax evasion for the year 1967 and resigned the vice presidency.<sup>12</sup> His plea was accepted and, as punishment, he was fined \$10,000 and placed on probation for three years.<sup>13</sup> Had Agnew not resigned the vice presidency, he likely would have

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7. U.S. CONST. amend. XXV.

8. JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* 158–66 (3d ed. 2014).

9. U.S. CONST. amend. XXV, § 4.

10. FEERICK, *supra* note 8, at 138.

11. *Id.* at 125–34.

12. *Id.* In other words, Agnew had failed to pay taxes on the illegal payments he had received as a political leader in Maryland.

13. *Id.* at 133.

been indicted and quite possibly sent to prison since strong evidence existed that “he was guilty of bribery and extortion as well as simple tax evasion.”<sup>14</sup>

After the House and Senate approved Ford’s nomination fifty-four days later (387 to 35 in the House; 92 to 3 in the Senate), the former Congressman took the oath as the nation’s new Vice President.<sup>15</sup> After Ford succeeded Nixon as President in August 1974, he nominated former New York Governor Nelson Rockefeller to be his Vice President.<sup>16</sup> Given Rockefeller’s liberal tendencies, his nomination upset many conservative Republicans.<sup>17</sup> One factor that angered *both* liberals and conservatives was that Rockefeller had given financial “gifts” totaling almost \$2 million to a number of public officials so that they would remain in public office rather than return to a more lucrative career in the private sector.<sup>18</sup> To some, these gifts smacked of influence peddling.<sup>19</sup> After an acrimonious debate and a lengthy delay of 121 days, Rockefeller’s nomination was finally approved by Congress (287 to 128 in the House; 90 to 7 in the Senate).<sup>20</sup> If the Twenty-Fifth Amendment had not then been part of the Constitution, the vice presidency would have been vacant from the moment of Nixon’s resignation on August 9, 1974, until January 20, 1977, when former Minnesota Senator Walter Mondale took the oath of office as Jimmy Carter’s Vice President.

Section 3 of the Twenty-Fifth Amendment, the first of the disability provisions, has been invoked three times in the nation’s past. The first occurred in 1985 when President Ronald Reagan, in the hospital and about to undergo cancer surgery, signed a letter designating Vice President George Bush as Acting President of the United States.<sup>21</sup> Some nine hours later, Reagan signed a second letter—this time reclaiming his powers and duties as President.<sup>22</sup> Ironically, if Reagan had delayed his resumption of presidential powers and duties until his recovery was further advanced, he might have escaped his embarrassing involvement in the devastating Iran-Contra scandal that was “finalized” shortly after his surgery took place.<sup>23</sup>

Section 3 was also invoked in 2002 and 2007 by President George W. Bush just prior to undergoing colonoscopies while under anesthesia.<sup>24</sup> In each instance, Vice President Dick Cheney served as Acting President for very brief periods of time.<sup>25</sup> Section 3 should have been, but was not, invoked in

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14. RICHARD M. COHEN & JULES WITCOVER, *A HEARTBEAT AWAY: THE INVESTIGATION AND RESIGNATION OF VICE PRESIDENT SPIRO T. AGNEW* 361 (1974).

15. FEERICK, *supra* note 8, at 148, 156.

16. *Id.* at 169.

17. *Id.*

18. *Id.* at 173–77.

19. *Id.*

20. *Id.* at 186.

21. Robert E. Gilbert, *The Politics of Presidential Illness: Ronald Reagan and the Iran-Contra Scandal*, *POL. & LIFE SCI.*, Fall 2014, at 58, 58–59.

22. *Id.* at 60.

23. *Id.* at 61.

24. Peter Baker, *Bush Will Temporarily Hand Reins to Cheney*, *WASH. POST* (July 21, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/20/AR2007072001790.html> [https://perma.cc/E9PL-AWYS].

25. *Id.*

1981 by President Reagan after he was shot and seriously injured by attempted assassin John Hinckley. This was most unfortunate because Reagan was severely incapacitated as a result of having been shot and would likely have been unable to respond to any crises that confronted him soon after that event.<sup>26</sup>

Section 4 of the Twenty-Fifth Amendment is the only section that has not yet been utilized. It conjures up the unpleasant specter of involuntary separation of the President from the powers and duties of the office by cooperative action of the Vice President and a majority of the Cabinet. Apparently, Ronald Reagan's Chief of Staff briefly considered invoking Section 4 late in Reagan's second term when the President appeared to be rather disengaged from the work of his administration.<sup>27</sup> But, as will be discussed later in this Article, the decision was made not to invoke it.

## II. PROPOSALS FOR A MEDICAL ADVISORY COMMITTEE

At least two proposals have been offered by prominent members of the medical community to establish "Medical Impairment Panels" to monitor the health of Presidents of the United States and to facilitate the implementation of relevant Sections of the Twenty-Fifth Amendment. The first to be discussed here was made by Dr. Herbert Abrams, a now deceased professor of radiology at Stanford University;<sup>28</sup> the second by Dr. Bert Park, a prominent Missouri neurosurgeon.<sup>29</sup> Dr. Abrams and Dr. Park spoke and wrote about their plans frequently over the years. The objective of each proposal was to ensure that the Vice President, the Cabinet, and Congress are informed as to situations when a President might be seriously impaired in terms of carrying out his or her official responsibilities as President of the United States. Each proposal will be assessed here in turn.

### A. *The Abrams Plan*

In 1995, Dr. Abrams proposed a committee system that would effectively result in a "Medical Impairment Panel."<sup>30</sup> The committee would be established "either by statute or by concurrent resolution . . . that ensures the vice president, the Cabinet and the public of objective, independent, and accurate assessments of the president's health."<sup>31</sup> Further, Abrams suggested that this committee should "consist of two internists, two neurologists, a

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26. See DEL QUENTIN WILBER, *RAWHIDE DOWN: THE NEAR ASSASSINATION OF RONALD REAGAN* 190–91, 200 (2011).

27. Gilbert, *supra* note 21, at 69.

28. Herbert L. Abrams, *Can the Twenty-Fifth Amendment Deal with a Disabled President? Preventing Future White House Cover-Ups*, 29 *PRESIDENTIAL STUD. Q.* 115, 115 (1999).

29. See *DISABILITY IN U.S. PRESIDENTS: REPORT, RECOMMENDATIONS AND COMMENTARIES BY THE WORKING GROUP* 33 (James F. Toole et al. eds., 1997).

30. Abrams, *supra* note 28, at 118. This Article uses the term "Medical Impairment Panel" to refer to a group of physicians tasked with overseeing the President's health and advising on issues of presidential inability suggested by Abrams and others.

31. *Id.*

psychiatrist, and a surgeon.”<sup>32</sup> These doctors would participate in an “annual review of pertinent history, systems, physical examination, and laboratory data on the president . . . together with the president’s physician.”<sup>33</sup> The committee would include “a reasonable mix of Democrats and Republicans to avoid the taint of partisanship, and its composition would be subject to the approval of the secretary of Health and Human Services.”<sup>34</sup> Abrams did not attempt to specify what he meant by the words “reasonable mix.” A 5-1 division between Democrats and Republicans seems quite *unreasonable* for such a sensitive and powerful body; would a 4-2 division represent a *reasonable* partisan “mix”?

Dr. Abrams did not describe what the process of approval by the Secretary of Health and Human Services might entail. Certain, of course, is that his proposal—if ultimately put into effect—all but guarantees that the Secretary of Health and Human Services would always be appointed primarily for reasons of staunch partisan loyalty to the President rather than for professional competence in his or her field of expertise. Whether this is appropriate or wise is unclear.

According to Abrams, a second—and very important—role this group of physicians would play is “the medical evaluation of the president whenever the question of disability arose.”<sup>35</sup> The committee on which they would serve would convene immediately after being informed by the Physician to the President or the Vice President that the President’s physical or mental condition needed to be reviewed.<sup>36</sup> After completing its assessment, the medical committee would “convey to the president and vice president the presence or absence of a state of impairment requiring consideration of invocation of the Twenty-fifth Amendment” and would make disclosure to the public of “[s]ignificant findings.”<sup>37</sup>

Despite the benign intent of this recommendation, it presents highly complex problems. First, Abrams pointed out that because the role of an independent body of experts would be to examine the President but not to deliver medical care, “they would not have the same professional obligations with regard to confidentiality as would his personal physician.”<sup>38</sup> Even assuming this view is correct, the violation of the principle of medical confidentiality in the case of the President of the United States would likely have devastating effects both at home and abroad by injecting into the public domain medical information that should be kept private. Abrams’s proposal, then, would be damaging to the ability of Presidents to inspire confidence and provide leadership.

In this important respect, the writings of political scientist Richard Neustadt are useful to consider. In his seminal book, which is still in print

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32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 122.

today almost sixty years after its initial publication in 1960, Neustadt focused his attention not on the topic of *presidential powers* but rather on the “concept” of *presidential power*.<sup>39</sup> The two are quite different from each other and it is important to understand the difference. *Presidential powers* are the constitutional powers specifically exercised by the President. For example, the President is Commander in Chief of U.S. military forces, can veto legislation, and can appoint individuals to various offices.<sup>40</sup> *Presidential power*, however, is of another nature and perhaps more difficult to understand. Neustadt writes of the enormous importance of the President’s “professional reputation.” He explains:

A President’s persuasiveness with others in the government depends on something more than his advantages for bargaining. [Those] he would persuade must be convinced in their own minds that he has skill and will enough to *use* his advantages. Their judgment of him is a factor in his influence with them. . . .

[Those] who share in governing this country are inveterate observers of a President. They have the doing of whatever he wants done. They are the objects of his personal persuasion. They also are the most attentive members of his audience. These doers comprise what in spirit, not geography, might well be termed the “Washington community.” This community cuts across the President’s constituencies. Members of Congress and of his Administration, governors of states, military commanders in the field, leading politicians in both parties, representatives of private organizations, newsmen of assorted types and sizes, foreign diplomats (and principals abroad)—all these are “Washingtonians” no matter what their physical location. . . . By definition all its members are compelled to watch the President for reasons not of pleasure but vocation. They need him in their business just as he needs them. . . .

. . . A President’s effect on them is heightened or diminished by their thoughts about his probable reaction to their doing. They base their expectations on what they can see of him. And they are watching all the time. . . .

. . . .

A President who values power . . . has every reason for concern with the residual impressions of tenacity and skill accumulating in the minds of Washingtonians-at-large. His bargaining advantages in seeking what he wants are heightened or diminished by what others think of him. Their thoughts are shaped by what they see. They do not see alone, they see together. What they think of him is likely to be much affected by the things they see alike. His look in “everybody’s” eyes becomes strategically important for his influence. Reputation, of itself, does not persuade, but it can make persuasion easier, or harder, or impossible.<sup>41</sup>

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39. See generally RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS* (The Free Press rev. ed. 1990) (1960).

40. U.S. CONST. art. II.

41. NEUSTADT, *supra* note 39, at 50–54.

Neustadt argues, then, that the President's professional reputation (what other political leaders at home and abroad think of his political skillfulness) is important to his persuasive abilities and that he must do all he can to protect that reputation.<sup>42</sup> He must truly understand that his leadership must be both steady and disciplined and that he must be seen as being "in control" of himself and his administration. In his official duties, words are important and he must always say what he means and must always mean what he says. His words and his policies must always be in sync and must reinforce each other. He must certainly strive to avoid errors in describing his policies and must be clear and steady in stating his administration's intentions. Presidential power depends, in part, on the ability of Presidents to protect their professional reputations since those reputations are essential to the art of governance.

In this respect, then, any public announcement of the President's alleged ailments by members of an Medical Impairment Panel would surely undermine his overall professional reputation and make it much more difficult for him to lead or, in other words, to exert influence. This is hardly an objective that should be sought after—except, of course, by enemies and competitors of the United States on the world stage and by the President's political enemies at home. What benefits, for example, would a public airing of Franklin Roosevelt's ailments have brought to him and to the United States during World War II, a time when the country needed a strong leader as well as popular reassurance and determination? Would it have enhanced or diminished Roosevelt's professional reputation and the nation's war efforts? Would it have enhanced or diminished his popular standing? At what price to the President and to the country?

By the same logic, what benefits would public scrutiny of Dwight Eisenhower's ileitis surgery in 1956 have brought to him personally and to the war in the Middle East that at the time he was struggling to bring to an end?<sup>43</sup> A competent surgeon suggested privately to Eisenhower's intimates that the "chances are six or eight to one against a man of Eisenhower's age recovering from an ileitis operation."<sup>44</sup> However, as we now know, Eisenhower did indeed recover. If the content of the surgeon's opinion had been publicized at home and abroad, would Eisenhower's "power" have held steady, or would it have sharply declined? Would full disclosure in either of these instances have produced desirable results for the President in office at the time or for the nation? Or would it more likely have produced confusion, upset, and political turmoil? To most observers, the answer is clear.

Dr. Abrams further accentuated this problem when he suggested that the committee "would have nothing to gain by withholding information from the public."<sup>45</sup> In the case of the President of the United States, this is, once again,

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42. *Id.*

43. DAVID A. NICHOLS, *EISENHOWER 1956: THE PRESIDENT'S YEAR OF CRISIS—SUEZ AND THE BRINK OF WAR* 284–86 (2011).

44. ROBERT E. GILBERT, *THE MORTAL PRESIDENCY: ILLNESS AND ANGUISH IN THE WHITE HOUSE* 102 (2d ed. 1998) (footnote omitted).

45. Abrams, *supra* note 28, at 122.



hardly a sensible notion. Does the public in the United States and abroad deserve to know *everything* about the President's state of health? Does not the President have privacy rights, as all other Americans do? Might not—indeed should not—some information be properly withheld from the public domain? Should, for example, the discovery of an aneurism in Eisenhower's heart by his cardiologist, Dr. Thomas Mattingly, in 1955 have been announced immediately or soon after to the world? Such an announcement may not have been correctly understood by either the public or by world leaders and almost certainly would have diminished Eisenhower's ability to lead at home and abroad. It also may well have prevented him from running for reelection in 1956 and, rather unfairly, from winning that election if he did run.

Eisenhower's autopsy, conducted almost nine years after he left office, revealed that the aneurysm *did indeed exist* for at least thirteen years and likely much longer but that it had *not* ruptured during the remainder of his lifetime.<sup>46</sup> In fact, after surmounting his 1955 cardiac problems, Eisenhower lived for fourteen more years until he died in March 1969 at the age of 78. Ironically, the former President outlived his opponent in the 1956 presidential election, Adlai Stevenson, and Stevenson's running mate, Estes Kefauver, by several years.<sup>47</sup> This was doubly ironic in light of the fact that Stevenson had given a rather tasteless televised address during the 1956 campaign in which he warned:

I must say bluntly that every piece of scientific evidence we have, every lesson of history and experience, indicates that a Republican victory tomorrow would mean that Richard M. Nixon would probably be President of this country within the next four years.

. . . .

I say frankly, . . . as a citizen more than candidate, that I recoil at the prospect of Mr. Nixon as a custodian of this nation's future, as guardian of the hydrogen bomb, as representative of America in the world, as Commander in Chief of the United States armed forces.

. . . .

Your choice tomorrow will not be of a President for tomorrow. It will be of the man—or men—who will serve you as President for the next four years.<sup>48</sup>

In supporting his proposal, Abrams complained that “White House physicians have shown a strong propensity for masking presidential illness.”<sup>49</sup> In this regard, he cited Cary Grayson, Woodrow Wilson's Physician to the President, who in 1918 “helped orchestrate the cover-up of

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46. Robert E. Gilbert, *Eisenhower's 1955 Heart Attack: Medical Treatment, Political Effects, and the “Behind the Scenes” Leadership Style*, POL. & LIFE SCI., Mar. 2008, at 2, 5–6.

47. *Id.* at 12–15.

48. Harrison E. Salisbury, *Democrat Ends Campaign*, N.Y. TIMES, Nov. 6, 1956, at 1, 39.

49. Abrams, *supra* note 28, at 122.

Wilson's massive stroke under the direction of Wilson's wife."<sup>50</sup> While this assertion about Grayson might well be accurate,<sup>51</sup> other—and far more recent—Physicians to the President have behaved quite differently and would seem wholly undeserving of such criticism. For example, in 1981, Physician to the President Dr. Daniel Ruge was convinced that Ronald Reagan should surely invoke the Twenty-Fifth Amendment after being shot and severely wounded by John Hinckley, but Reagan's "political" aides decided otherwise.<sup>52</sup> Also, Dr. John Hutton, Physician to the President to Ronald Reagan during Reagan's second term, believed that it was absurd for Reagan to resume his powers and duties in 1985 only nine hours after undergoing extensive cancer surgery.<sup>53</sup> But Reagan did resume them—with very unfortunate results to himself and the country. More specifically, it now appears that Reagan, while recuperating in the hospital, gave "final approval" to a controversial policy of arms sales to Iran that backfired badly and produced humiliation for the President and his entire administration.<sup>54</sup>

Also, during the Clinton administration, invocation of Section 3 of the Twenty-Fifth Amendment arose once as a real possibility. This was when the President fell while in Florida in March 1997 and badly injured his quadriceps tendon. Dr. Connie Mariano, Physician to the President during Clinton's presidency, explained that Clinton received a spinal anesthetic prior to surgery that "did not affect his consciousness or his cognitive abilities."<sup>55</sup> She added, "If the president had undergone general anesthesia for this surgery, however, I was fully prepared to recommend invoking Section 3 of the Twenty-Fifth Amendment, which would have allowed the powers and duties of the presidency to pass into the hands of Vice President Gore."<sup>56</sup> She also indicated that she "had informed Bruce Lindsey, a key presidential adviser, that, if the President required general anesthesia, Section 3 should be invoked. As general anesthesia was unnecessary, [she] did not recommend its invocation."<sup>57</sup>

The viewpoints expressed by Physicians to the President associated with the Reagan and Clinton administrations seem to suggest that blanket condemnations of White House physicians for gross insensitivity or for cowardice on the issue of presidential disability are unwarranted and unfair. After enactment of the Twenty-Fifth Amendment in 1967, members of this

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50. *Id.*

51. See generally Joel K. Goldstein, *Vice-Presidential Behavior in a Disability Crisis: The Case of Thomas R. Marshall*, POL. & LIFE SCI., Fall 2014, at 37 (discussing Grayson's time as Physician to the President and medical cover-ups).

52. GILBERT, *supra* note 44, at 224–25.

53. Interview by Stephen F. Knott et al. with John Hutton, former Physician to the President 32 (Apr. 15–16, 2004), <https://millercenter.org/the-presidency/presidential-oral-histories/john-hutton-md-oral-history-white-house-physician> [https://perma.cc/S5KW-NVDZ].

54. Gilbert, *supra* note 21, at 58–76.

55. E. Connie Mariano, *In Sickness and in Health: Medical Care for the President of the United States*, in *MANAGING CRISIS: PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT* 83, 93 (Robert E. Gilbert ed., 2000).

56. *Id.*

57. *Id.*

group seem to have become much more sensitive to the constitutional avenues now available to Presidents in confronting instances of disability and much more alert to the opportunities provided by the Twenty-Fifth Amendment in dealing with them. A hundred years ago, Woodrow Wilson and Dr. Grayson did not have these constitutional advantages since the Twenty-Fifth Amendment did not exist then and the Constitution was rather vague on issues of disability and inability.

That very vagueness may have made presidential advisers and associates of all kinds quite hesitant to recommend that a President step aside to make way for a temporary Acting President since the new Acting President may not have agreed that his role was only temporary and that he must be willing to relinquish his powers with grace and calm whenever the President chose to reclaim them.<sup>58</sup> More specifically, what would have convinced Woodrow Wilson that Vice President Thomas Marshall would have voluntarily relinquished his presidential powers when Wilson wanted them to be released rather than holding on to them until Wilson's term had finally run out? Since 1967, the answer to this compelling question has been, quite simply, the Twenty-Fifth Amendment.

More recently, a group that included former Physicians to the President has worked to further enhance the status of Physician to the President in the power structure of the White House. This group, known as the Working Group on Presidential Disability, is a body formed in 1994 by the Bowman Gray School of Medicine and the Jimmy Carter Presidential Center.<sup>59</sup> It recommended that "the President appoint a Senior Physician to a position as his or her personal physician in the Executive Office of the President."<sup>60</sup> Further, it recommended that this "Senior Physician" have the responsibility of "facilitating the application of the Twenty-Fifth Amendment" and that "the Senior White House Physician be accorded a title such as Assistant to the President or Deputy Assistant to the President, or equivalent military rank."<sup>61</sup> These physicians—who have had experience as White House functionaries of a very special sort—made these suggestions as a way of increasing the status and personal clout of future Physicians to the President so that in any subsequent instances involving possible invocations of the Twenty-Fifth Amendment, their advice will be taken very seriously, rather than being essentially ignored, by others in the White House chain of command. All of this should suggest that Abrams's sharp criticisms of Physicians to the President as being secretive and untrustworthy cheerleaders for presidential continuance in office regardless of health status seem badly outdated.

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58. Dr. Abrams seemed to agree that Physicians to the President tended to cover up presidential illnesses *before* enactment of the Twenty-Fifth Amendment. See Herbert L. Abrams, *The Vulnerable President and The Twenty-Fifth Amendment, with Observations on Guidelines, a Health Commission, and the Role of the President's Physician*, 30 WAKE FOREST L. REV. 453, 470 (1995).

59. See DISABILITY IN U.S. PRESIDENTS: REPORT, RECOMMENDATIONS AND COMMENTARIES BY THE WORKING GROUP, *supra* note 29, at 6, 29–30.

60. *Id.* at 22.

61. *Id.*

Proposals based on such outdated assumptions should be approached with great caution.

Additional points raised by Dr. Abrams are quite important and deserve discussion here. The first is his provocative remark that a closely divided Medical Impairment Panel would not be problematic in resolving issues of presidential disability. Abrams wrote, “Five-to-four decisions of the Supreme Court are legion. . . . But their split decisions have hardly shaken the foundations of the republic.”<sup>62</sup> He also claimed that “[a]n independent body of experts will be objective, will have no conflict of interest, . . . and can be depended on not to violate the public trust.”<sup>63</sup> These rather grandiose pronouncements are highly questionable.

First, contrary to Abrams’s assertion, closely divided U.S. Supreme Court decisions often generate intense conflict and occasional outrage among the general population, the political “influentials,” and the states. For example, the Supreme Court’s 2010 decision in *Citizens United v. FEC*,<sup>64</sup> which saw the court vote five to four to strike down limitations on spending by corporations in political campaigns, provoked a “firestorm of criticism.”<sup>65</sup> As Mark Alexander writes, “there is a serious democratic tension when one constitutional value (speech) gets promoted over another (equality).”<sup>66</sup> He continues:

In our modern fund-raising machinery, as candidates and elected officials raise money from a small set of elite donors, they are disproportionately responsive to the few, not to the many, and not to their constituents. When this occurs, elected officials cannot do their jobs as well, the few have concentrated power, the many have diluted power and political equality is trampled.<sup>67</sup>

So angry were so many at this five-to-four decision that President Barack Obama publicly rebuked the Court during his 2010 State of the Union address on national television by deliberately denouncing the ruling in the presence of the Court’s Justices, several of whom had voted with the majority in the case.<sup>68</sup>

Three years later, the same Supreme Court, again in a five-to-four decision, determined in *Windsor v. United States*,<sup>69</sup> that the Defense of Marriage Act—enacted by Congress in 1996 to thwart gay marriage—was unconstitutional.<sup>70</sup> While this decision was seen as a great victory for same-

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62. Abrams, *supra* note 28, at 124.

63. *Id.* at 122.

64. 558 U.S. 310 (2010).

65. Monica Youn, *First Amendment Fault Lines and the Citizens United Decision*, in MONEY, POLITICS, AND THE CONSTITUTION: BEYOND CITIZENS UNITED 95, 95 (Monica Youn ed., 2011).

66. Mark Alexander, *Citizens United and Equality Forgotten*, in MONEY, POLITICS, AND THE CONSTITUTION, *supra* note 65, at 153, 153.

67. *Id.*

68. Richard Briffaut, *On Dejudicializing American Campaign Finance Law*, in MONEY, POLITICS, AND THE CONSTITUTION, *supra* note 65, at 173, 173.

69. 133 S. Ct. 2675 (2013).

70. *Id.* at 2682.

sex couples hoping to marry, it provoked a sharp counterattack in several states. The Indiana legislature, for example, enacted a law in 2015 aimed at insulating citizens of that state from the “encroachment” of gay rights. But the outcry was so great—not only by gay rights activists but also by corporations, the media, and even sports heroes—that the Republican Governor, Mike Pence, and the Republican legislature very quickly altered the offensive legislation.<sup>71</sup> This, of course, further infuriated the state’s antigay forces.

What these experiences signify is rather clear. Contrary to what Dr. Abrams asserted, closely divided Supreme Court decisions frequently enrage major segments of the public, particularly when they relate to emotional national issues. It should be easy to imagine, then, the furies that almost certainly would be unleashed if a Medical Impairment Panel should issue a closely divided “report” recommending that a President should essentially be removed from the exercise of the powers and duties to which he or she had been duly elected.

Second, it is unrealistic to expect that Medical Impairment Panel members would always be able to present their views about the President in an unambiguous, unbiased, nonpartisan, easily understood, and widely accepted manner. In fact, it is not even guaranteed that they would all abide by professional standards of personal behavior. Specifically, in their performance as panel members in relation to psychological and psychiatric diagnoses, it would appear that psychiatrists can be found on every side of psychiatric issues and that the testimony of psychiatric personnel can be inaccurate—or even badly tainted and thoroughly untrustworthy.

As an example, after John Hinckley—in order to show his love for movie actress Jodie Foster—shot President Reagan, Press Secretary James Brady, a Secret Service agent, and a Washington, D.C., policeman in March 1981 outside the Washington Hilton Hotel, he was found to be psychologically unsound and was subsequently confined to St. Elizabeth’s Psychiatric Hospital in Washington, D.C.<sup>72</sup> Just a few years after his initial confinement, however, Hinckley sought permission to leave the hospital, without any supervision whatsoever, for visits with his family.<sup>73</sup> When his intention was challenged in court, psychiatrists differed greatly in their testimony. One in particular stood out as having a rather unique viewpoint. Dr. Glenn Miller, a well-established psychiatrist, strongly supported unsupervised family visits.<sup>74</sup> He testified at the time that, in his opinion, the 1981 would-be assassin posed no danger to President Reagan, Press Secretary Brady, or anyone else.<sup>75</sup> Miller also testified that Hinckley showed remorse for what

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71. David Von Drehle, *The Battle of Indiana*, TIME, Apr. 13, 2015, at 30.

72. Kenneth B. Noble, *Hinckley Is Told to Surrender All Correspondence*, N.Y. TIMES (Apr. 15, 1987), <http://www.nytimes.com/1987/04/15/us/hinckley-is-told-to-surrender-all-correspondence.html> [<https://perma.cc/6FM9-76E4>].

73. *Id.*

74. *Id.*

75. AP, *Doctor, Backing Hinckley, Tells of Letter to Murderer*, N.Y. TIMES (Apr. 14, 1987), <http://www.nytimes.com/1987/04/14/us/doctor-backing-hinckley-tells-of-letter-to-murderer.html> [<https://perma.cc/F9C6-W6VD>].

he had done, no longer saw himself as a hero for attempting to kill Reagan, and was no longer obsessed with actress Jodie Foster.<sup>76</sup>

Although Hinckley's lawyer had introduced Dr. Miller in the courtroom as "a witness who was hired by the hospital as a consultant," it soon became clear to the court—and to the public—that Dr. Miller was on the payroll of Hinckley's wealthy father.<sup>77</sup> Thus, his testimony was quickly and widely debunked as having been bought and paid for. Other psychiatrists who gave testimony during the Hinckley proceedings (and were unpaid by the wealthy Hinckley family) differed sharply from Miller in their views. They were convinced that Hinckley suffered from a severe, chronic mental illness and remained dangerous to himself and to others, including Jodie Foster.<sup>78</sup> They also revealed that President Reagan's would-be assassin, while hospitalized at St. Elizabeth's, had written several letters to serial killer Ted Bundy, then on Florida's death row.<sup>79</sup> Bundy was a kidnapper, rapist, and serial killer who confessed to killing at least thirty females in seven states between 1974 and 1978.<sup>80</sup> In 1989, Bundy was executed for his crimes.<sup>81</sup> Rather strangely, Hinckley had written to Bundy not to question or condemn him for his horrific killing spree but rather to express his sorrow about the "awkward position Bundy must be in."<sup>82</sup>

These independent psychiatrists also revealed that Hinckley had recently corresponded with Squeaky Fromm, who had tried to assassinate President Ford in 1975, and had made clear his intention to communicate with convicted serial killer Charles Manson.<sup>83</sup> Hinckley also had some fifty-seven photographs of Jodie Foster in his hospital room—a fact that, in itself, might well suggest his continued obsession with the actress.<sup>84</sup> Despite this obsession, Hinckley had recently become engaged, the "independent" psychiatrists informed the court, to a forty-three-year-old woman who was found not guilty by reason of insanity for killing her sleeping ten-year-old daughter.<sup>85</sup> In light of these startling disclosures, the "bought and paid for" testimony of Dr. Miller was publicly and decisively repudiated, and

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76. *Id.*

77. Leslie Maitland Werner, *Hinckley's Father Paid for Expert's Testimony*, N.Y. TIMES (Apr. 18, 1987), <http://www.nytimes.com/1987/04/18/us/hinckley-s-father-paid-for-expert-s-testimony.html> [https://perma.cc/LS8R-4UBZ].

78. Leslie Maitland Werner, *Request for Hinckley Leave Withdrawn*, N.Y. TIMES (Apr. 14, 1987), <http://www.nytimes.com/1987/04/16/us/request-for-hinckley-leave-withdrawn.html> [https://perma.cc/H2VV-P26S].

79. *Id.*

80. Jon Nordheimer, *Bundy Is Put to Death in Florida After Admitting Trail of Killings*, N.Y. TIMES (Jan. 25, 1989), <http://www.nytimes.com/1989/01/25/us/bundy-is-put-to-death-in-florida-after-admitting-trail-of-killings.html> [https://perma.cc/84X2-HE88].

81. *Id.*

82. AP, *supra* note 75.

83. Kenneth B. Noble, *Deciding Consequences of Insanity Defense*, N.Y. TIMES (Apr. 19, 1987), <http://www.nytimes.com/1987/04/19/weekinreview/deciding-consequences-of-insanity-defense.html> [https://perma.cc/W3WM-N7GG].

84. James Brooke, *Hinckley Tries, Again, to Gain Some Freedom*, N.Y. TIMES (Sept. 30, 1996), <http://www.nytimes.com/1996/09/30/us/hinckley-tries-again-to-gain-some-freedom.html> [https://perma.cc/DQ92-NZ9Q].

85. Werner, *supra* note 77.

Hinckley's request for unsupervised departures from his psychiatric hospital was rejected for many years thereafter.<sup>86</sup>

What if a Standing Medical Impairment Panel was established in the United States, as Dr. Abrams suggests, and was investigating the subject of possible psychiatric dysfunction on the part of an incumbent President? A dueling band of psychiatrists would then be called upon to offer "objective and trustworthy" testimony to the Medical Impairment Panel, rather than testimony that was distorted, biased, or shaped by "compensation."<sup>87</sup> Then, members of Congress would be charged with carefully weighing the objective and trustworthy testimony and taking appropriate action regarding a possible invocation of the Twenty-Fifth Amendment. Could this process be carried out with certainty of fairness? Could not future Dr. Millers emerge from time to time with their bought-and-paid-for testimony? Would the objectivity, reliability, and professionalism of the process be transparent to all? Or would large segments of the population be convinced that a partisan coup was in progress and respond with rage?

More specifically, suppose that the Republican psychiatrists on the Medical Impairment Panel determined that the President of the United States, a Democrat, was indeed psychologically ill and should step aside in favor of the Vice President? Suppose, too, that the Democrats on the panel decided that the President was wholly well, or at least well enough to remain in power? Since members of Congress would then be offered at least two competing, divergent, and eminently "respectable" psychiatric opinions upon which to hang their votes, they would be able to subscribe rather easily to whatever opinion supported their normal partisan proclivities, while insisting that their votes were based on the proffered medical advice and nothing else. But, in fact, the medical "theories" thrust onto the public domain in this instance may well have been put forward for thoroughly partisan purposes. Would, then, the process have been objective, fair, and aimed at the common good? Or would it have represented nothing more than abject partisanship dressed cleverly in psychiatric disguise? Finally, would the American people accept the validity of such an obviously partisan process or, rather, take to the streets in protest? In light of the deepening partisan divide in this country and the lessened inclination to compromise,<sup>88</sup> the answer to each of these questions seems clear.

One final criticism of the Abrams's proposal deserves attention. Although physicians are generally well trained and often well intentioned, they are also fallible human beings with significant limitations. They are not all-knowing gods who should speak to the nation *ex cathedra* on all medical matters. Despite their impressive knowledge base, physicians can, and do, on occasion make serious mistakes in their diagnoses and prognoses and should not be put in the position of publicly and independently recommending that a President step down from the exercise of his powers and duties, whether

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86. *Id.*

87. *See supra* note 75 and accompanying text.

88. *See* BRENDAN J. DOHERTY, *THE RISE OF THE PRESIDENT'S PERMANENT CAMPAIGN* 150, 170–71 (2012).

permanently or temporarily. Even the best and most extensive training in medicine does not lead to medical infallibility, a fact that should prevent physicians from publicly “playing god” in terms of presidential health and mortality. A discreet, behind-the-scenes role for medical professionals in caring for the president makes eminent good sense; a public role in announcing to the world diagnoses, prognoses, and whether the Twenty-Fifth Amendment should be invoked—as envisioned by the Abrams proposal—does not.

### *B. The Park Proposal*

Dr. Bert Park, M.D., proposed a rather different plan to achieve regular and objective medical assessments of the President’s health status. He wrote:

A Presidential Disability Commission, staffed at least in part by physicians skilled in disability determination, could be chosen or appointed *before* the inception of the next Administration. . . . Equally divided by political persuasion, such a commission would be charged with monitoring the president’s health on a yearly basis and reporting its findings to the vice-president.<sup>89</sup>

Park added that this group “would have no power to initiate proceedings against the president, much less to depose him; its duties would be restricted to gathering medical facts to assist the vice president in making an informed decision should the question of inability arise.”<sup>90</sup>

Park, then, would take steps to ensure that there would be an “equal” division—by party—of Presidential Disability Commission members. In my view, this is clearly superior to Dr. Abrams’s approach. Nevertheless, in the present badly overheated political environment with contending political forces clearly at war with each other,<sup>91</sup> the Park proposal would likely result in frequent “presidential health confrontations” in which one side would try to achieve partisan advantage by disabling (e.g., removing from office) a troublesome leader of the opposite party. Overturning the nation’s election returns because of partisan animosity would be harmful to the country’s morale and destructive to whomever happened to be serving as the country’s legitimately elected leader. It would also irreparably damage our reputation as a nation resting firmly on the bedrock foundations of democracy.

It is troubling to think that a President of the United States could be required by law to submit to annual medical examinations by physicians who he does not know and who were nominated, at least in part, by a confrontational opposition party in Congress. By forcing physicians on the President, political enemies can violate the President’s privacy rights and his freedom to consult his own physicians.

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89. BERT E. PARK, *AILING, AGED, ADDICTED: STUDIES OF COMPROMISED LEADERSHIP* 206 (1993).

90. *Id.*

91. STEPHEN F. KNOTT, *RUSH TO JUDGMENT: GEORGE W. BUSH, THE WAR ON TERROR, AND HIS CRITICS* 1–2 (2012).



In any event, the function of Dr. Park's commission would be to "gather[] medical facts to assist the vice president in making an informed decision should the question of inability arise."<sup>92</sup> Dr. Park explained here that, "as the amendment expressly states, only the vice president or cabinet can initiate any deliberations relevant to a determination of presidential inability."<sup>93</sup> He wrote that:

first, the disability commission would undertake a physical examination, supported by appropriate diagnostic tests. Second, these findings are analyzed to determine the nature and extent of the patient's impaired bodily functions. The third step entails a comparison of the results of that analysis with the criteria specified in the [*Guides to the Evaluation of Permanent Impairment*]. That need not be performed by the same physician (or physicians) responsible for the initial examination. The final step in rating medical impairment takes into account all relevant considerations in order to reach a "whole person" impairment rating on a percentage basis.<sup>94</sup>

In a presentation made in support of his proposal in 1995 to members of the Working Group on Presidential Disability, a collection of some fifty physicians, lawyers, government personnel, and university professors formed to study a broad range of disability issues, Dr. Park commented:

Perhaps some relevant examples from recent history might very quickly assist you in understanding what I mean by the term, "percentage impairment of the whole person." What does that really entail? With regard to the all-importance of brain dysfunction, several factors are included in the evaluation of such impairment in the *Guides*, among them disturbances in language, of complex and integrated function such as abstraction and emotions, as well as the presence of episodic or permanent neurologic deficits. Now, applying these and other *Guides'* criteria to Franklin Delano Roosevelt during his last term in office allows one not only to substantiate, but also to quantitate, his impairment retrospectively.<sup>95</sup>

Park then went on to state that "Roosevelt would have been objectively rated from 20–45 percent impaired by 1945."<sup>96</sup> Even if accurate, is it certain that this alleged impairment level posed any real problems with regard the President's effectiveness? Did Park argue that it did? If so, what is the evidence supporting his judgment? Park stated that by 1945, Roosevelt "suffered from congestive heart failure, chronic obstructive pulmonary disease, and periods of anemia, all of which may adversely affect brain function, and each with its own percentage of impairment as figured in the final equation."<sup>97</sup> However, Park's inclusion of the word "may" in this instance suggests rather clearly that such illnesses need *not* adversely affect

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92. PARK, *supra* note 89, at 206.

93. *Id.*

94. *Id.* at 207.

95. Bert E. Park, *Reform: Yes, in PRESIDENTIAL DISABILITY: PAPERS, DISCUSSIONS, AND RECOMMENDATIONS ON THE TWENTY-FIFTH AMENDMENT AND ISSUES OF INABILITY AND DISABILITY AMONG PRESIDENTS OF THE UNITED STATES* 141, 146 (James F. Toole & Robert J. Joynt eds., 2001).

96. *Id.*

97. *Id.*

brain function. How, then, can the matter of inability—and its extent—be determined?

Park also asked “would anyone today choose to be led by a president certifiably impaired from the standpoint of brain dysfunction approaching 50 percent of his former self?”<sup>98</sup> He answered, “I think not, and certainly not if this point were made public at the time.”<sup>99</sup>

These statements, however, are rather confusing. The data presented above by Dr. Park of Roosevelt’s impairment level in 1945 fell into a broad range of 20 to 45 percent. What, then, was the *actual* level of Roosevelt’s impairment? Was it 20 percent? Was it closer to 45 percent? Unbiased referees might well argue that an 80 percent unimpaired Franklin Roosevelt—or even a 55 percent unimpaired one—was fully up to meeting his official responsibilities. In short, Dr. Park’s statistical analysis really has little meaning here because it is so broad, so indefinite, and tells us so little about Roosevelt’s actual performance in office. Even a 50 percent impaired leader might have superior leadership skills compared to his wholly unimpaired, but thoroughly inexperienced, replacement.

In this regard, it might be useful to note that many Americans—and many Americans in leadership positions—may well have preferred the charismatic Roosevelt to remain in the White House at that time of world conflagration rather than confront the prospect of a new, untried, and untested Commander in Chief. Thus, Greenstein suggests that Roosevelt’s “temperament could scarcely have been better suited for inspiring public confidence. . . . Even if the sense of absolute assurance he radiated was only that of a masterful performer, it reveals his singular emotional fitness for the demands of his times.”<sup>100</sup>

The power of Roosevelt’s leadership was often in evidence as late as 1944 and even early into 1945. Consider a memorandum that he sent to Secretary of State Cordell Hull in January 1944, little more than a year before his death, in response to a question about Indochina that Hull had raised.<sup>101</sup> It suggests that Roosevelt, although ill, was quite clear headed, rather perceptive, and very much in command:

I saw Halifax last week and told him quite frankly that it was perfectly true that I had, for over a year, expressed the opinion that Indo-China should not go back to France but that it should be administered by an international trusteeship. France has had the country—thirty million inhabitants for nearly one hundred years, and the people are worse off than they were at the beginning.

As a matter of interest, I am wholeheartedly supported in this view by Generalissimo Chiang Kai-shek and by Marshal Stalin. I see no reason to play in with the British Foreign Office in this matter. The only reason they seem to oppose it is that they fear the effect it would have on their own

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98. *Id.*

99. *Id.*

100. FRED I. GREENSTEIN, *THE PRESIDENTIAL DIFFERENCE: LEADERSHIP STYLE FROM FDR TO GEORGE W. BUSH* 25 (2d ed. 2004).

101. See J. William Fulbright, *In Thrall to Fear*, *NEW YORKER*, Jan. 8, 1972, at 41, 54.

possessions and those of the Dutch. They have never liked the idea of trusteeship because it is, in some instances, aimed at future independence. This is true in the case of Indo-China.

Each case must, of course, stand on its own feet, but the case of Indo-China is perfectly clear. France has milked it for one hundred years. The people of Indo-China are entitled to something better than that.<sup>102</sup>

In her study of Roosevelt's ill health, Rose McDermott concluded that

[b]ecause this condition manifested intermittently, it did not impact all his decisions and actions. Most notably, it appears not to have affected Roosevelt's performance at Yalta. . . . Roosevelt managed to secure the two things he cared about most: Soviet agreement to the United Nations and its future cooperation in the war against Japan.<sup>103</sup>

Jay Winik offered strong support for this analysis when he noted that, at Yalta,

Roosevelt was, despite his physical frailty, a towering figure still in command. He presided over each plenary session and made sure that the major topics were addressed. . . . Roosevelt obtained Stalin's promise to enter the Pacific war no later than ninety days after the surrender of Germany, in exchange for control of parts of Manchuria after Japan surrendered. Second among the president's principal goals was securing an agreement for the establishment of the United Nations, which would be an international framework for peace.<sup>104</sup>

Crispell and Gomez contribute their insights to this discussion by adding this important point: "FDR's condition varied sharply from day to day . . . [but] he always picked up and bounced back quickly . . . [and] his inner vitality, even though weakened, was so radiant that, after a few moment's talk, he could make almost any visitor completely forget that he seemed ill."<sup>105</sup>

On April 2, 1945, Roosevelt again seemed very much in command when he sent a fiery message to Soviet leader Josef Stalin. It was a message that demonstrated his continued and quite powerful involvement in affairs of state:

It would be one of the great tragedies of history if at the very moment of victory now within our grasp, such distrust, such lack of faith should prejudice the entire undertaking after the colossal losses of life, material, and treasure involved. Frankly, I cannot avoid a feeling of bitter resentment toward your informants, whoever they are, for such vile misrepresentations of my actions or those of my trusted subordinates.<sup>106</sup>

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102. *Id.* (reproducing Memorandum from Franklin D. Roosevelt, President, to Cordell Hull, Sec'y of State (Jan. 24, 1944)).

103. ROSE McDERMOTT, *PRESIDENTIAL LEADERSHIP, ILLNESS, AND DECISION MAKING* 115 (2008).

104. JAY WINIK, *1944: FDR AND THE YEAR THAT CHANGED HISTORY* 513–14 (2015).

105. KENNETH R. CRISPELL & CARLOS F. GOMEZ, *HIDDEN ILLNESS IN THE WHITE HOUSE* 114–15 (1988) (footnote omitted).

106. JOSEPH LELYVELD, *HIS FINAL BATTLE: THE LAST MONTHS OF FRANKLIN ROOSEVELT* 312 (2016) (quoting a cable from Roosevelt to Stalin dispatched April 4, 1944).

From reading his angry words, few would imagine that ten days later, Roosevelt would be dead and Truman would be President. On learning of this transition, General Eisenhower, U.S. commander in Europe, commented that on the night that Roosevelt died, he “went to bed depressed and sad.”<sup>107</sup>

While Park’s analysis of Roosevelt is surely provocative, it is incomplete and raises more questions than it answers. First, is it certain that Roosevelt’s alleged 1944 to 1945 impairment levels posed any problems whatsoever with regard to his effectiveness? What evidence supports this view? More specifically, assuming that Park is correct that Roosevelt was 45 percent “impaired” from 1944 to 1945, did the President’s impairment result in poor leadership? If so, examples should be provided to make Park’s points meaningful. Today, many believe that Roosevelt remained an alert, shrewd, and articulate leader to the end, despite his frequent mood swings and operation below the peak level of performance shown earlier in his term.<sup>108</sup> The President tried to compensate for his waning strength by allowing some of his powers to shift to aides, but he typically remained in charge.<sup>109</sup> Franklin Roosevelt is still widely seen as “the most influential leader in the United States in the twentieth century.”<sup>110</sup> This might well suggest that Dr. Park’s overall analysis—which strongly links his proposal for a Medical Impairment Panel to a single case study of Roosevelt’s 1944 to 1945 health status—is inadequate and incomplete.

In Dr. Park’s remarks before the Working Group on Presidential Disability in 1995, he made several comments about the Vice President that deserve discussion. He commented, for example, that

[t]he experiences of Chester A. Arthur and Thomas Riley Marshall during the respective disabilities of their immediate superiors has shown that, though the cabinet may be willing to hear that a president is disabled, a squeamish vice president . . . might choose to abstain. As a result, a disabled president would remain in office. In fact, this is what occurred following the attempt to assassinate Reagan.<sup>111</sup>

Certainly, the assassination attempt against President Reagan strongly suggests the complexity of invocations of Section 4 of the Twenty-Fifth Amendment. Although Reagan was severely wounded by the shot fired at him by John Hinckley, Section 3 of the Twenty-Fifth Amendment was not invoked, possibly because the President was too severely incapacitated by his gunshot wound to invoke it, at least after losing consciousness at the hospital. Although Section 4 of the Amendment provides an alternative route to a transfer of presidential power, it was also not used. Vice President Bush was not in Washington at the time and did not arrive there until early that

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107. NANCY GIBBS & MICHAEL DUFFY, *THE PRESIDENT’S CLUB: INSIDE THE WORLD’S MOST EXCLUSIVE FRATERNITY* 57 (2012).

108. CRISPELL & GOMEZ, *supra* note 105, at 114.

109. *See* STEPHEN HESS, *ORGANIZING THE PRESIDENCY* 35–36 (1976).

110. ALLAN M. WINKLER, *FRANKLIN D. ROOSEVELT AND THE MAKING OF MODERN AMERICA* 204 (Mark C. Carnes ed., 2006).

111. Park, *supra* note 95, at 148.

evening.<sup>112</sup> Ironically, Reagan's Chief of Staff was then Jim Baker, a moderate Republican and very close friend of the Vice President who had also coordinated the Vice President's 1980 presidential campaign. Because of his well-known friendship with Bush, Baker likely felt uncomfortable in recommending invocation of the Twenty-Fifth Amendment to the Reagan loyalists.<sup>113</sup>

Understandably, the Chief of Staff reasoned that Reagan's other aides—and perhaps Reagan himself—might have seen any suggestion of invocation by Baker as a sign of disloyalty to the president or as an act of excessive loyalty to Bush.<sup>114</sup> Therefore, although he mentioned the *possibility* of invocation to Reagan's other aides,<sup>115</sup> Baker simply did not recommend it. It is worth noting, however, that Richard Allen, another Reagan aide, had convened a meeting of the Cabinet in the White House situation room that day, both to keep Cabinet members up to date on what was happening and to have them available if it did become necessary to invoke the Twenty-Fifth Amendment.<sup>116</sup>

In the matter of invocations of Sections 3 and 4 of the Amendment, all Vice Presidents are likely to tread very carefully. The appearance of being too eager to become Acting President might well end their careers. In 1981, Bush was wise to be measured and cautious in his behavior in response to the assassination attempt. Since Reagan's doctors were highly optimistic that the President would recover from his wound, Bush was understandably reticent to become too prominent in events.<sup>117</sup> This can be seen in the fact that he wisely refused to land in a helicopter on the White House lawn—as he had been urged to do—since such behavior is “reserved” for the President.<sup>118</sup>

Bush's refusal to become too prominent in events after Reagan was shot was well rewarded. Eight years later, he was nominated for the presidency by the Republican party and then elected to that office with Reagan's active support.<sup>119</sup> He might never have attained these goals had he appeared too ambitious, too assertive, or too grandiose on the day that Reagan was shot.

Dr. Park raised three final points that deserve discussion. First, he wrote that, “[a]s regards the three instances of presidential inability during Reagan's tenure, it bears re-emphasizing that *one* individual was largely responsible in each case for withholding the application of the Twenty-fifth Amendment.”<sup>120</sup> He then named the three individuals to whom he referred: presidential aide Richard Darman in 1981, Reagan himself in 1985, and Chief

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112. WILBER, *supra* note 26, at 178.

113. See H.W. BRANDS, REAGAN: THE LIFE 290 (2015).

114. *Id.* at 164.

115. JAMES M. RONAN, LIVING DANGEROUSLY: THE UNCERTAINTIES OF PRESIDENTIAL DISABILITY AND SUCCESSION 96 (2015).

116. EDWIN MEESE III, REAGAN: THE INSIDE STORY 82–83 (1992).

117. WILBER, *supra* note 26, at 193.

118. JON MEACHAM, DESTINY AND POWER: THE AMERICAN ODYSSEY OF GEORGE HERBERT WALKER BUSH 276 (2015).

119. *Id.* at 318, 328–29.

120. PARK, *supra* note 89, at 223.

of Staff Howard Baker in 1987.<sup>121</sup> What “that dubious legacy suggests,” Park noted, “is the need to seek a second opinion from someone other than ‘official sources.’”<sup>122</sup>

Park is correct that Richard Darman played an active role in the decision not to invoke the disability provision of the Twenty-Fifth Amendment in 1981.<sup>123</sup> However, Darman did not have the power to determine on his own authority that Section 3 would not be invoked.<sup>124</sup> As previously discussed, Chief of Staff Jim Baker was rather neutralized as a source of power on that particular occasion because of his closeness to Vice President Bush. This meant that a person who should have played a key role in considering invocation of Section 3 had not done so, leaving a subordinate (Darman) to push hard and effectively for noninvocation.<sup>125</sup> Nevertheless, the ultimate decision was not Darman’s alone but rather the consensus view of Reagan’s key lieutenants.

Influential counselor Ed Meese’s view was that President Reagan “had not surrendered his authority” and was still, therefore, in command.<sup>126</sup> Meese expressed satisfaction with a continuation of this arrangement. Baker came to support Meese’s viewpoint and did so firmly. They agreed, therefore, that invoking the Amendment would be “premature.”<sup>127</sup> And Vice President Bush reinforced their position substantially when he told cabinet members on the night of the shooting: “The President is still President . . . . He is not incapacitated and I am not going to be a substitute President. I’m here to sit in for him while he recuperates. But he’s going to call the shots.”<sup>128</sup> It is clear, therefore, that Darman’s viewpoint on noninvocation was shared widely by other powerful players; it was certainly not his alone.

With regard to 1985, it is quite unclear what Dr. Park meant when he referred to Reagan’s “withholding” invocation of the Twenty-Fifth Amendment. Reagan did not withhold invocation that year. He invoked Section 3, in fact, just prior to undergoing surgery for colon cancer.<sup>129</sup> Although Reagan’s comments at the time of invocation were somewhat unclear, invocation of the Twenty-Fifth Amendment was the only mechanism in existence—short of resignation—by which he could constitutionally pass on his powers and duties to Vice President Bush.<sup>130</sup> Therefore, he must have invoked Section 3. In his 1990 autobiography, Reagan stated explicitly that

121. *Id.*

122. *Id.*

123. *See* RONAN, *supra* note 115, at 96.

124. *Id.*

125. *Id.*

126. MEESE, *supra* note 116, at 83.

127. CHRIS WHIPPLE, *THE GATEKEEPERS: HOW THE WHITE HOUSE CHIEFS OF STAFF DEFINE EVERY PRESIDENCY* 116 (2017).

128. MEACHAM, *supra* note 118, at 279.

129. RONALD REAGAN, *AN AMERICAN LIFE* 500 (1990).

130. *See* Gerald M. Boyd, *Reagan Transfers Power to Bush for 8-Hour Period of ‘Incapacity,’* N.Y. TIMES (July 14, 1985), <http://www.nytimes.com/1985/07/14/us/reagan-transfers-power-to-bush-for-8-hour-period-of-incapacity.html> [https://perma.cc/JTT4-QUDA].

he had, in fact, done so.<sup>131</sup> He wrote, “Before they wheeled me into the operating room, I signed a letter invoking the Twenty-Fifth Amendment, making George Bush acting president during the time I was incapacitated under anesthesia.”<sup>132</sup>

Concerning the decision not to invoke the Amendment in 1987, the issue of inability arose again late in Reagan’s second term. One of the President’s aides, James Cannon, complained to Howard Baker, the President’s newest Chief of Staff, that Reagan seemed “inattentive at Cabinet meetings” and that many staffers speculated he preferred to spend his time in the White House residence rather than work.<sup>133</sup> However, after meeting on several occasions with Reagan, Baker became convinced that the President was emerging from a period of lethargy, likely related to the devastating Iran-Contra scandal, in which he had approved the “arms for hostages” arrangement with Iran shortly after undergoing major surgery for colon cancer.<sup>134</sup> The independent counsel’s investigation of Iran-Contra led to eleven convictions of top administration aides.<sup>135</sup> The scandal quite conceivably could have brought down the Reagan presidency.<sup>136</sup> Reagan’s reemergence, in Baker’s view, saw him much more “involved” and much more assertive, thus making invocation of the Amendment unnecessary.<sup>137</sup>

The second major point Dr. Park raises is the question, “how has the present system of impairment determination fared today when applied to executives of major corporations and the like?”<sup>138</sup> He responds to his own question by writing:

Independent clinical studies substantiate that . . . permanent impairment can be rated with reasonable accuracy, uniformity, and dispatch. In essence, the machinery for such determination has been in place since 1971 and has worked well. It would seem, then, no great leap of principle to extend the practice to the workings of the Twenty-Fifth Amendment.<sup>139</sup>

The problem with Park’s assessment, however, is that there are extraordinarily significant differences between executives of major corporations and Presidents of the United States. The “removal for cause” of a corporate leader is generally seen as a private matter—one that is handled by a corporate board of directors.<sup>140</sup> Board members choose and appoint the corporate leader themselves, typically without major input from shareholders or anyone else outside the corporate board.<sup>141</sup> The President of the United

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131. REAGAN, *supra* note 129, at 500.

132. *Id.*

133. RONAN, *supra* note 115, at 116.

134. Gilbert, *supra* note 21, at 64–66.

135. JULES TYGIEL, RONALD REAGAN AND THE TRIUMPH OF AMERICAN CONSERVATISM 192 (2d. ed. 2006).

136. JOHN P. BURKE, PRESIDENTIAL POWER: THEORIES AND DILEMMAS 220 (2016).

137. RONAN, *supra* note 115, at 116.

138. PARK, *supra* note 89, at 208.

139. *Id.* (footnote omitted).

140. See Note, *Removal Without Cause of Corporate Executives Under Agreement*, 109 U. PA. L. REV. 224, 224–26 (1960).

141. See *id.*

States, however, is chosen for his position by an electoral college that is now “elected” by some *130 million voters* in the fifty states, Washington, D.C., and overseas.<sup>142</sup> The difference between these two processes is so great that no “leap of faith” could justify extending the very private processes of the corporate world to the broadly transparent public domain.

Third, Dr. Park recommended that on questions of possible disability in Presidents of the United States, “a second opinion” should be sought apart from the opinions of White House aides.<sup>143</sup> This second opinion, of course, would come from members of his proposed Medical Impairment Panel.<sup>144</sup> However, a superior suggestion, in my view, would be to draw this “second opinion” from the senior and associate White House Physicians to the President rather than from a board of examiners outside the White House who likely have never before met the President, have never before seen him except on their television screens, and are complete strangers to him, as he is to them.

Over time, Physicians to the President become close to the President. Their office is in the White House itself, close to his; they typically see the President regularly, perhaps even several times a day; they speak with him often; thus, they come to know the President and know him rather well. In return, he knows them and likely trusts them. This intimate relationship between the President and his doctors is quite important and should be put to good advantage. Who better to give medical advice about (and to) the President than the doctors who know and treat him intimately and over time? Also, their evaluation would be much better accepted by the President and by much of the country.

#### CONCLUSION

At the final session of the Working Group on Presidential Disability on December 3, 1996, Dr. Park highlighted his remarks in favor of a “Standing Presidential Impairment Panel” by stating:

What I, therefore, would hope to represent as the finished product of our deliberations is some suggested wording for a concurrent resolution to be considered by Congress that designates the composition of this consultative body and specifies the method and prospective timing of its selection. Not only would such expertise strengthen the mandate of the White House physician, it would provide for that necessary second opinion that the American public deserves.<sup>145</sup>

Not surprisingly, Dr. Abrams strongly supported Park’s “motion” but neither man saw his hopes realized. At this concluding session, the Park-Abrams motion supporting creation of a Standing Medical Impairment Panel to monitor the President’s health and report on it to relevant officials was

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142. Emmarie Huetteman, *The Electoral College Meets Monday. Here’s What to Expect.*, N.Y. TIMES (Dec. 18, 2016), <https://www.nytimes.com/2016/12/18/us/politics/the-electoral-college-meets-monday-heres-what-to-expect.html> [<https://perma.cc/HTW5-YHHJ>].

143. PARK, *supra* note 89, at 223.

144. *Id.*

145. *See* Park, *supra* note 95, at 150.



overwhelmingly rejected by group members.<sup>146</sup> The vote was 17 percent in favor and 83 percent opposed.<sup>147</sup> In this “election,” I voted with the majority and have explained the reasons for my “no” vote in this paper and elsewhere. In the intervening years, I have never regretted my vote or changed my mind on the issues that shaped it.

A medical commission, as proposed by either Dr. Abrams or Dr. Park, however well intentioned they both may have been, would damage unacceptably the professional reputation of Presidents of the United States and, at the same time, weaken greatly Presidents’ ability to lead. Because of the systems of separation of powers and checks and balances given to us by the framers of the Constitution, Presidents are already checked and balanced by our political institutions (e.g., Congress and the courts) to a notable degree; they are checked and balanced by the media as well. The first several months of the Trump administration have strongly illustrated this point, and President Trump has certainly tweeted vociferously of his displeasure in response.<sup>148</sup> But while these restraining mechanisms are useful in our political system, too many “checks and balances” on Presidents, including those suggested by Drs. Abrams and Park, make for a dangerously weakened and continually threatened chief executive. In my view, we should say “no” to such suggestions.

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146. See *December 2, 1996 Afternoon Session Discussion*, in *PRESIDENTIAL DISABILITY: PAPERS, DISCUSSIONS, AND RECOMMENDATIONS ON THE TWENTY-FIFTH AMENDMENT AND ISSUES OF INABILITY AND DISABILITY AMONG PRESIDENTS OF THE UNITED STATES*, *supra* note 95, at 447, 489–90.

147. See *id.*

148. See *Everything President Trump Has Tweeted (and What It Was About)*, L.A. TIMES (Sept. 14, 2017), <http://www.latimes.com/politics/la-pol-updates-everything-president-trump-has-tweeted-and-what-it-was-about-2017-htmlstory.html> [https://perma.cc/XQ8V-DCPG]; Amanda Wills & Alysha Love, *All the President's Tweets*, CNN (Sept. 7, 2017), <http://www.cnn.com/interactive/2017/politics/trump-tweets/> [https://perma.cc/3JV8-XX9E].